SB 17 FILE 2

Re Capital Punishment
– real good?

See p. 162 for
results of two studies

the economics of **Public Issues**

Seventh Edition

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25

the economics of Crime and Punishment

Is there a relationship between punishment and the number and types of crimes committed? If so, what are the available alternatives to punishing guilty offenders? Should we impose large fines instead of incarceration? Should we have public whippings? Should capital punishment be allowed? To establish a system of crime deterrence, we would need to assess carefully the value of different supposed deterrents.

One thing we can be sure of. Uniformly heavy punishments for all crimes will lead to a larger number of major crimes being committed. Let's look at the reasoning. All decisions are made on the margin. If an act of theft will be punished by hanging and an act of murder will be punished by the same fate, there is no marginal deterrence to murder. If a theft of $5 is met with a punishment of 10 years in jail

and a theft of $50,000 incurs the same sentence, why not steal $50,000? Why not go for broke? There is no marginal deterrence to prevent one from doing so.

A serious question is how our system of justice can establish penalties that are appropriate from a social point of view. To establish the correct (marginal) deterrents, we must observe empirically how criminals respond to changes in punishments. This leads us to the question of how people decide whether to commit a "crime." A theory needs to be established as to what determines the supply of criminal offenses.

Adam Smith once said:

> The affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy, to invade his possessions. It is only under the shelter of the civil magistrate that the owner of that valuable property, which is acquired by the labour of many years, or perhaps by many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provokes, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate continually held up to chastise it. The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days' labour, civil government is not so necessary.[1]

Smith pointed out that in any society where one person has substantially more property than another, robberies will be committed. We can surmise that the individuals who engage in robberies are seeking income. We can also surmise that, before acting, a professional criminal might be expected to look at the anticipated returns and anticipated costs of criminal activity. These could then be compared with the net returns from legitimate activities. In other words, those en-

[1]Adam Smith, *The Wealth of Nations*, 1776.

gaging in crimes do so on the basis of a cost/benefit analysis in which the benefits outweigh the costs. The benefits of the crime of robbery are clear. The cost would include, but not be limited to, apprehension by the police, conviction, and jail. (The criminal's calculations are analogous to those made by a professional athlete when weighing the cost of possible serious injury against the benefits to be gained from participating in the sport.)

If we view the supply of offenses in this manner, we can come up with methods by which society can lower the net expected rate of return for committing any illegal activity. That is, we can figure out how to reduce crime most effectively. We have talked about one particular aspect—the size of penalties. We also briefly mentioned another—the probability of detection for each offense. When either of these costs of crime goes up, the supply of offenses goes down; that is, less crime is committed.

Can this theory be applied to a decision, pro or con, on capital punishment? Sociologists, psychologists, and others have numerous theories correlating the number of murders committed to various psychological, sociological, and demographic variables. In general, they have stressed social and psychological factors as determinants of violent crime and have therefore felt that capital punishment would have no deterrent effect. Economists, on the other hand, have stressed a cost-benefit equation, which implies that capital punishment would deter violent crime.

We start with a commodity called the act of murder. If the act of murder is like any other commodity, the quantity "demanded" (by perpetrators, of course, not victims) will be negatively related to the relative price. But what is the price of murder? Ignoring all the sociological, psychological, or psychic costs of murder, we have to consider the probability of being caught and, after capture, the possible jail sentence or capital punishment that may be called for. But here again, we have to look at the probability of a particular jail sentence and the probability of going to the gas chamber, or the guillotine, or the four winds. Thus, it would do little good to observe the difference in murder rates between states that have capital punishment and states that do not. Instead, we must assess the probability of a convicted murderer actually being executed in those states that do have capital punishment and compare this probability with what happens in states that do not. In some states that allow capital punishment, for example, the probability of a convicted murderer being executed is zero. We find, for example, that a charge of first-degree murder is often changed to a charge of second-degree murder if the penalty for murder is execution. In states that do not allow the death penalty, however, first-degree murder sentences are given more frequently. Recently, it has been argued that "death-qualifying" juries—that is, juries consisting only of persons who do not oppose the death penalty—are more likely to convict individuals of crimes for which the penalty is capital punishment.[2] Because these variables exist among states allowing capital punishment, it is necessary to look at the actual number of executions within a state, and not the laws, in order to establish whether capital punishment is actually a deterrent to murder.

Now, immediately critics of such cost/benefit analysis point to the "fact" that the murderer, either in a moment of unreasoned passion or when confronted with an unanticipated situation (for example, during an armed robbery), does not take into account the expected probability of going to the gas chamber. That is to say, murderers are not acting rationally when they murder. Is this a valid criticism of the economic model of the demand for murder? It is not. If the model predicts poorly, then either the assumptions or the model must be changed. Indeed, if one contends that the expected "price" of committing a murder has no effect on the quantity of murders, one is implicitly negating the law

[2]See, for example, the discussion of *Lockhart v. McCree* in "Death Penalty: A Barrier Falls," *Newsweek*, May 19, 1986.

of demand or stating that the price elasticity of the demand for murder is zero. One is also confusing the average murderer with the marginal murderer. All potential murderers do not have to be aware of or react to the change in the expected "price" of committing a murder for the theory to be useful. If a sufficient number of marginal murderers act as if they were responding to the higher expected "price" of murdering, then the demand curve for murders by perpetrators will be downward sloping.

A few economists have actually worked through economic models of the demand for murder and other crimes. One of the first statistical studies of significance is that by Isaac Erlich, published in 1975.[3] One of the variables he included was the objective conditional risk of being executed if caught and convicted of murder. Two elasticities given in one study were -0.06 and -0.065. While these elasticities are relatively small, they are not zero. The implication of these elasticities, given the number of murders and executions in the period covered by the study (1935–1969), was striking. The implied tradeoff between murders and executions was between 7 and 8. "Put differently, an additional execution per year over the period in question may have resulted, on average, in 7 or 8 fewer murders."[4]

The deterrent effect of capital punishment on the crime of murder was more recently also analyzed by Stephen Layson, an economist at the University of North Carolina at Greensboro. His findings are even more suggestive. Layson concluded that every execution of a convicted murderer deters, on average, 18 other murders that would have occurred without it. He also studied the relationship between arrests and convictions of murderers and the murder rate. His conclusions were that a 1-percent increase in the arrest rate for murder would lead to 250 fewer murders per year being committed and that a 1-percent increase in murder convictions would deter about 105 murders.[5]

[3]Isaac Erlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," *The American Economic Review*, Vol. 65, no. 3 (June 1975).
[4]Ibid., p. 414.

As might be expected, these findings are highly controversial and have led to a debate that still goes on. Critics have stressed, for example, the tenuous statistical basis of Erlich's findings.[6] While the argument over capital punishment continues, the evidence that crime rates in general appear to vary inversely with estimates of penalties, probabilities of conviction, and legal opportunities has received substantial support.[7] Currently, the arrest rate for murderers is 75 percent; only 38 percent of all murders result in a conviction, and 1 percent of murders result in an execution. It is perhaps not too hard to understand why 75 percent of Americans now favor the death penalty.

One final note. In the case of capital punishment, the execution must be thought to fall on the guilty parties, rather than randomly applied. History tells us that under the emperors in China, executions were frequent. However, the emperors were not always so diligent about executing the right person. This system of "punishment" does little good for society in terms of combating crime, not to mention the loss suffered by the innocent victim and his or her family due to perverted justice.

SUMMARY

One can analyze criminal acts as economic activities. The potential criminal makes an economic decision in which he

[5]Stephen K. Layson, "Homicide and Sentence: A Reexamination of the United States Time-series Evidence," *Southern Economic Journal*, vol. 52 (July 1985), pp. 68–89. For an evaluation of Layson's conclusions, see Ernest Van Den Haag, "Death and Deterrence," *National Review*, (March 14, 1986), p. 16.
[6]Peter Parsell and John R. Taylor, "The Deterrent Effect of Capital Punishment: Another View," *The American Economic Review*, vol. 67, no. 3 (June 1977), pp. 445–451.
[7]Gary Becker and William Landes, editors, *Essays in the Economics of Crime and Punishment* (Columbia University Press: New York, 1974).

or she does a cost/benefit analysis of criminal activities versus legal consequences. A key set of variables in such an analysis involves the costs of criminal activity, which include the costs of getting caught, being sentenced. and suffering punishment. In most major cities, the probabilities of being caught, sentenced, going to trial, and serving time are very low. Hence, when they are multiplied together and the product is multiplied times the potential punishment, the expected cost is extremely small. The potential criminal's cost/benefit analysis therefore often implicitly shows that crime does indeed pay. In order to reduce criminal activities, including murder, an economist would argue that the price paid by the criminal must be increased.

DISCUSSION QUESTIONS

1. The analysis just presented makes the assumption that criminals act rationally. Does the fact that they do not necessarily do so negate our analysis?
2. In many cases, murder is committed among people who know each other. Does this mean that raising the price the murderer has to pay will not affect the quantity of murder demanded by perpetrators?

complice in sale of cocaine, it was incumbent on the state to prove, first, that defendant was aware of another individual's plan to resell the cocaine; and, second, that in supplying the individual with cocaine, defendant acted with the intent to promote the other individual's plan. The state was not required to show defendant's awareness of and intent to promote the specific sale that actually occurred. Shindle v. State, Ct. App. Op. No. 674 (File No. A-1960), 731 P.2d 567 (1987).

Applied in Boxell v. State, Ct. App. Op. No. 658 (File No. A-1175), 728 P.2d 1220 (1986); Kinegak v. State, Ct. App. Op. No. 767 (File No. A-1576), P.2d (1987).

Quoted in Cole v. State, Ct. App. Op. No. 805 (File No. A-1505), P.2d (1988).

Cited in Dailey v. State, Ct. App. Op. No. 324 (File No. 4190), 674 P.2d 857 (1984).

Sec. 11.16.120. Exemptions to legal accountability for conduct of another.

NOTES TO DECISIONS

Conviction of accessory when principal is undercover agent. — Conviction of a professional hunting guide for hunting violations as an accessory when the principal was an undercover agent for the government was affirmed; the Alaska court of appeals stated that the defense of entrapment under AS 11.81.450 provides an adequate remedy for any government overreaching. Vaden v. Alaska, Ct. App. Op. No. 744 (File No. A-1581), 717 P.2d 781 (1987).

Quoted in Kot v. State, Sup. Ct. Op. No. 2774 (File No. 5570), 678 P.2d 386 (1984).

Chapter 31. Attempt and Solicitation.

Section
100. Attempt

Sec. 11.31.100. Attempt. (a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime which was the object of the attempt if the conduct engaged in by the defendant would be a crime had the circumstances been as the defendant believed them to be.

(c) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime.

(d) An attempt is

(1) an unclassified felony if the crime attempted is murder in the first degree;

(2) a class A felony if the crime attempted is an unclassified felony other than murder in the first degree;

(3) a class B felony if the crime attempted is a class A felony;

(4) a class C felony if the crime attempted is a class B felony;

(5) a class A misdemeanor if the crime attempted is a class C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

(e) If the crime attempted is an unclassified crime described in a state law which is not part of this title and no provision for punishment of an attempt to commit the crime is specified, the punishment for the attempt is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the amount of the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime attempted is punishable by an indeterminate or life term, the attempt is a class A felony. (§ 2 ch 166 SLA 1978; am § 1 ch 102 SLA 1980; am § 10 ch 45 SLA 1982; am § 1 ch 59 SLA 1988)

Effect of amendments. — The 1988 amendment, in subsection (d), inserted present paragraph (1), redesignated former paragraphs (1)-(5) as present paragraphs (2)-(6), and added "other than murder in the first degree" at the end of paragraph (2).

NOTES TO DECISIONS

Applicability of this section. — Since under Alaska law, delivery of cocaine is expressly defined to include an attempted delivery, the more specific statute controls and this section, the general attempt statute, is therefore not applicable to delivery of cocaine. Stuart v. State, Ct. App. Op. No. 464 (File No. A-2761), 698 P.2d 1218 (1985).

Failure to include "substantial step" language in indictment 'or attempted murder was a defect only as to form, where the indictment included a concise description of defendant's actions that constituted the offense, including the proper language regarding his state of mind. Cier o v. State, Ct. App. Op. No. 813 (File No. A-2033), P.2d (1988).

Attempted kidnapping was class A felony under this section before 1982 amendment. — Under the law as it existed before the 1982 amendment to this section became effective, attempted kidnapping was unquestionably a class A felony. Galbraith v. State, Ct. App. Op. No. 437 (File No. A-197), 693 P.2d 880 (1985).

Attempted first-degree sexual assault. — At the very least, a defendant must have formed a specific intent to engage in sexual penetration in order to be convicted of attempted first-degree sexual assault. Baden v. State, Ct. App. Op. No. 285 (File No. 6832), 667 P.2d 1275 (1983).

Offense of attempted second-degree murder was an impossibility. Hunt v. State, Ct. App. Op. No. 348 (File No. 7141), 678 P.2d 415 (1984).

Applicability of partial affirmative defenses. — A person charged with attempted kidnapping is not entitled to assert a partial defense when the intended victim of the crime is voluntarily released unharmed; under the plain language of AS 11.41.300(b), the partial affirmative defense applies only in a prosecution for kidnapping. Laraby v. State, Ct. App. Op. No. 555 (File No. A-530), 710 P.2d 427 (1985).

Evidence was sufficient to support conviction. — See McCarlo v. State, Ct. App. Op. No. 335 (File No. 7112), 677 P.2d 1268 (1984).

Conviction reversed because of insufficient evidence. — See Brower v. State, Ct. App. Op. No. 656 (File No. A-716), P.2d (1986).

Conviction and sentence upheld. — See Andrejko v. State, Ct. App. Op. No. 444 (File No. A-205), 695 P.2d 246 (1985).

Convictions reversed because of er-

roneous jury instruction. — Convictions for attempted sexual assault in the first degree and kidnapping were reversed because of an erroneous jury instruction on sexual assault in the first degree concerning consent. The correct standard is whether the defendant recklessly disregarded the victim's lack of consent. Lassiter v. State, Ct. App. Op. No. 387 (File No. 7736), 684 P.2d 139 (1984).

Sentence upheld. — Travelstead v. State, Sup. Ct. Op. No. 407 (File No. A-1110, 689 P.2d 491 (1984); Schnicker v. State, Ct. App. Op. No. 732 (File No. A-1995), 739 P.2d 1310 (1987).

Sentence for attempted first degree murder upheld. — See Stancl v. State, Ct. App. Op. No. 451 (File No. A-780, 697 P.2d 1050 (1985).

Conviction of attempted first-degree sexual assault affirmed. — Conviction of attempted sexual assault on the first degree under AS 11.41.410 as it read before the 1983 amendment and this section was affirmed. Sexual charges based on non-consensual genital intercourse do not require proof of a specific sexual intent; and plain error was not established though the prosecutor's expressions which might have been construed as a personal opinion of the guilt of the defendant or an argument relating to a defendant's need for treatment were improper and unattested. Pate v. State, Ct. App. Op. No. 551 (File No. A-247), 712 P.2d 385 (1985).

Sentence under former AS 11.41.410(b) and this section held excessive. — See Holhouse v. State, Ct. App. Op. No. 602 (File No. 7665), 687 P.2d 1106 (1984).

Applied in Patterson v. State, Ct. App. Op. No. 681 (File No. A-978), P.2d (1987).

Cited in Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983); Brower v. State, Ct. App. Op. No. 381 (File No. 7816), 683 P.2d 280 (1984); Hart v. State, Ct. App. Op. No. 482 (File No. A-295), 702 P.2d 651 (1985); Chief v. State, Ct. App. Op. No. 618 (File No. A-954), 718 P.2d 475 (1986); Hastings v. State, Ct. App. Op. No. 706 (File No. A-992), P.2d (1987); James v. State, Ct. App. Op. No. 733 (File No. A-1154), 739 P.2d 1311 (1987); Stevens v. State, Ct. App. Op. No. 773 (File No. A-1327), P.2d (1988); James v. State, Ct. App. Op. No. 814 (File No. A-2318), P.2d (1988).

Sec. 11.31.110. Solicitation.

NOTES TO DECISIONS

Cited in Monroe v. State, Ct. App. Op. No. 798 (File No. A-1992), 752 P.2d 1017 (1988).

Sec. 11.31.150. Substantive crimes involving attempt or solicitation.

NOTES TO DECISIONS

Cited in Stuart v. State, Ct. A., p. Op. No. 464 (File No. A-276), 698 P.2d 1218 (1985).

Even though there is no question that the crime of attempt requires a specific intent, it seems equally beyond dispute that a charge of attempt to commit a specific crime clearly advises the defendant of the offense with which he is charged. State v. Thomas, Sup. Ct. Op. No. 1077 (File No. 2234), 525 P.2d 1092 (1974).

Indictment charging attempted rape and citing only the rape statute held sufficient. — See State v. Thomas, Sup. Ct. Op. No. 1077 (File No. 2234), 525 P.2d 1092 (1974).

Defendant may be found guilty though attempt not expressly charged. — Jury could find defendant guilty of the attempt to commit the crime of possessing narcotic drugs despite the fact that the attempt was not expressly charged. Simpson v. United States, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

Substantial evidence of attempt. — In a prosecution for possession of narcotic drugs, although there was no substantial evidence that defendant committed the crime charged in the information, there was substantial evidence that she attempted to commit the crime charged. Simpson v. United States, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

Same offense for sentencing purposes. — Assault with intent to rob and attempted robbery constituted the "same offense" for sentencing purposes. Brookins v. State, Sup. Ct. Op. No. 1936 (File No. 3972), 600 P.2d 12 (1979).

Sentence upheld. — See Bowie v. State, Sup. Ct. Op. No. 769 (File No. 1122), 491 P.2d 800 (1972); Spearman v. State, Sup. Ct. Op. No. 1210 (File No. 2520), 543 P.2d 202 (1975); Braham v. State, Sup. Ct. Op. No. 1522 (File No. 2558), 571 P.2d 631 (1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978); Johnson v. State, Sup. Ct. Op. No. 1656 (File No. 3424), 580 P.2d 700 (1978); Ferguson v. State, Sup. Ct. Op. No. 1791 (File No. 3800), 590 P.2d 43 (1979); Morris v. State, Sup. Ct. Op. No. 1830 (File No. 4132), 592 P.2d 1244 (1979); Ranil v. State, Sup. Ct. Op. No. 2217 (File No. 4944), 619 P.2d 722 (1980).

Sentence held excessive. — See Hansen v. State, Ct. App. Op. No. 218 (File No. 6965), 657 P.2d 862 (1983).

Applied in Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Stated in State v. Silas, Sup. Ct. Op. No. 1851 (File No. 4237), 595 P.2d 651 (1979); Coleman v. State, Sup. Ct. Op. No. 2190 (File No. 4416), 621 P.2d 869 (1980); Ranil v. State, Sup. Ct. Op. No. 2217 (File No. 4944), 619 P.2d 722 (1980); Clark v. State, Ct. App. Op. No. 96 (File No. 5658), 645 P.2d 1236 (1982); Tazruk v. State, Ct. App. Op. No. 195 (File No. 6954), 655 P.2d 788 (1982).

Cited in Handley v. State, Sup. Ct. Op. No. 2155 (File Nos. 3946, 4035), 615 P.2d 627 (1980); Walker v. State, Ct. App. Op. No. 231 (File No. 6304), 662 P.2d 948 (1983).

Sec. 11.31.110. Solicitation. (a) A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

(b) In a prosecution under this section,

(1) it is not a defense

(A) that the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation; or

(B) that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation;

(2) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, after soliciting another person to engage in conduct constituting a crime, prevented the commission of the crime.

(c) Solicitation is a

(1) class A felony if the crime solicited is an unclassified felony;

(2) class B felony if the crime solicited is a class A felony;

(3) class C felony if the crime solicited is a class B felony;

(4) class A misdemeanor if the crime solicited is a class C felony;

(5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

(d) If the crime solicited is an unclassified crime described in a state law which is not part of this title and no provision for punishment of a solicitation to commit the crime is specified, the punishment for the solicitation is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime solicited is punishable by an indeterminate or life term, the solicitation is a class A felony. (§ 2 ch 166 SLA 1978; am § 2 ch 102 SLA 1980; am § 11 ch 45 SLA 1982)

Cross references. — For legislative purpose of ch. 45, SLA 1982, see § 1, ch. 45, SLA 1982, in the Temporary and Special Acts; for legal accountability based on the conduct of another and complicity, see AS 11.16.110.

Effect of amendments. — The 1980 amendment added subsection (d).

The 1982 amendment, substituted "an unclassified felony" for "murder in any degree or kidnapping" in subsection (c).

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement No. 44, May 20, 1980, or 1980 House Journal Supplement No. 79, May 28, 1980.

NOTES TO DECISIONS

Former law construed. — See McConkey v. State, Sup. Ct. Op. No. 855 (File No. 1464), 504 P.2d 823 (1972); Cassell v. State, Ct. App. Op. No. 91 (File No. 5136), 645 P.2d 219 (1982), decided under former AS 11.10.070.

One contracting with another to kill a third person was guilty of attempted first-degree murder, not solicitation. — See Braham v. State, Sup. Ct. Op. No. 1522 (File No. 2558), 571 P.2d 631 (1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978), decided under former AS 11.10.070 and 11.15.010.

Cited in Beaver v. State, Ct. App. Op. No. 73 (File No. 6223), 641 P.2d 1264 (1982); P.S. v. State, Ct. App. Op. No. 191 (File No. 6870), 655 P.2d 1329 (1982).

Sec. 11.31.140. Multiple convictions barred. (a) It is not a defense to a prosecution under AS 11.31.100 or AS 11.31.110 that the crime that is the object of the attempt or solicitation was actually committed pursuant to the attempt or solicitation.

(b) A person may not be convicted of more than one crime defined by AS 11.31.100 or AS 11.31.110 for conduct designed to commit or culminate in commission of the same crime.

(c) A person may not be convicted on the basis of the same course of conduct of both (1) a crime defined by AS 11.31.100 or AS 11.31.110; and (2) the crime that is the object of the attempt or solicitation.

Revisor's notes. — Subsection (e) was enacted as (f). Renumbered in 1982 when the original (e) was renumbered as AS 12.47.055.

Effect of amendments. — The 1984 amendment substituted "Corrections" for "Health and Social Services" in the first and last sentences in subsection (b) and "corrections" for "health and social services" in the introductory language of subsection (e).

Sec. 12.47.055. Treatment for other defendants not limited. Nothing in AS 12.47.050 limits the discretion of the court to recommend, or of the Department of Corrections to provide, psychiatrically indicated treatment for a defendant who is not adjudged guilty but mentally ill. (§ 22 ch 143 SLA 1982, am E.O. No. 55, § 5 (1984))

Revisor's notes. — Enacted as AS 12.47.050(e). Renumbered in 1982.

Effect of amendments. — The 1984 amendment substituted "Corrections" for "Health and Social Services."

Sec. 12.47.060. Post conviction determination of mental illness. (a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, and the defendant is convicted of a crime, the defendant, the prosecuting attorney, or the court on its own motion may raise the issue of whether the defendant is guilty but mentally ill. A hearing must be held on this issue at or before the sentencing hearing. At the hearing the court shall determine whether the defendant has been shown to be guilty but mentally ill by a preponderance of the evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

(b) If the court finds that a defendant is guilty but mentally ill, it shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

(c) A defendant determined to be guilty but mentally ill under this section is subject to the provisions of AS 12.47.050.

(d) In this section, "guilty but mentally ill" has the meaning given in AS 12.47.030. (§ 22 ch 143 SLA 1982)

Sec. 12.47.070. Psychiatric examination. (a) If a defendant has filed a notice of intention to rely on the affirmative defense of insanity under AS 12.47.010 or has filed notice under AS 12.47.020(a), or there is reason to doubt the defendant's fitness to proceed, or there is reason to believe that a mental disease or defect of the defendant will otherwise become an issue in the case, the court shall appoint at least two qualified psychiatrists or two forensic psychologists certified by the American Board of Forensic Psychology to examine and report upon the mental condition of the defendant. If the court appoints psychiatrists, the psychiatrists may select psychologists to provide assistance. If the defendant has filed notice under AS 12.47.090(a), the report shall consider whether the defendant can still be committed under AS

12.47.090(c). The court may order the defendant to be committed to a secure facility for the purpose of the examination for not more than 60 days or such longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(b) In an examination under (a) of this section, any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(c) The report of an examination under (a) of this section shall include the following:

(1) a description of the nature of the examination;

(2) a diagnosis of the mental condition of the defendant;

(3) if the defendant suffers from a mental disease or defect, an opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's defense;

(4) if a notice of intention to rely on the affirmative defense of insanity under AS 12.47.010(b) has been filed, an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the nature and quality of the defendant's conduct was impaired at the time of the crime charged; and

(5) if notice has been filed under AS 12.47.020(a), an opinion as to the capacity of the defendant to have a culpable mental state which is an element of the crime charged.

(d) If the examination under (a) of this section cannot be conducted by reason of the unwillingness of the defendant to participate in it, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

(e) The report of the examination under (a) of this section shall be filed with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant. (§ 22 ch 143 SLA 1982)

NOTES TO DECISIONS

Editor's notes. — The cases annotated under Notes to Decisions were decided under former AS 12.45.087.

The conviction of a person who is incompetent to stand trial violates due process of law. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

One of the primary reasons for requiring that a defendant be competent before standing trial is to safeguard the accuracy of the guilt finding process. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

The defendant must have some minimum ability to provide his counsel with information necessary or relevant to his defense. He must also be able to understand the nature of the proceedings sufficiently to participate in certain decisions about the conduct of the defense. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Some strategic choices must be the product of meaningful communication between the defendant and his counsel. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

But this does not mean that a defendant must possess any high degree of legal sophistication or intellectual prowess. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Numerous persons are subjected to criminal prosecution, and properly so, even though they are of relatively low intelligence or are suffering from some significant emotional or physical impairment. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Not every emotional flaw renders one incompetent to stand trial. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

The presence of some degree of mental illness is not an invariable barrier to prosecution. There may be an impaired functioning of some aspects of the defendant's personality and yet he may still be minimally able to aid in his defense and to understand the nature of the proceedings against him. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Standard for determining competency is relative. — See Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Where the psychiatric examination of the defendant yields professional findings that he is competent to stand trial, the question of whether to hold any further or evidentiary hearings is addressed to the sound discretion of the trial court. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Physical examination did not violate predecessor section. A physical examination between a clinical psychologist and defendant shortly after defendant was arrested and taken into custody, because the police feared defendant was suicidal, was properly authorized under AS 33.30.130(a), which specifies the duty of the commissioner of public safety to provide for persons pending arraignment or commitment, and did not violate subsection (a) of former AS 12.45.087, and the evidence resulting from it was therefore legally obtained. Loveless v. State, Sup. Ct. Op. No. 1819 (File No. 3320), 592 P.2d 1206 (1979).

Duty to order examination. — Once motion for competency evaluation was made under former AS 12.45.100 that was neither frivolous nor lacking in good faith and that set forth reasonable cause to believe accused might be incompetent, trial court had mandatory duty to order examination. Leonard v. State, Ct. App. Op. No. 223 (File No. 6261), 658 P.2d 798 (1983).

Where trial judge erroneously denied defendant's motion for competency evaluation under former AS 12.45.100, proper remedy was new trial preceded by competency determination. Leonard v. State, Ct. App. Op. No. 223 (File No. 6261), 658 P.2d 798 (1983).

Sec. 12.47.080. Procedure upon verdict of not guilty. (a) If a defendant is found not guilty under AS 12.47.040(a)(2), the prosecuting attorney shall, within 24 hours, file a petition under AS 47.30.700 for a screening investigation to determine the need for treatment if the prosecuting attorney has good cause to believe that the defendant is suffering from a mental illness and as a result is gravely disabled or likely to cause serious harm to self or others.

(b) In this section, "mental illness" has the meaning given in AS 47.30.915(12). (§ 22 ch 143 SLA 1982)

Sec. 12.47.090. Procedure after raising defense of insanity. (a) At the time the defendant files notice to raise the affirmative defense of insanity under AS 12.47.010 or files notice under AS 12.47.020(a), the defendant shall also file notice as to whether, if found not guilty by reason of insanity under AS 12.47.010 or 12.47.020(b), the defendant will assert that the defendant is not presently suffering from any mental illness that causes the defendant to be dangerous to the public peace or safety.

Sec. 47.10.060. Waiver of jurisdiction. (a) If the court finds at a hearing on a petition that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment under this chapter, it shall order the case closed. After a case is closed under this subsection, the minor may be prosecuted as an adult.

(b) *[Repealed, § 8 ch 110 SLA 1967.]*

(c) *[Repealed, § 8 ch 110 SLA 1967.]*

(d) A minor is unamenable to treatment under this chapter if the minor probably cannot be rehabilitated by treatment under this chapter before reaching 20 years of age. In determining whether a minor is unamenable to treatment, the court may consider the seriousness of the offense the minor is alleged to have committed, the minor's history of delinquency, the probable cause of the minor's delinquent behavior, and the facilities available to the division of youth and adult authority for treating the minor.

(e) A person who has been tried as an adult under this section, or the Department of Health and Social Services on the person's behalf, may petition the superior court to seal the records of all criminal proceedings, except traffic offenses, initiated against the person, and all punishments assessed against the person, while the person was a minor. A petition under this subsection may not be filed until five years after the completion of the sentence imposed for the offense for which the person was tried as an adult. If the superior court finds that the punishment assessed against the person has had its intended rehabilitative effect, the superior court shall order the record of proceedings and the record of punishments sealed. Sealing the records restores civil rights removed because of a conviction. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court. (§ 9 art I ch 145 SLA 1957; am § 1 ch 118 SLA 1962; am §§ 3, 8 ch 110 SLA 1967; am § 6 ch 104 SLA 1971; am § 13 ch 63 SLA 1977)

Cross references. — For hearings before the juvenile court, see AS 47.10.070. See also, Children's Rule 3, Alaska Rules of Court.

NOTES TO DECISIONS

Non-criminal treatment of child offenders is to be rule. — The statutory framework for dealing with child offenders contemplates that non-criminal treatment is to be the rule and adult criminal disposition the exception. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Section provides means to determine amenability to treatment available for child offenders. — The waiver procedure set out in this section and in Rule of Children's Procedure 3 provides the means by which the children's court judge determines, prior to adjudicating the delinquency petition, that an accused child is not a suitable subject for the treatment available for child offenders. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The court's authority to impose a penal sentence on a juvenile is limited under the strict procedures of subsections (a) and (d) and Children's Rule 3. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A minor may move to waive children's court jurisdiction pursuant to subsection (a). M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

A minor under the age of 18 cannot "elect" to be tried as an adult. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Where no waiver hearing has been conducted, the court has no authority to sentence a delinquent child as an adult. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Before treating a juvenile as an adult, the court must first conduct a waiver hearing. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Option available to prosecution absent waiver. — A proceeding in children's court, which is limited to the dispositions set forth in AS 47.10.080(b), is the only option available to the prosecution absent waiver under subsection (a) of this section, and the standards established in subsection (a) are sufficiently clear to prevent arbitrary enforcement. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

But hearing is not criminal in nature. — A waiver hearing is not criminal in nature and is dispositional, rather than adjudicatory. N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

And right to attend may be waived. — Although a minor had a constitutional right to attend her waiver hearing, she waived that right when she voluntarily failed to appear at the hearing by refusing to waive extradition from another state. N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

Findings necessary to justify waiver. — To justify waiver, the children's court judge must find, on sufficient evidence, that probable cause is established at the hearing for believing that the child committed the act with which he was charged in the petition and which if committed by an adult would constitute a crime and the child is not amenable to the treatment provided under this article. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

As a prerequisite to criminal prosecution, the children's court must find not only that the child is properly accused but also that he would not be receptive to the rehabilitative programs available to the court. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The inability to predicate a plan for a defendant during the short time remaining before his 19th birthday coupled with the obvious need of treatment as disclosed by the record may be sufficient to justify a waiver to adult jurisdiction. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The court may close out the case as a juvenile matter only upon finding cause to believe that the minor is delinquent and that the minor is not amenable to treatment. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A court must find that there is probable cause to believe that the minor is delinquent and that the minor is not amenable to treatment before jurisdiction may be waived. In re J.H.B., Sup. Ct. Op. No. 1676 (File No. 2917), 578 P.2d 146 (1978).

Subsection (d) is clear on its face that age 20 is the proper age for determining whether a minor is amenable to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The 1977 amendments of this section and 47.10.080 show that it is the legislature's intent that age 20 is the age to be used in determining the amenability issue. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Binding advance consent to treatment. — In order to give effect to the legislature's intent that a court may consider treatment until age 20 in determining waiver of juvenile jurisdiction, it is necessary that the judge be able to evaluate at the time of the waiver hearing whether the juvenile will in fact be available for treatment. It is not possible for the judge to know this unless the child can give binding consent at the time of the hearing. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

The portion of the opinion in In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978) that held that a minor in a waiver hearing could not give a binding advance consent to treatment beyond age 19 was mistaken. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

Waiver decision without testimony of psychologist or psychiatrist. — A waiver of juvenile jurisdiction decision can be made without the testimony of a psychologist or psychintrist, since such testimony is germane to at most two of the four factors set out in subsection (d) of this section, and not all four of those facts need be determined adversely to the youth to warrant waiver of juvenile jurisdiction. In re J.R., Sup. Ct. Op. No. 2165 (File No. 5194), 616 P.2d 865 (1980).

There is no conflict between subsection (d) and AS 47.10.080(b)(1). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The inconsistency between subsection (d) of this section and 47.10.080(b)(1) that existed prior to the 1977 amendments to these sections has been eliminated in that subsection (d) now provides that the determinative age is 20 and AS 47.10.080(b)(1) provides that the maximum limitation of confinement of minors is to the age of 20. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Factors to be considered in judging seriousness of alleged offense. — In judging the seriousness of the alleged offense, the children's court judge may consider not only the type of crime charged but also the circumstances surrounding its commission, the factors leading to delinquency, history of delinquency, and facilities available for rehabilitation. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The amenability decision rests in the sound discretion of the children's court judge. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972); In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

But the latitude afforded him is not unbounded. The proper exercise of that discretion must be predicated not only upon procedural regularity sufficient to satisfy the basic requirements of due process but also on a full inquiry into the amenability issue. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The trial court must make an evidentiary record and make written findings of fact, as required by Children's Rule 3(h), as to each of these four factors enunciated in subsection (d). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

These findings must be supported by substantial evidence. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Substantial evidence must be presented before jurisdiction may be waived. D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Based on these findings, the trial court, within its sound discretion, must make a decision as to the minor's amenability to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Factors to be considered in determining amenability. — Subsection (d) of this section suggests four factors which may be considered by the court when inquiring into the amenability issue: (1) the seriousness of the offense; (2) the delinquency of the minor; (3) the probable cause of the delinquent behavior; and (4) the facilities available for the treating of the minor. J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

All four factors listed in subsection (d) need not be resolved against the child to justify waiver. Nor is there value in requiring the children's court to make an arithmetic calculation as to the weight to be given each factor. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

But there must be a thorough examination of the child, his background and alternative strategies of rehabilitation short of adult criminal treatment. Lacking such an examination, the children's court has no evidentiary basis for the decision. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972); D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Though the standards for determining amenability to treatment through the children's court lack explicit definition, it is clear from the statute that the court in most cases must go beyond the circumstances surrounding the alleged delinquent acts and the age of the child. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Even though the children's court may have independent knowledge concerning children's treatment programs and facilities, it is necessary to make the existence and evaluation of such programs a part of the waiver proceedings to enable proper review by the supreme court. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

At a waiver hearing there must be a thorough examination of (1) the probable cause for believing that the child committed the act with which he was charged and (2) the amenability of the child to juvenile treatment. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

In the absence of such an examination there is no evidentiary basis for a waiver decision. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974); J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

The record must disclose the existence and evaluation of the available children's treatment programs in all future cases in order to establish the validity of the hearing. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

The constitutional prerequisites for a valid waiver of juvenile court treatment are reflected in Rule of Children's Procedure 3 which guarantees the child a hearing before the children's court judge after adequate notice thereof, counsel at the hearing who has had access to records and reports relevant to issues before the court, and a statement of reasons accompanying the waiver order. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Compliance with Rule of Children's Procedure 3(h) is essential to insure that the waiver hearing is not a "mere ritual" and to provide a meaningful basis for review. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

The waiver hearing is a critically important stage in criminal proceedings against a child. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

At stake at a child's waiver hearing is the statutory promise of special rehabilitative treatment in lieu of the harsher sanction of criminal conviction. Because the consequences of waiver are great, the hearing must measure up to the essentials of due process and fair treatment. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The investigation at a waiver hearing cannot be a mere ritual. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

There must be a hearing which measures up to the essential of due process and fair treatment. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974); J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

The right of confrontation applies to children's proceedings in which the child is charged with misconduct for which he may be incarcerated. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Waiver without hearing is denial of due process. — To waive children's court jurisdiction without a hearing or opportunity for adversary presentation is a denial of fair process. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

As is waiver without substantial evidence of unamenability to treatment. — To waive children's court jurisdiction without substantial evidence having been presented that the child is unamenable to juvenile rehabilitation programs is denial of fair process. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The proper standard of proof as to the amenability of a minor to treatment is the "preponderance of the evidence" standard. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Probable cause determination cannot be based on hearsay testimony. — The probable cause determination of a court at a waiver hearing concerning juveniles cannot be based upon hearsay testimony. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 501 P.2d 837 (1972).

Exclusion of testimony held proper. — Although proffered testimony was relevant to the amenability issue, the superior court did not abuse its discretion in excluding it because its prejudicial impact outweighed its probative value. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Insufficient evidence. — Where the court had little information concerning the probable cause of the minor's delinquent behavior, it was aware only of the nature of the offenses, of the fact that the minor was apparently not in need of funds, and of his statement that he regarded the commission of the crimes as a game, this information was insufficient to satisfy the requirements of this subsection. D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Waiver hearing did not comply with the standards set forth in this section and Rule of Children's Procedure 3. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

Trial court's conclusion that minor was amenable to treatment was abuse of discretion. — See In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Pros... ...or joyriding. — One under 18... ...are could be charged, prosecutes... ...ceed in the district court, as an... ...misdemeanor violation of A... ...riding" statute, former AS 28... ...fore there had been an orde... ...superior court waiving the ju... ...enile jurisdiction. State v. G... ...Op. No. 1786 (File No. 2978),... (1979).

Applied in St... ...Ct. App. Op. No. 125 (File No. 5879), 650 P.2d 422 (1982).

Quoted in Henson v. State, Sup. Ct. Op. No. 1300 (File No. 3020), 576 P.2d 1352 (1978).

Cited in E. L. L. v. State, Sup. Ct. Op. No. 1540 (File No. 3374), 572 P.2d 787 (1977); State v. P. H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984); Brower v. State, Ct. App. Op. No. 381 (File No. 7816), P.2d (1984).

Sec. 47.10 ...arings. The court may conduct the hearing in an informal ma... ...ne courtroom or in chambers. A hearing may be held before ...ng adult advisory panel in accordance with AS 47.10.075 ... ...t shall give notice of the hearing to the department and it may ... representative to the hearing. The court shall also transmit a copy of the petition to the department. The representative of the department may also be heard at the hearing. The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor. Nothing in this section may be applied in such a way as to deny a child's rights to a public trial and to a trial by jury. (§ 10 ch 1 art I ch 145 SLA 1957; am § 1 ch 49 SLA 1966; am § 53 ch 71 SLA 1972)

Cross references. — For waiver hearings, see AS 47.10.060.

Editor's notes. — John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971) and RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971), cited below, were decided prior to the 1972 amendment to this section.

NOTES TO DECISIONS

Constitutionality. — See In re Gault, 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed. 2d 527 (1967), discussing due process requirements in juvenile delinquency proceedings.

Constitutional requirements apply to children. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Hence, states must afford juveniles due process of law in delinquency proceedings that might result in the child's incarceration, and accordingly juveniles must be afforded the right to be represented by counsel, must be given proper and timely notice, must be given the right of confrontation and cross-examination of witnesses, and afforded the privilege against self-incrimination. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

While the U.S. Supreme Court has not held that children must be afforded due process rights in the pre-adjudication stages of the juvenile process, the Alaska supreme court believes that due process safeguards are necessary not only at the adjudicative hearing, but at any stage which may result in deprivation of the child's liberty. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The extension to children of fundamental constitutional rights does not mean a total substitution of the adult criminal model for the present children's court system. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The problems of pre-adjudication treatment of juveniles are unique to the juvenile process; hence, what is held with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Due process standards must be observed at a detention inquiry since it may result in the deprivation of the child's liberty. Due process requires at the very least that detention orders be based on competent, sworn testimony, that the child have the right to be represented by counsel at the detention inquiry, and that the detention order state with particularity the facts supporting it. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Incarceration, when applied to children, is a taking of liberty under the 14th amendment, regardless of benevolent-sounding labels. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The due process clause of the 14th amendment applies when a child is charged with misconduct for which he may be incarcerated in an institution, regardless of the labels of the adjudication and institution, so the child is entitled to notice of charges, counsel, confrontation and cross-examination, and the privilege against self-incrimination. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The right to grand jury indictment is not so fundamental that due process is offended by alternate methods for instituting children's proceedings where the child is charged with having violated a criminal statute. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Children who are charged with acts which would be chargeable only by grand jury indictment, if committed by an adult, need not be indicted by a grand jury. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Children are constitutionally entitled to jury trial in the adjudicative stage of a delinquency proceeding. However, due to the uniqueness of some facets of the procedures governing children's court proceedings and the potential damage which may accrue to the child by a public trial, the child should first consult with his counsel and his parents or guardian when appropriate, and then affirmatively assert the right to a trial by jury before it is finally granted. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971). But see McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971), in which it was held that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.

Whenever a child in a delinquency proceeding is charged with acts which would be a crime, subject to incarceration if committed by an adult, Alaska Const., art. I, § 11, guarantees him the right to jury trial. To the extent In re White, Sup. Ct. Op. No. 507 (File No. 1013), 445 P.2d 813 (1968) (subsequently overruled, in re G.K., Sup. Ct. Op. No. 796 (File Nos. 1627, 1654, 1674), 497 P.2d 914 (1972)) is inconsistent with this opinion, it is overruled. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The purposes of the right to jury trial, such as protection against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge, apply as much in children's cases as in adults' cases. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

If the child waives jury trial, the state may not require it, but jury trial shall be provided only on demand. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The Hammonds test of waiver (Hammonds v. State, Sup. Ct. Op. No. 483 (File No. 828), 442 P.2d 39 (1968)), applies to infants as well as adults. The consequences of application will differ for infants, because some decisions can be "knowingly and intelligently" made only by persons of fuller knowledge and maturity. An infant not advised by an attorney could make few knowledgeable and intelligent decisions about whether to waive rights in judicial proceedings. On the other hand, in areas where an adult ordinarily delegates to his attorney decision-making authority, as in deciding whether to object to introduction of evidence, the competence of the attorney rather than of the client generally determines whether waivers satisfy the Hammonds criteria. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The right to counsel extends to children charged with delinquency. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

A juvenile must be afforded the right to be represented by counsel at the delinquency proceeding, and a denial of that right violates due process. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Right to reasonable time to prepare for trial. — It is unquestionable that the right to the assistance of counsel of necessity includes the concomitant right to have a reasonable time in which to prepare for trial. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

While an adult defendant in a criminal case must be brought to trial within a reasonable time, due process requires that he may not be brought to trial too soon. He must be given a reasonable time to consult with his counsel and to prepare his defense. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

This section provides for the exclusion of the public from children's hearings. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

But such provision involves only persons whose presence is not desired by child. — The area of discretion in the rule, where the court may refuse to open the hearing, involves persons whose presence is not desired by the child. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

It is an abuse of discretion for the court to refuse admittance to individuals whose presence is favored by the child, except in special circumstances such as the unavailability of a courtroom sufficiently large to hold all the individuals whose presence is sought. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

If the child or his guardian ad litem wants the press, friends, or others to be free to attend, then the hearing must be open to them. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

As children are guaranteed the right to a public trial by the Alaska Constitution, RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Due process requires that children have the right to a public trial by jury where they are charged with acts which would be a crime if committed by an adult. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The fundamental constitutional right of public trial by jury must be afforded children in delinquency adjudication proceedings, in spite of the possible interference with the benevolent motives of the children's court system which have, in the past, justified denial of those rights. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The reasons for the constitutional guarantees of public trial apply as much to juvenile delinquency proceedings as to adult criminal proceedings. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Delinquency must be proved beyond a reasonable doubt under the due process clause of the 14th amendment. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Cited in In re [illegible], Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975); M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Collateral references. — Power of juvenile court to require testimony by children, 151 ALR 1229.

Applicability of rules of evidence in juvenile delinquency proceedings, 43 ALR2d 1128.

Degree of proof in juvenile delinquency proceedings, 43 ALR2d 1138.

Sec. 47.10.075. Young adult advisory panels. (a) Unless the minor objects, the court may select a young adult advisory panel to hear the case and advise the court of a recommended judgment and order. The court may consider any of the panel recommendations in making its judgment and order in the case.

(b) The principal of each high school shall submit annually to the court a list of the students enrolled in grades 10, 11 and 12. The court shall determine the method of selecting the members of each panel.

(c) A student shall be excused from attending school while serving as a panel member. A student may not serve more than once each year on a panel.

without also finding him guilty of assault, a lesser-included offense instruction on assault was required. Marker v. State, Op. No. 432, 692 P2d 977 (Alaska App. 1984).

A lesser-included offense instruction is not necessarily inappropriate even if there is a reasonable theory under which the jury could find defendant guilty of the crime charged without also finding him guilty of the lesser offense. Marker v. State, Op. No. 432, 692 P2d 977 (Alaska App. 1984).

This rule does not preclude a mistrial in a case in which the jurors cannot agree on a greater offense but can agree on a lesser offense. Desnek v. State, Op. No. 455, 697 P2d 1059 (Alaska App. 1985).

Juries need not unanimously agree upon a particular statutory theory of the crime charged if there is sufficient evidence in the record to support either theory. State v. James, Op. No. 2925, 698 P2d 1161 (Alaska 1985).

Under this rule, a jury may not convict a defendant of offenses which are related to the crime charged but which are not necessarily included therein. State v. Minano, Op. No. 3006, 710 P2d 1013 (Alaska 1985).

An indictment charging a greater offense necessarily also charges all lesser-included offenses as well as attempts; consequently, where a trial court finds that there was insufficient evidence to permit an indictment charging the greater offense, but sufficient evidence to charge the lesser offense including an attempt, the indictment should not be dismissed, but the charges should be reduced to charge the lesser offense. State v. Ison, Op. No. 754, 744 P2d 416 (Alaska App. 1987).

PART VII. JUDGMENT

Rule 32. Sentence and Judgment.

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter bail as provided in Rule 41 (a), Alaska Rules of Criminal Procedure. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. If the defendant is being sentenced following a plea of guilty or nolo contendere the court shall question the defendant to ascertain that he understood the meaning of his plea, and that it was freely and voluntarily entered.

(b) Judgment — Execution.

(1) *Execution.* The judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. At the time of imposition of sentence, the judge or magistrate shall make a statement on the record explaining his reasons for imposition of the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge or magistrate. The clerk shall forthwith deliver to a peace officer a copy of the judgment for execution. The peace officer shall note on the copy of the judgment the date of its delivery to him. When the judgment has been executed, the peace officer shall promptly return the copy to the clerk with his proceedings endorsed thereon.

(2) *Conviction of a Corporation.* If a corporation is convicted of any criminal offense the court may give judgment thereon and shall cause such judgment to be enforced in the same manner as a judgment in a civil action, or as otherwise provided by law.

(c) Procedure for Determining Mitigating and Aggravating Factors and Effect of Prior Convictions.

(1) At the time guilt is established by verdict or plea, counsel shall inform the court and the defendant of any prior convictions which bring into effect the presumptive sentencing provisions of AS 12.55.125; any dispute over the fact of prior convictions shall be set for hearing pursuant to paragraph (2) (ii), and the court shall order a presentence investigation by the Division of Corrections.

(2) At the time guilt is established, the court shall set:

(i) the time for the submission by counsel of affidavits setting forth aggravating and mitigating factors pursuant to AS 12.55.155 and extraordinary circumstances pursuant to AS 12.55.165, which time shall be not less than five working days after the finding of guilt;

(ii) a hearing not less than five working days from the time set for submission of the affidavits required by paragraph (2) (i) above, if there is any dispute between the parties concerning the requirement of presumptive sentencing, aggravating and mitigating factors and extraordinary circumstances which may exist.

(3) At the presentence hearing provided for by paragraph (2) (ii) the court shall enter an order establishing if presumptive sentencing applies, setting forth the aggravating and mitigating factors. A copy of this order shall be given to the Division of Corrections. If presumptive sentencing applies and there are no aggravating or mitigating factors, only a short form of the presentence report is required.

(4) At the time guilt is established the court shall establish the date for sentencing and provide that the presentence report be made available to the attorneys ten calendar days before sentencing in order that any factual errors in the report may be resolved among the attorneys and the Division of Corrections or at a hearing before the judge to whom the case is assigned for sentencing unless good cause is shown for the hearing to be before another judge.

(d) Presentence Investigation.

(1) *When Made.* The probation service shall make presentence investigation and report before the court imposes sentence or grants probation. The report shall not be submitted to the court or its contents disclosed to any one except counsel unless the defendant has tendered a plea of guilty or nolo contendere or has been found guilty. The court may

...ilize the report in determining if a bargained sentence recommendation will be followed pursuant to Rule 11. In the event the attorneys for the parties request the preparation of a presentence report to aid ... in plea bargaining the court may order such report to be made prior to the time stated in this rule.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal conviction including a finding of delinquency of the defendant and such information about his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. No record of arrest or other police contacts shall be included in the report. The report shall be made available to the state's attorney and to the defendant's attorney in all cases and to the defendant unless the court enters on the record findings of reasons why the report would prove detrimental to the rehabilitation of the defendant or safety of the public. Unless otherwise ordered, further disclosure of the report shall be limited to the reviewing court on appeal and to the agencies having charge of the defendant's rehabilitation.

(e) **Sentencing Referrals to Three-Judge Panel.**

(1) If the trial court finds that extraordinary circumstances exist under AS 12.55.165, the case shall be transferred forthwith to a three-judge sentencing panel of the superior court. All pertinent files, records and transcripts shall be transmitted to the sentencing panel by the clerk of the court within 30 days of the date of the order transferring the case.

(2) Three judges of the superior court shall be appointed by the chief justice to be the regular members of the sentencing panel. Two other judges of the superior court shall be appointed by the chief justice as first and second alternate members of the sentencing panel. At least one of the three regular members and one of the two alternate members of the sentencing panel shall reside outside of Anchorage. The term of appointment of the regular and alternate members of the sentencing panel shall be two years, except that the first three regular members appointed shall serve staggered terms of one, two, and three years. The chief justice may appoint additional alternate members of the sentencing panel to serve on a case-by-case basis in the event of the disability or disqualification of more than two judges.

(3) The chief justice shall appoint one of the three regular members to be administrative head of the sentencing panel and his or her office shall serve as the administrative repository for all papers and documents pertaining to cases submitted to the sentencing panel.

(4) Both the prosecuting attorney and the defendant may exercise in a timely fashion a challenge for cause, or a peremptory challenge if not previously exercised, to one judge on the sentencing panel in accordance with AS 22.20.022 and Rule 25 (d) (1), Alaska Rules of Criminal Procedure. In the event that a judge on the sentencing panel is the same judge who made the finding under subsection (1) of this rule, that judge shall be automatically disqualified.

(5) The sentencing panel shall either sentence the defendant or remand the case to the court within 60 days from the date that the case was transmitted to the sentencing panel. The sentencing panel shall provide a written statement of its findings and conclusions in support of any order remanding a case to the trial court.

(6) If the sentencing panel elects to take testimony or sentence the defendant under AS 12.55.175 (b) or (c), both the prosecution and the defendant shall have the right to be present in court during the proceedings. The defendant shall have the right to address the sentencing panel personally before sentence is imposed. The proceedings shall be held in a location best suited to the convenience of the parties and the court as determined by the sentencing panel.

(7) If the three-judge sentencing panel imposes sentence on the defendant, any further sentencing proceedings, including proceedings relating to sentence modification, shall occur before the same three-judge panel, who shall be considered the sentencing court. If at the time further proceedings are requested any of the three judges is no longer available, one or more alternate members shall sit in the same fashion as provided for in AS 12.55.175 (a).

(8) The right to bail of a convicted defendant is neither conferred nor enlarged by this rule.

(f) **Transcript of Sentencing Proceeding.** A transcript of any sentencing proceeding at which the defendant is committed to serve in excess of 6 months on one or more charges shall be prepared and furnished to the state attorney, defendant, and the Alaska Parole Board.

(Adopted by SCO 4 October 4, 1959; amended by SCO 157 effective February 15, 1973; by Amendment No. 5 to SCO 157 effective July 1, 1974; by SCO 330 effective January 1, [illegible]; by SCO 418 effective August 1, 1980; by SCO [illegible] effective October 21, 1980; by SCO 437 effective October 21, 1980; by SCO 550 effective February 1, 1983; by SCO 554 effective April 4, 1983; and by SCO 603 effective September 14, 1984)

Cross References

(a) CROSS REFERENCES: AS 12.55.010

sentencing judge may consider instances of past anti-social ... substantiated by supporting information, even though ... was not charged or convicted. Nukapigak v. State, Op. ... 562 P2d 697 (Alaska 1977).

...estion: "Do you have anything you want to say before I ... sentence?" was minimal compliance with allocution ...ement of this rule, where defendant w... ...ntenced four days ... Supreme Court imposed more strin... ...ttrass standard. ...ell v. State, Op. No. 1482, 568 P2d 11... 1978).

...al court's failure to afford defendant the opportunity to make ...nent on his own behalf at sentencing hearing was not ...ss error. Mohn v. State, Op. No. 1719, 584 P2d 40 (Alaska ...).

...der Rule 32(a) the obligation is on the court to afford the ...dant the opportunity to speak and not on the defendant to ...est such an opportunity, hence defendant's failure to assert ... his right of allocution did not constitute waiver. Mohn v. State, Op. No. 1719, 584 P2d 40 (Alaska 1978).

Defendant's contention that consideration of his juvenile ...ord by the court imposing sentence violated his right to privacy ...rejected. Penn v. State, Op. No. 1774, 588 P2d 288 (Alaska ...).

Despite the fact that defendant spoke at some length under ...examination by his counsel at the sentencing hearing, the ...'s failure to inform him of his right of allocution required ...encing. Law v. State, Op. No. 2301, 624 P2d 284 (Alaska ...).

In order to establish a claim of racial bias in sentencing defend... must show that the sentence was probably higher than that ... would have been imposed upon a defendant of a different ... with a like criminal history who committed a similar offense. ...leman v. State, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Trial court, in conducting a hearing pursuant to this rule to ...mine whether mitigating and aggravating factors have been ...blished, may consider evidence previously introduced at the ... Wolf v. State, Op. No. 99, 647 P2d 609 (Alaska App. 1982).

Where defendant was given a chance to exercise his right of ...cation just prior to sentencing and did not exercise that right on ...ground that he needed more time to prepare, failure of the trial ...rt to give the defendant more time was not error. Hastings v. State, Op. No. 706, 736 P2d 1157.

Rule 32.1. Appeal From Conviction of Sentence—Notification of Right to Appeal.

A person convicted of a crime after trial shall be advised by the judge or magistrate:

(a) That he has the right to appeal from the judgment of conviction within 30 days (or 15 days in appeals from the district court made under Rule 217, Alaska Rules of Appellate Procedure) from the date shown in the clerk's certificate of distribution on the judgment appealed from by filing a notice of appeal with the clerk of court.

(b) That in accordance with Appellate Rule 215, the defendant may appeal the sentence on the ground that it is excessive, that upon such appeal the court may reduce or increase the sentence, and that by appealing the sentence, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has twice been placed in jeopardy for the same offense.

(c) That if he wants counsel and is unable to pay for the services of an attorney, the court will appoint an attorney to represent him on the appeal.

(Added by SCO 157 effective February 15, 1973; amended by SCO 218 effective January 15, 1976; by SCO 536 effective October 1, 1982; and by SCO 643 effective September 15, 1985)

Annotations

Cases

Sentence of five years' imprisonment for burglary, two of which were suspended, was not clearly mistaken, even though the defendant was 19 years old and it was his first felony offense. Zurfluh v. State, Op. No. 2238, 620 P2d 690 (Alas... 1980).

Where defendant was convicted of assault with a dangerous weapon for striking another person in the face with a beer bottle, sentencing court was not clearly mistaken in imposing a five-year sentence. Wire v. State, Op. No. 2, 621 P2d 18 (Alaska 1980).

Thirty-year sentence for third rape conviction and ten-year sentence for assault with a dangerous weapon, the sentences to run consecutively, were not excessive. Coleman v. State, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Four month jail term for selling marijuana on school premises was appropriate notwithstanding sentencing guideline which suggested not more than thirty days for the quantity of marijuana involved. Anderson v. State, Op. No. 2763, 621 P2d 1345 (Alaska 1981).

Sentence of ten years with five suspended for sale of cocaine was excessive for a youthful first offender. Kelly v. State, Op. No. 2268, 622 P2d 432 (Alaska 1981).

A total sentence of 55 years was not excessive for second degree murder and two counts of shooting with intent to kill where defendant had a lengthy criminal record and a propensity for violent crime. Nielsen v. State, Op. No. 2279, 623 P2d 304 (Alaska 1981).

Sentence of 35 years for murder was not excessive even though defendant had no prior criminal record. Bryant v. State, Op. No. 2280, 623 P2d 310 (Alaska 1981).

Fifteen-year sentence was not inappropriate for shooting with intent to wound. Kagak v. State, Op. No. 2311, 624 P2d 818 (Alaska 1981).

Ten-year sentence for manslaughter was not excessive for defendant, an alcoholic, 67 years of age, with extensive criminal record and one prior homicide conviction. Phillips v. State, Op. No. 2229, 625 P2d 816 (Alaska 1981).

Rule 32.3. Judgment and Orders—Effective Dates and Commencement of Time for Appeal, Review and Reconsideration.

(a) **Effective Dates of Orders and Judgments.** Orders and judgments become effective the date they are entered.

(1) *Oral Orders.* The date of entry of an oral order is the date the order is put on the official electronic record by the judge unless otherwise specified by the judge. At the time the judge announces an oral order, the judge shall also announce on the record whether the order shall be reduced to writing. If the oral order is reduced to writing, the effective date shall be included in the written order.

(2) *Written Orders Not Preceded by Oral Orders.* The date of entry of a written order not preceded by an oral order is the date the written order is signed unless otherwise specified in the order.

(3) *Judgments.* The date of entry of a criminal judgment is the date the judgment is put on the official electronic record by the judge unless otherwise specified by the judge. All judgments shall be reduced to writing and the effective date shall be included in the written judgment.

(b) **Commencement of Time for Appeal, Review and Reconsideration.** The time within which a notice of appeal may be filed and reconsideration or review of orders and judgments may be requested begins running on the date of notice as defined below.

(c) **Date of Notice.**

(1) *Oral Orders.*

(i) As to the parties present when an oral order is announced, the date of notice is the date the judge announces the order on the official electronic record, unless at that time the judge announces his intention of having the order reduced to writing in which case the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(ii) As to parties not present at the announcement of an oral order the date of notice is the date shown in the clerk's certificate of distribution of notice of the order. If, however, at the time the judge announces the oral order he announces his intention of having the order reduced to writing, the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(2) *Written Orders.* The date of notice of a written order is the date shown in the clerk's certificate of distribution on the written order.

(3) *Judgments.* All judgments must be reduced to writing. The date of notice of a judgment is the date shown in the clerk's certificate of distribution on the written judgment.

(4) *Other Service Requirements.* These notice provisions apply to the notice of orders and judgments under Rule 44(c) and do not affect the service requirements of any other rule of criminal procedure.

(d) **Clerk's Certificate of Distribution.** Every written notice of an oral order and every written order and judgment shall include a clerk's certificate of distribution showing the date copies of the notice, order or judgment were distributed, to whom they were distributed, and the name or initials of the clerk who distributed them.

(Added by SCO 554 effective April 4, 1983)

Cross References

CROSS REFERENCE: App. R. 204

Rule 33. New Trial.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury, the court may vacate the judgment if entered, take additional testimony and enter a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other ground shall be made within 5 days after verdict or finding of guilt, or within such further time as the court may fix during the 5-day period.

(Adopted by SCO 4 October 4, 1959: amended by SCO 554 effective April 4, 1983)

Annotations

Cases

Where a case has been appealed, a trial court can entertain a motion for new trial based on newly discovered evidence without first applying for and obtaining a remand of the case from the supreme court to the trial court for the stated purpose of granting a new trial. State v. Salinas, Op. No. 39, 562 P2d 298, 5 [illegible] (Alaska 1961).

A motion for new trial based on the grounds of newly discovered evidence must meet the following requirements: (1) It must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial. (2) The motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal. Rank v. State, Op. No. 144, [illegible] (Alaska 1963).

Where newly discovered evidence was not such as would probably produce an acquittal on a new trial, and motion failed to show the requirement that there be a showing of diligence in attempting to locate a witness before or at the time of trial, the court properly exercised his discretion in denying a motion for new trial based on newly discovered evidence. Rank v. State, [illegible] 382 P2d 760 (Alaska 1963).

Where in a criminal case erroneous and prejudicial admission of hearsay evidence had resulted in reversal and retrial for appellant, it was reversible error for the trial court at the retrial to deny a motion for a new trial which was supported by affidavits of jurors showing that prejudicial evidence received in the first trial was actually before the jury at the retrial by virtue of the jury's knowledge of the contents of a local newspaper article published the last day of the retrial quoting the statement erroneously received in the first trial. Watson v. State, Op. No. 335, 413 P2d [illegible] (Alaska 1966).

As one of the exceptions to the general rule prohibiting jurors to impeach their verdicts, the verdict must not be allowed to stand where a party was deprived of a fair trial and since affidavits showed that they were exposed to a newspaper article containing information previously held so prejudicial as to require a new trial, established that the appellant was deprived of such a fair trial that the court erred in denying motion for new trial. Watson v. State, Op. No. 335, 413 P2d 22 (Alaska 1966).

judgment debtor is a final order terminating the proceeding and is appealable. Mallonee v. Grow, Op. No. 841, 502 P2d 432 (Alaska 1972).

In the interest of judicial economy, and because of the important issues involved, procedural rules were relaxed so that the merits of an appeal from a temporary restraining order issued by the superior court, which determined that a strike by public school teachers was illegal and which ordered the teachers to return to work, could be decided on the merits as though a declaratory judgment had been entered. Anchorage Educ. Assoc. v. Anchorage Sch. Dist., Op. No. 2537, 648 P2d 993 (Alaska 1982).

III. Criminal Appeal by State

The limitation on the right of the state to appeal does not prevent the state from using the petition for review proceeding to question the jurisdiction of the superior court. State of Alaska v. Salinas, Op. No. 39, 362 P2d 298 (Alaska 1961).

The prohibition of appeals by the state except to test the indictment does not prevent the state from petitioning for review of the trial court ruling that the accused was a minor and without the jurisdiction of the superior court, such ruling affecting a "substantial right" of the state to try the accused and preventing a final judgment. State of Alaska v. Linn, Op. No. 47, 363 P2d 361 (Alaska 1961).

The state may appeal "to test the sufficiency of the indictment" thereby raising any question as to the adequacy and adaptation of the indictment to its purpose. The inquiry is not limited to whether the indictment met the formal statutory requirements for a valid indictment. State of Alaska v. Shelton, Op. No. 56, 368 P2d 817 (Alaska 1962).

State had a right to appeal trial court's order arresting judgment where motion in arrest of judgment challenged only the sufficiency of the indictment. State v. Adkerson, Op. No. 294, 403 P2d 673 (Alaska 1965).

If the trial court dismissed a count of the indictment upon a motion for acquittal, but based its action unequivocally on the sole ground that the indictment was defective, the state had a right to appeal for the purpose of testing the sufficiency of the indictment. State v. Selman, Op. No. 302, 406 P2d 181 (Alaska 1965).

The issue whether an information substituted in place of a complaint in a magistrate court was adequate to prosecute an offense within the criminal jurisdiction of that court tested the sufficiency of the information, and appeal by the state from dismissal of the case was not barred. State v. Smith, Op. No. 356, 417 P2d 252 (Alaska 1966).

The supreme court on a criminal appeal taken by the state from a judgment of the superior court setting aside a conviction in the district court has authority to pass upon the sufficiency of information used as substitute for a complaint in the district court. State v. Pete, Op. No. 372, 420 P2d 338 (Alaska 1966).

In an appeal brought by the state from a judgment of the superior court setting aside a conviction in the district court on grounds of insufficiency of information, the supreme court reversed the superior court's order and also in order to avoid piecemeal appeals further considered other points made in the appellee's brief in defense of the judgment below and appearing in the record, albeit not passed upon below. State v. Pete, Op. No. 372, 420 P2d 338 (Alaska 1966).

Death of the appellant while criminal appeal was pending abated the criminal action ab initio. Hartwell v. State, Op. No. 391, 423 P2d 282 (Alaska 1967).

The limitation placed by AS 22.05.010 upon the state's right to appeal in a criminal case applies only to instances where the Supreme Court's jurisdiction is sought by appeal. Other forms of review authorized under the statute are not subject to the limitation. State v. Browder, Op. No. 699, 486 P2d 925 (Alaska 1971).

Neither the limitation placed by AS 22.05.010 upon the state's right to appeal in a criminal case nor the prohibition of Constitutional Article 1, § 15, against double jeopardy requires an erroneous nonfinal order or decision, favorable to the accused, to stand uncorrected. The state can invoke the discretionary review jurisdiction of the Supreme Court in criminal cases where the matter sought to be reviewed involves a nonfinal order or decision of the superior court. State v. Browder, Op. No. 699, 486 P2d 925 (Alaska 1971).

The state has the right to appeal a sentence only if it contends that the sentence imposed was too lenient. Where the state, which has unsuccessfully sought consecutive sentences, fails to challenge the defendant's sentence on two counts of negligent homicide on the ground that it was too lenient, there is no jurisdiction for the state's appeal under the sentence review statute. State v. Gibson, Op. No. 1215, 543 P2d 406 (Alaska 1975).

Double jeopardy prevents the retrial of any person acquitted by a trial court. Only where a guilty verdict rendered in the trial court has been reversed on appeal in the superior court, when that court is acting as an intermediate appellate court, can the state appeal a not guilty verdict to the supreme court. State v. Gibson, Op. No. 1215, 543 P2d 406 (Alaska 1975).

The state may appeal any adverse final judgment of a trial court in a criminal action dismissing an indictment for any reason unless retrial would be barred by the double jeopardy clauses of the state or federal constitutions. State v. Michel, Op. No. 48, 634 P2d 3[illegible] (Alaska App. 1981).

Rule 203. Supervision and Control of Proceedings.

The supervision and control of the proceedings on appeal is in the appellate court from the time the notice of appeal is filed with the clerk of the trial courts, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the trial court, or to modify or vacate any order made by the trial court in relation to the prosecution of the appeal, including any order fixing or denying bail.

(SCO 439 effective November 15, 1980; amended by SCO 572 effective February 1, 1984)

Rule 204. Appeal: Time—Notice—Bonds.

(a) When Taken — Appeals and Cross-Appeals.

(1) *Appeals.* The notice of appeal shall be filed within 30 days from the date shown in the clerk's certificate of distribution on the judgment appealed from.

(2) *Subsequent Appeals.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the filing of the timely notice of appeal by any other party, or within 30 days from the date shown in the clerk's certificate of distribution on the judgment, whichever period expires last.

(3) *Motions That Terminate Time for Appeals in Civil Cases.* In a civil case, the running of the time for filing an appeal is terminated by a timely motion filed in superior court pursuant to the rules of civil procedure enumerated in this subsection. The full time for an appeal by any party begins to run again on the date of notice, as defined in Civil Rule 58.1 (c), of any of the following orders made on a timely motion:

(3) Granting or denying a motion for judgment under Civil Rule 50 (b);

(4) Granting or denying a motion to amend or make additional findings of fact under Civil Rule 52 whether or not an alteration of the judgment would be required if the motion is granted;

(5) Granting or denying a motion to alter or amend a judgment under Civil Rule 59;

(6) Denying a new trial under Civil Rule 59; or

(7) Granting or denying a motion for reconsideration under Civil Rule 77 (m).

(ii) *Motions That Terminate Time for Filing Appeal in Criminal Cases.* In a criminal case, if a motion for a new trial or in arrest of judgment or a timely motion for reconsideration has been filed in the superior court, or if a motion for modification, correction, or suspension of sentence under Criminal Rule 35 has been made within the allowed period following the date shown in the clerk's certificate of distribution on the judgment, an appeal from a judgment may be filed within 30 days after the date of notice of the order deciding the motion. Notice of entry is defined in Criminal Rule 32.3(c).

(iii) *Effect of Taxing of Costs and Prejudgment Interest.*

(A) The running of the time for filing an appeal is not terminated by proceedings related to the taxing of costs pursuant to Civil Rule 79 or while awaiting calculation of prejudgment interest. However, the Statement of Points on Appeal filed pursuant to Appellate Rule 210 (e) may be amended by an appellant or cross-appellant to include the subjects of costs and attorney's fees or prejudgment interest and these subjects will thereafter be considered part of the appeal if contained in the brief of appellant or cross-appellant. If an appeal or cross-appeal is pending, costs and attorney's fees or the amount of prejudgment interest shall be considered a final judgment subject to separate appeal limited to the subject of costs, attorney's fees or prejudgment interest.

(B) Notwithstanding Rule 203, the pendency of an appeal shall not divest the trial court of jurisdiction to consider the matters of costs and attorney's fees pursuant to Civil Rules 79 and 82.

(c) *Premature Appeals.* If a notice of appeal is filed after the announcement of a decision but before the date shown in the clerk's certificate of distribution on the judgment, the notice of appeal shall be treated as filed on the date shown in the clerk's certificate of distribution on the judgment.

(b) **Notice of Appeal.** A party may appeal from a judgment by filing a notice of appeal with the court from which the appeal is being taken. The notice of appeal must specify the parties taking the appeal and their current addresses, designate the judgment or part thereof appealed from, and name the court to which the appeal is taken. The notice of appeal shall be accompanied by proof of service on all other parties to the action in the trial court. As provided elsewhere in these rules, at the time it is served and filed the notice of appeal shall be accompanied by a statement of points on appeal (Rule 210 (e)) and designation of record on appeal (Rule 210 (a) (1)) and, if required, by the filing fee (Rule 204 (h)) and a bond for costs on appeal (Rule 204 (c) (1)). If a motion for an extension of time to file the statement of points on appeal or designation of record on appeal has been filed with the appellate court, the appellant shall serve and file with the notice of appeal a written statement to that effect. A motion to waive bond on appeal pursuant to Rule 104 (c), or to appeal at public expense pursuant to Rule 209, may be filed along with the notice of appeal. Otherwise, the clerk of the trial courts shall refuse to accept for filing any notice of appeal not conforming to this paragraph.

(c) **Bond on Appeal.**

(1) Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal in a civil case. The bond shall be in the sum of seven hundred fifty dollars ($750.00), unless the superior court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or such costs as the supreme court may award if the judgment is modified. If a bond on appeal in the sum of seven hundred fifty dollars ($750.00) is given, no approval thereof is necessary. After a bond on appeal is filed, an appellee may by motion raise objection to the form or amount of the bond or to the sufficiency of the surety which shall be determined by the superior court. In lieu of filing such cost bond, the appellant may deposit in the office of the clerk of the court from which the appeal is taken a sum of money reasonably sufficient to cover such costs, the amount thereof to be fixed by the superior court.

(2) Notwithstanding subparagraph (1), a bond for costs on appeal shall not be required in an appeal from a decision of the trial court in any criminal case or any civil case where an indigent party is entitled to court-appointed counsel, and a bond shall not be required from an employee appealing from a denial of compensation by the Alaska Workers' Compensation Board or from a denial of a claim for benefits under AS 23.20 (Employment Security Act).

(d) **Supersedeas Bond.** Whenever in a civil case an appellant entitled thereto desires a stay on appeal, he may present to the superior court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in

full, together with costs and interest, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs and interest as the supreme court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, and interest, unless the superior court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the court or the state troopers or when the proceeds of such property of a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the cost of the action, costs on appeal, and interest, unless the superior court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. A municipality or an officer or agent thereof desiring a stay on appeal is exempted from the requirement of posting supersedeas bond imposed by this subsection.

(e) **Failure to File or Insufficiency of Bond.** (Rescinded by Supreme Court Order 576 effective February 1, 1984)

(f) **Judgment Against Surety.** By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the superior court and irrevocably appoints the clerk of that court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the superior court prescribed may be served on the clerk of the superior court who shall forthwith mail copies to the surety if his address is known.

(g) **Joint or Consolidated Appeals.** If two or more persons are entitled to appeal from a judgment or order of a court and their interests are such as to make joinder practical, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party.

(h) **Filing Fee.** When a notice of appeal is filed, the appellant shall pay to the clerk of the court from which the appeal is taken a filing fee prescribed in Rule 9, Rules Governing the Administration of All Courts.

(i) **Notice to Appellate Court.** Immediately upon the filing of the notice of appeal, the Clerk of the trial courts shall send to the clerk of the appellate courts: a copy of the notice of appeal, statement of points on appeal, designation of record on appeal, and proof of service of these documents, indicating the date on which they were filed; evidence that the filing fee has been paid and a bond for costs on appeal posted, if required, or a statement that the appeal is at public expense; a statement identifying all parties to the appeal and the attorneys who represented them in the trial court; and a copy of the judgment being appealed.

(SCO 439 effective November 15, 1980; amended by SCO 461 effective June 1, 1981; by SCO 510 effective August 30, 1982; by SCO 513 effective October 1, 1982; by SCO 554 effective April 4, 1983; by SCO 573 effective February 1, 1984; by SCO 574 effective February 1, 1984; by SCO 575 effective February 1, 1984; by SCO 726 effective December 15, 1986; SCO 794 effective March 15, 1987; by SCO 830 effective August 1, 1987; and by SCO 847 effective January 1, 1988)

Annotations

Cases

I. In General
II. Entry of Judgment
III. Timeliness of Appeal
  A. In General
  B. Tolling of Time for Appeal

I. In General

An appeal does not in itself operate to prevent execution of judgment below, and in order to prevent such an enforcement appellant must either file a supersedeas bond approved by the court or obtain a stay of enforcement from the supreme court. Liberty National Insurance Company v. Hunter, Op. No. 281, 398 P2d 997 (Alaska 1965).

Where appellee did not take a cross-appeal nor allege an issue of attorney's fees not previously raised by [illegible] statement of points on appeal, he could not attack the award in this regard for first time by appellee's brief. Alaska Brick Company v. McCoy, Op. No. 287, 400 P2d 454 (Alaska 1965).

An attorney in a workmen's compensation proceeding is within the scope of this rule and has the right of appeal from award of attorney's fees by either the Board or the superior court. Rose v. Alaskan Village, Inc., Op. No. 333, 412 P2d [illegible] (Alaska 1966).

This rule governs procedure for obtaining a stay of a compensation award once an appeal has been taken from the superior court. Johns v. State of Alaska, Dept. of Highways, Op. No. 424, 431 P2d 148 (Alaska 1967).

In determining whether to approve a supersedeas bond under this rule, the superior court should apply the same criteria applicable in determining "irreparable damage" under the statutory provisions of AS 23.30.125(c). Johns v. State of Alaska, Dept. of Highways, Op. No. 424, 431 P2d 148 (Alaska 1967).

It is not necessary to hold an evidentiary hearing on [illegible] alleged deprivation of the right to appeal where petitioner alleges she requested her trial defense counsel to file an appeal from her conviction, but fails to indicate time, location, manner or circumstances under which she had requested her counsel to file an appeal. Pore v. State, Op. No. 437, 452 P2d 433 (Alaska 1969).

...court has the primary responsibility to determine ... should be allowed to appeal at public expense. ...nson, Op. No. 1229, 544 P2d 1028 (Alaska 1976).

...written statement of reasons for denying a motion ... expense, a judge should take care to state with ... detail preliminary and basic facts upon which ... judge makes such findings will the supreme ... have a clear understanding of the basis for the ...Johnson v. Johnson, Op. No. 1229, 544 P2d 1028

Rule 210. Record on Appeal.

Designation of Contents of Record on Appeal.

...the time the notice of appeal is filed, the ... shall also serve upon the appellee and file ... court a designation of the portions of ... including transcripts, exhibits and any ... from the court file, to be contained in the ... appeal. The designation must describe the ... with reasonable specificity. Within 10 days ... service and filing of such a designation, any ... to the appeal may serve and file a desig... additional portions of the record to be ...

...appellant designates nothing other than ... required by subsection (f)(1) of this rule, ... appellee thereafter designates additional ... the parties shall proceed under subsection ... this rule as if the appellee were the appellant.

...In the absence of an agreement between the ... or an order of the court to the contrary, the ... shall pay all costs for preparation of the ... record and transcript, including the cost of ... of those portions designated by the ... This rule does not govern the payment for ... prepared for the use of the parties or counsel.

Transcript.

...If there is to be included in the record on ... any evidence or proceedings that were ste...graphically reported or electronically recorded, ... appellant shall incorporate in his designation a ...scription in the best practical manner of the par...lar parts of the evidence or proceedings to be ...luded. At the time of filing the request for the ...paration of the transcript, the appellant shall ...ate the type of proceedings and the number of days ... trial involved.

...The appellant shall ascertain from the clerk of ... trial court whether the trial court transcript ...partment has the capability to prepare the tran...script in a timely manner. If it does not, the appellant ...shall contract with an authorized transcribing firm ... prepare the transcripts, at a price agreed to ...between them, within a time which will enable the ...clerk of the trial court to comply with subsection (g) ...of this rule. The agreement between the appellant ...and the authorized transcribing firm shall comply with Rule 36 of the Rules Governing the Administration of All Courts. An authorized transcribing firm shall promptly notify the clerk of the trial court when it has been engaged to prepare a transcript for appeal. Promptly upon receipt of such notice, the clerk of the trial courts shall comply with Rule 36 (b) of the Rules Governing the Administration of All Courts. At the time of filing the original of the transcript with the clerk of the trial courts, the authorized transcribing firm shall also submit a statement of the costs of the transcript, identifying the attorney or party who made payment. If additional payment is made at a later time, the transcribing firm shall promptly notify the clerk of the trial courts. The clerk of the trial courts shall transmit this information to the clerk of the appellate courts.

(3) If the appellant's designation includes only part of the recorded or reported evidence or proceedings, the appellee, in his designation referred to in subdivision (a) of this rule, shall in like manner designate such additional parts thereof as he desires to have added. If it is impractical to describe with precision those portions which the parties desire to have included in the record on appeal, amended or supplemental designations may be filed at the time a transcript has been prepared.

(4) The request for the preparation of a transcript shall be:

[a] In writing;

[b] Served on the other parties to the appeal;

[c] Accompanied by proof of service; and

[d] Filed in duplicate with the clerk of the trial courts. The duplicate copy shall be forwarded immediately by the clerk of the trial courts to the clerk of the appellate courts.

(5) If a copy of the transcript or of the necessary portions thereof is already on file, the appellant shall not be required to file any additional copies.

(6) Transcripts will be prepared in a form prescribed by the administrative director by administrative bulletin.

(c) **Stipulation as to Record.** Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the trial courts may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(d) **Record to be Abbreviated.** All matters essential to the decision of the questions presented by the appeal must be included in the record on appeal, and all matters not essential to the decision of such questions shall be omitted; and the appellate court will consider nothing but those parts of the record so designated. For any infraction of this rule, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require, and such costs

may be imposed upon offending attorneys or parties. In addition, if any material part of the record, proceedings and evidence is not included in the record on appeal, the appeal may be dismissed, or such other order made as the circumstances may appear to the court to require.

(e) **Statement of Points.** At the time of filing his notice of appeal, the appellant shall serve and file with this designation a concise statement of the points on which he intends to rely on the appeal. The appellate court will consider nothing but the points so stated. On motion in the appellate court, and for cause, the statement of points may be supplemented subsequent to the filing of the designation of record.

(f) **Record to be Prepared by Clerk — Necessary Parts.**

(1) The clerk of the trial courts shall prepare the record on appeal which shall consist of original papers, exhibits and transcript as designated by the parties, and which shall always include, whether or not designated, the following: the material pleadings, without unnecessary duplication; the verdict or the findings of fact and conclusions of law; in an action tried without a jury, the referee's or master's report, if any; the opinion, if any; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and the statement by the appellant of the points on which he intends to rely.

(2) In a criminal case, if among the points on appeal is an allegation that the sentence is excessive or too lenient, the record on appeal shall also include, whether or not designated the material required by Rule 215(g)(1).

(3) If the original of any item to be included in the record on appeal cannot be located or is otherwise unavailable, the clerk may substitute a copy, and shall accompany the record with an affidavit of the clerk or a deputy clerk stating the reasons why the original is not available.

(4) The record on appeal shall be assembled by the clerk in one or more separate parts or volumes, as the clerk may deem convenient, and with each page numbered at the bottom consecutively, in order that convenient and easy reference, by page and volume numbers, may be had to any particular paper or exhibit in the record.

(5) The clerk shall prepare, sign and attach to the record on appeal a certificate containing the following: a table of contents which shall list each document and exhibit contained in the record on appeal with corresponding volume and page numbers where each such document may be found, and a brief description of each exhibit indicating if the exhibit is a "physical exhibit" which will not be transmitted pursuant to subsection (1) of this rule; the date upon which the preparation of the record was completed; and the dates upon and manner in which notice of such completion of the record was given by the clerk and the names of the parties or their attorneys to whom such notice was given.

(6) Promptly upon the completion of the record on appeal, the clerk shall give notice thereof to all parties to the judgment and to the clerk of the appellate courts, by sending them a copy of the certificate referred to in paragraph (5).

(7) Paragraphs (3), (4), (5), (6), (8) and (9) of this subsection apply to all records on appeal, including supplemental records prepared pursuant to subsection (h) or some other provision of these rules, and including records prepared pursuant to Rule 215 (g), 216 (f), 217(c), or 218(e).

(8) The clerk of the trial courts shall comply with paragraph (6) of this subsection even though, pursuant to paragraph (g) (1), the clerk of the appellate courts may request that a particular record be transmitted to his office immediately upon its completion.

(9) Papers filed under seal in the trial court, recordings or transcripts of closed hearings held in the trial court, and exhibits submitted or introduced at closed hearings in the trial court, must be included in the record on appeal if designated by a party or required by these rules to be included. Such papers must be maintained under seal while they constitute part of a record on appeal, and access to them shall be governed by Rule 512.5(c).

(g) **Time for Completion of Record.**

(1) The preparation of the record on appeal shall be completed within 40 days from the date of filing the notice of appeal. After completion, the record shall be retained in the clerk's office for a length of time sufficient to permit the preparation of briefs in accordance with Rule 212. The original record and such copies as may be required, shall be transmitted to the appellate court in a manner and at a time designated by the clerk of that court.

(2) Should an authorized transcribing firm be unable to complete the transcripts in sufficient time to enable the clerk of the trial courts to comply with this subsection, either the transcribing firm, or the appellant shall move the appellate court for an extension of time for completion of the record on appeal. The motion shall comply with Rule 503, shall also be served on the clerk of the trial court, and shall be considered a routine motion within the meaning of Rule 503 (e).

(3) Ultimate responsibility for compliance with the time periods of this subsection shall be with the appellant. Sanctions for noncompliance may be imposed as provided in Rule 511.5.

...Power of the Court to Correct, Modify or Supplement Record. It is not necessary for the record on ... approved by the trial court or a judge ... as provided in subdivision (k) of this ... Rule 211, but if any difference arises ... record truly discloses what occurred in ... court, the difference shall be submitted to ... by that court and the record made to ... that court's decision. If anything material ... party is omitted from the record on ... or accident by court personnel, or is ... them, the parties by stipulation, or the ... either before or after the record is transmitted to the appellate court, or the appellate court, ... suggestion or of its own initiative, may ... the omission or misstatement shall be ... and if necessary that a supplemental ... certified and transmitted by the clerk ... courts. All other questions as to the contents of the record shall be presented to the ... court. On motion in the appellate court, ... the record may be modified or supplemented to correct omissions by counsel.

...ord for Preliminary Hearings in the Appellate Court. (Rescinded by Supreme Court ... effective February 1, 1984)

...veral Appeals. When more than one appeal ... the appellate court from the same judgment ... one record on appeal shall be prepared ... all the matter designated or agreed upon ... parties, without duplication. The preparation ... record shall be completed within 40 days after ... of the last notice of appeal.

...Appeals When No Stenographic Report or Electronic Recording was Made. In the event no ... graphic report or electronic recording of the ... or proceedings at a hearing or trial was ... the appellant may prepare a statement of the ... of proceedings from the best available ... including his recollection, for use instead of a ... graphic or electronically recorded transcript. ... statement shall be served on the appellee, who ... serve objections or proposed amendments, and ... be submitted to the court from which the ... is being taken for settlement and approval. As ... and approved, the statement shall be ... by the clerk of that court in the record on ... appeal.

(l) Exhibits. If physical exhibits are designated for the record on appeal, the clerk of the trial courts shall list them in the table of contents, together with a brief description of each, but shall not transmit them to the appellate court unless requested to do so by the clerk of the appellate courts. If a party wishes to have particular physical exhibits transmitted, he may file a motion with the appellate court. As used in this subsection, "physical exhibits" includes exhibits other than documents or photographs, and also includes documents or photographs of unusually large size or unusual bulk or weight.

(m) Transfer of Record on Appeal. If it is impractical for Alaska counsel for a party to prepare his brief because he resides in a city or town other than the one where the record on appeal is situated, the clerk of the appellate courts may direct the transfer of the record for the accommodation of counsel in the preparation of briefs.

(SCO 439 effective November 15, 1980; amended by SCO 461 effective June 1, 1981; by SCO 510 effective August 30, 1982; by SCO 554 effective April 4, 1983; by SCO 577 effective February 1, 1984; by SCO 578 effective February 1, 1984; by SCO 631 effective September 15, 1985; by SCO 736 effective December 15, 1986; by SCO 768 effective March 15, 1987; by SCO 795 effective March 15, 1987; and by SCO 883 effective July 15, 1988)

Annotations

Cases

I. In General
II. Contents of Record on Appeal
  A. In General
  B. Statement of Points

I. In General

Matters that were not made issues in the trial court, by either the pleadings or the pre-trial order or that were not tried before the court, will not be considered on appeal. Lumbermens Mutual Cas. Co. v. Continental Cas. Co., Op. No. 160, 387 P2d 104 (Alaska 1963).

Where in his reply brief the appellee raised the issue of allowance of attorney's fees, but did not cross-appeal and did not by cross-statement of points alert appellant to such an issue so that additional portions of the record could have been designated if appropriate, the issue of attorney's fees allowed by trial court was not considered on appeal. Alaska Brick Company v. McCoy, Op. No. 287, 400 P2d 454 (Alaska 1965).

An argument not made at trial or listed in appellant's statement of points on appeal will not be considered. Moran v. Holman, Op. No. 834, 501 P2d 769 (Alaska 1972).

The failure to raise a point at trial court level or include it in statements of points to be raised on appeal generally will foreclosure the appeal of an alleged error, unless it reaches the level of plain error. Burford v. State, Op. No. 954, 515 P2d 382 (Alaska 1973).

Letter from Workers' Compensation Board notifying claimant's counsel that the record on appeal was complete was sufficient notice under this rule even though no "certificate" that the record was complete was sent. Cowitz v. Alaska Workers' Compensation Board, Op. No. 3078, 721 P2d 635 (Alaska 1986).

In light of the fact that superior court order holding appellant's appeal from an administrative agency decision in abeyance was never vacated, that the agency did not furnish the superior court clerk with a copy of its decision on reconsideration, that the agency did not prepare and certify the record on appeal, and that the clerk of the superior court never notified the agency of the date by which it was to complete the record on appeal, appellant's counsel reasonably could have been in doubt as to how to proceed with the administrative appeal, thus superior court erred in dismissing the appeal for lack of prosecution. King v. State Dept. of Natural Resources, Op. No. 3226, 742 P2d 253 (Alaska 1987).

II. Contents of Record on Appeal

...peal, along with the brief, clearly inform cross-appellee ... error. State v. Abbott, Op. No. 804, 498 P2d 712 ...

... that instructions were "lacking and misleading" ... court erred in giving requested instructions are too ... consideration on appeal. Transamerica Title Insurance ... Ramsey, Op. No. 869, 507 P2d 492 (Alaska 1973).

Rule 213. Oral Argument.

... party may serve and file a written ... for oral argument not later than 10 days after ... on which appellant's reply brief is due pursuant to Rule 212(a)(1), or pursuant to any extension of time granted under Rule 502 or 503. If oral argument is timely requested, it will automatically be scheduled. When a request is made by one party, the right to oral argument extends to all parties. Oral argument shall be scheduled and held as provided in Rule 505.

(b) **Opening and Conclusion.** The original appellant shall be entitled to open and conclude the argument of the case. Men there is a cross-appeal, the appeal and cross-appeal shall be argued together. In such cases the order of oral argument shall be determined by the court at the request of either party or upon its own motion.

(SCO 439 effective November 15, 1980)

Rule 214. Disposition of Appeals.

(a) The court may determine that an appeal shall be disposed of by summary order and without formal written opinion. To assist the court in making this determination, the parties may request in writing that an appeal be so decided. The request shall be signed by all parties and may be filed any time after the filing of the notice of appeal.

(b) In a criminal case, a summary order under this rule shall contain, at a minimum, a statement of the issues considered by the appellate court. This statement of issues may be made by reference to a trial court opinion. For purposes of this rule, "criminal case" includes all collateral criminal proceedings listed in AS 22.07.020(a).

(c) Nothing in this rule limits the right of the parties to oral argument pursuant to Rule 213.

(d) Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state.

(SCO 439 effective November 15, 1980)

Rule 215. Sentence Appeal.

(a) **Notification of Right to Appeal Sentence.** At the time of imposition of any sentence of imprisonment of 45 days or more, the judge shall inform the defendant as follows:

(1) That the sentence may be appealed on the ground that it is excessive;

(2) That upon such appeal the appellate court may reduce or increase the sentence, and that by appealing the sentence under this rule, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has been twice placed in jeopardy for the same offense;

(3) That if the defendant wants counsel and is unable to pay for the services of an attorney, the court will appoint an attorney to represent him on the appeal.

(b) **Notice of Appeal.** Written notice of appeal from a sentence by the prosecution, or by a defendant appealing solely on the ground that the sentence is excessive, shall be filed with the clerk of the court which imposed the sentence not later than 30 days after the date shown in the clerk's certificate of distribution on the written judgment, except as provided for by Appellate Rule 204(a)(4). The notice of appeal need only state that the sentence which is being appealed is too lenient or excessive. Whether or not the defendant is represented by counsel, a notice of appeal filed by a defendant shall state the mailing address of the defendant. No fee shall be collected for filing a notice of sentence appeal. When filed, the notice of appeal shall be accompanied by proof of service on opposing counsel.

(c) **Termination of Appeal.** Any appeal of a sentence initiated by the defendant may be terminated by his filing within 30 days from the filing of the notice of appeal a notice of intent to terminate the appeal. Such a termination shall prevent any increase in the sentence or sentences imposed.

(d) **Indigent's Right to Counsel on Sentence Appeal.** An indigent defendant is entitled to the assistance of counsel in prosecuting an appeal on the ground that the sentence is excessive. Where an appeal is taken by the prosecution pursuant to AS 12.55.120(b) on the ground that the sentence is too lenient, and the defendant has not appealed, the appellate court in its discretion may appoint counsel for an indigent defendant.

(e) **Forwarding Notice of Appeal.** Immediately upon filing of a notice of sentence appeal, the clerk shall forward a copy of the notice to the clerk of the appellate court. The copy of the notice sent to the appellate court shall be accompanied by a copy of the judgment as required by Rule 204 (i).

(f) **Sentencing Report.** The trial court shall prepare a sentencing report as part of the record, which shall include the following:

(1) A verbatim record of the sentencing hearing, including statements made by witnesses, the prosecuting attorney, the defense attorney, and the defendant;

(2) The reasons for selecting the particular sentence imposed;

(3) Specific findings on all material issues of fact and on all factual questions required as prerequisite to the selection of the sentence imposed;

(4) A precise statement of the terms of the sentence imposed and the purpose the sentence is intended to serve.

(g) Record on Appeal.

(1) *Preparation and Contents.* Within 15 days after the filing of a notice of sentence appeal, the clerk shall prepare sufficient copies of the record on appeal, which shall consist of the following:

[a] A transcript of the entire sentencing proceeding, which shall include the complete sentencing report required by subdivision (f) of this rule;

[b] All reports and documents which were available to the sentencing court as an aid in imposing sentence;

[c] Notices of factors in aggravation or mitigation, if any, filed under AS 12.55.155 (f).

The clerk shall number the pages of the record consecutively in the same manner as required by Rule 210 (f) (4). The 15-day period may be extended as provided in Rule 210 (g).

(2) *Distribution.* Immediately upon preparation of the record on appeal, the clerk shall send the original to the clerk of the appellate courts, and copies to the defendant, his counsel, and the attorney for the prosecution.

(h) Memoranda on Appeal.

(1) *By Appellant.* Within 15 days after service of copies of the record on appeal provided for in (g) of this rule, the appellant shall file with the appellate court the original and three copies of a typewritten memorandum in support of the appeal.

(2) *By Appellee.* Within 15 days after service of a copy of appellant's memorandum, the appellee may file with the appellate court the original and three copies of a typewritten memorandum in opposition to the appeal.

(3) *Reply Memorandum.* No reply memorandum shall be filed unless ordered by the court.

(4) *Form and Contents of Memoranda.* The memoranda filed by either the appellant or the appellee need not comply with the requirements of Appellate Rule 212 unless ordered by the appellate court.

(5) *Service of Memoranda.* When filed, the original memoranda shall be accompanied by proof of service on opposing counsel.

(i) Disposition of Appeals by Reviewing Court. Sentence appeals will be disposed of by the appellate court on the record. Oral argument, if timely requested no later than ten days after the date on which the appellee's sentence memorandum is due, is limited to fifteen minutes per side, unless otherwise ordered by the court of appeals. The order of argument is as provided in Rule 213(b). In cases where sentence appeals are consolidated with appeals on the merits, a timely request for argument on the merits in accordance with Rule 213(a) or Rule 217(h) is deemed to include a request for argument on the sentence appeal.

(j) Bail Pending Appeal. A sentence appealed on the sole ground that the sentence is excessive does not confer or enlarge the right to bail pending appeal.

(k) Consolidation of Sentence Appeals with Regular Appeals. An appeal of a sentence on the ground that the sentence is excessive or too lenient shall be consolidated with an appeal by the same party based upon other grounds. Upon consolidation, the procedure for perfecting an appeal on other grounds shall govern.

(SCO 439 effective November 15, 1980; amended by SCO 515 effective October 1, 1982; by SCO 554 effective April 4, 1983; by SCO 575 effective February 1, 1984; by SCO 781 effective March 15, 1987; by SCO 827 effective August 1, 1987; by SCO 829 effective August 1, 1987; and by SCO 862 effective July 15, 1988)

Annotations

Cases

A sentence will be modified on appeal only if those circumstances where the reviewing court is convinced that the sentencing court was clearly mistaken in imposing a particular sentence. McClain v. State, Op. No. 1016, 519 P2d 811 (Alaska 1974).

Where a case is on appeal, the denial of guilt should not be considered as a factor weighing against probation. Bradley v. State, Op. No. 1145, 535 P2d 1031 (Alaska 1975).

The standard of review on a sentence appeal is to determine whether the trial clearly mistaken. State v. Trunnel, Op. No. [illegible] 549 P2d 550 (Alaska 1976).

A sentence is imposed at the time it is first announced [illegible] on the record by the court. State v. Trunnel, Op. No. 1260, 549 P2d 55[illegible] (Alaska 1976).

When a sentence is reduced under Criminal Rule [illegible] amounts to the imposition of a new sentence which the state may appeal. State v. Trunnel, Op. No. 1260, 549 P2d 550 (Alaska 197[illegible]

Probationer may seek relief by sentence appeal following probation revocation and imposition of sentence of imprisonment. Gilligan v. State, Op. No. 1378, 560 P2d 17 (Alaska 197[illegible]

Mere assertion that defendant told his attorney that he wanted to attack sentence as excessive does not demonstrate that failure to file appeal within 30 days was due to excusable neglect, or that the limit should be relaxed to avoid injustice, where motion for modification of sentence was made two years after sentence was imposed. Taylor v. State, Op. No. 1436, 564 P2d 1219 (Alaska 197[illegible]

Denial of a motion to reduce sentence is not the imposition of a sentence for the purpose of paragraph (b) of this rule. Davis v. State, Op. No. 1453, 566 P2d 640 (Alaska 1977).

Rule permitting defendant sentenced to 45 days or more to appeal the sentence did not conflict with statute conferring

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Capital punishment in paralysis

Huge caseload bloats lethargic, costly system in Florida, U.S.

By DAVE VON DREHLE
Herald Staff Writer

On a whim during a burglary, Charles Proffitt murdered Joel Medgebow on July 10, 1973. He plunged a bread knife into his sleeping victim's chest, "just to see what it felt like."

Three years later, using *Proffitt vs. Florida* as its test case, the U.S. Supreme Court upheld Florida's death penalty. Proffitt could be dead in six months, Attorney General Robert Shevin predicted.

Today, 15 years after the murder, Charles Proffitt is alive and well, sewing uniforms for inmates at Florida State Prison. The Florida Supreme Court reduced his sentence to life last year.

The state of Florida spent at least half a million dollars over a decade and a half trying to execute Charles Proffitt. It failed.

THE DEATH PENALTY

A FAILURE OF EXECUTION
First of a series

For Florida, and the 36 other states that impose the death penalty, *Proffitt vs. Florida* is still a test case. And the death penalty fails the test. The death penalty is costly, slow and inefficient.

Apart from any arguments about the morality of capital punishment, there is something terribly wrong with the system.

● Costly: The death penalty costs much more than life imprisonment without parole. It has cost Florida at least $57 million since 1973, according to conservative calculations based on independent studies.

● Slow: 36 inmates on Florida's Death Row have been there more than 10 years. Florida's senior Death Row resident, Howard Douglas, is in his 15th year — and his execution is nowhere in sight.

● Inefficient: Half of all death sentences are overturned on appeal, usually after years of expensive litigation. For every execution in America, courts sentence 13 more people to die.

The statistics speak for themselves: Death Row is going to get bigger, the wait for execution is sure to get longer, and the cost is bound to get higher. Experts are coming to the grim conclusion that little or nothing can be done to make the system work. It is a failure of execution.

Nowhere is this fact more clear than in Florida, a fervently pro-execution state that has always been among the first to arrive at death penalty milestones.

Here — where 296 convicted killers make up the largest Death Row in the nation — judges, prosecutors and politicians are quietly lowering their sights, giving up on swift and sure justice, and learning to live with a bloated system that splutters and wheezes.

"I don't know if we're ever going to catch up," says Carolyn Snurkowski, Florida's chief appellate prosecutor. The best the system can hope for, she says, is to "keep plodding along."

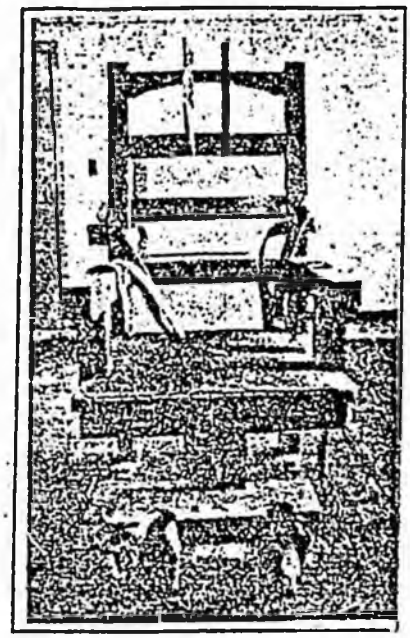
For capital punishment advocates, this is a bitter pill. Just two years ago, former Florida Attorney General Jim Smith pumped up his campaign for governor by promising two executions a month or more. "This delay couldn't go on forever," he said.

Today, the numbers refute such predictions. Even though the public solidly supports the death penalty, Florida has executed but two men in the past two years. Nationwide, the number is just 39.

In the same two years, Florida courts sent 89 people to Death Row. Nationwide: some 600.

"We're not going to clear out Death Row any more than we're going to pay off the national debt," says former Florida Bar Association President James Rinaman of Jacksonville. Rinaman, a death penalty advocate, has labored for more than three years to speed up the system.

A WHOPPING BILL



- Spent by Florida taxpayers on the death penalty since 1973: at least $57,215,210.
- Executions: 18.
- Cost per execution: at least $3,178,623.
- Cost of life in prison (40 years): $515,964.
- The appeal process: at least $36.1 million, just for government-paid lawyers.

Failure clearly visible

The failure of the death penalty is visible from one end of the nation to the other.

● More than 2,100 people live on America's Death Rows. At the current execution rate, it would take 82 years to kill them all. And the Death Row population is likely to double by the turn of the century.

● In Dade County, the public defender is under court order not to take on any more death penalty cases — the caseload is too great. Private attorneys must be appointed — and paid for — by the courts. "The system doesn't have the resources to handle the workload," says Public Defender Bennett Brummer.

● The number of capital cases on appeal in the federal courts will more than triple in the next two years, according to a study prepared for the federal judiciary. Lawyers to handle these appeals will cost the nation's taxpayers $30 million a year, the study concluded.

California, for example, has 234 prisoners on Death Row — the third-largest population in the country. Its last execution was in 1967. Yet the taxpayer-funded budget for defense attorneys there is more than $2 million a year.

● Even Bob Graham, the former Florida governor who signed more death warrants than anyone in the state's history, pronounces the death penalty system a "quagmire."

"And if the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short," Graham says.

It was not supposed to be this way. Not after millions of dollars and years of effort spent trying to make the death penalty work.

The heyday

The heyday of the death penalty in America came in the 1930s. Hanging judges and biased juries too often used the penalty as little more than a legal lynching.

Proffitt

Bundy

> 'If the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short.'
>
> Sen. Bob Graham

Gradually, the numbers subsided: there were fewer executions in the '40s and fewer still in the '50s. Legal assaults on the fairness of the death penalty system stopped executions altogether in Florida in 1964. In 1965, a commission to revise New York's penal code found that "whatever aspect of the death penalty one examines, one finds nothing but obstruction, confusion and waste."

Two years later, executions ceased across the country.

In 1972, a narrow and fractured majority of the U.S. Supreme Court concluded the death penalty, as it existed in America, was unconstitutional.

Justice William Brennan wrote that capital punishment depends on "a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future."

Although Brennan and Justice Thurgood Marshall said the death penalty would always be unconstitutional, the seven other justices encouraged the states to draft new laws that would meet the constitutional test.

'A back-breaker'

Florida obliged within six months. Texas, Georgia, Louisiana and others were close behind. Courts and legislatures in 37 states have tinkered ceaselessly ever since, trying to make the death penalty fair, rational and swift.

But instead of fair, rational and swift, all this tinkering is making the law ever more complicated. And complicated means slow. It means expensive.

"There is no question that it's a back-breaker," says Sandy Weinberg, a former federal prosecutor. Recently, Weinberg helped win freedom for Death Row inmates William Riley Jent and Earnest Lee Miller. "It takes eight years or more of litigation to execute someone, and the process just can't go faster."

"The Supreme Court has said 'death is different,' " says Bob Spangenberg, a Boston-based consultant who has studied legal costs and the death penalty for 24 state and federal agencies. "The court has said everyone must follow extensive procedures to guarantee the process is fair. And that takes a lot of time. In *every* case."

As judges anguish over each case, more and more pile up behind. The backlog is infinite. With 300 new cases every year, the U.S. could execute one person every day, and it would take more than 30 years to empty all the Death Row cells.

No one familiar with the system believes that is possible. Daily executions are unprecedented in American history. The executioner's busiest year was 1935, when there were 199 executions.

That record rate, given the current pace of death sentencing, wouldn't make a dent in America's Death Row. At that rate, Death Row would keep on growing.

Last year there were 25 executions in America, the most in a quarter century. Yet the system is barely plodding along, falling further and further behind.

Even that great motivator of balky government — community outrage and pressure — cannot speed the system. No murderer is more loathed and notorious than Theodore Robert Bundy. In 1978, Bundy slipped into a Tallahassee sorority house and bludgeoned two sleeping women to death, then killed a 12-year-old girl in Lake City.

He was sentenced to die three times in 1979. Nine years later, Bundy is alive and well on Death Row.

For five of those years, his case sat before the Florida Supreme Court. Like all capital cases in Florida, Bundy's sentence went to the state high court for a mandatory review. Court justices insist they weren't dragging their heels. The backlog was just too big.

Florida high court justices plow through 70 mandatory reviews each year, consuming at least a third of their time. On top of that, the justices are hit with 30 to 40 last-minute appeals.

"Let me put it this way: Capital cases are a very small part of the caseload of the Court, but we must spend a very, very, very substantial amount of time on them," says Justice Gerald Kogan. "The workload is far out of proportion with the actual number of cases."

Chief Justice Parker Lee McDonald: "If I could figure out a way to make this better or easier or quicker, I would. But I can't."

Executing Ted Bundy

Bundy's federal appeals couldn't even *start* until the state Supreme Court made its ruling. Once the federal appeals were filed, they immediately bogged down in another backlog.

Last week, the 11th Circuit Court of Appeals in Atlanta turned down a Bundy petition. The court took almost two years to decide. Some think the end is in sight for Ted Bundy. They've been wrong before.

There's nothing unusual about Bundy's case. Indeed, there are 55 death cases in Florida alone that have been in the system longer than Bundy's.

And it's getting worse. A year ago, only 275 of the 2,100 death penalty cases in America — 13 percent — had reached the federal level of appeals. Almost all of them were from Southern states. They consumed about a third of the judges' time in the 11th Circuit Court of Appeals and the Fifth Circuit in New Orleans.

From those 275 cases, the federal caseload will increase to 1,000 by 1990, according to Spangenberg, the Boston analyst. He talks of "a tidal wave" of death penalty cases about to swamp courts that have little or no experience with such appeals.

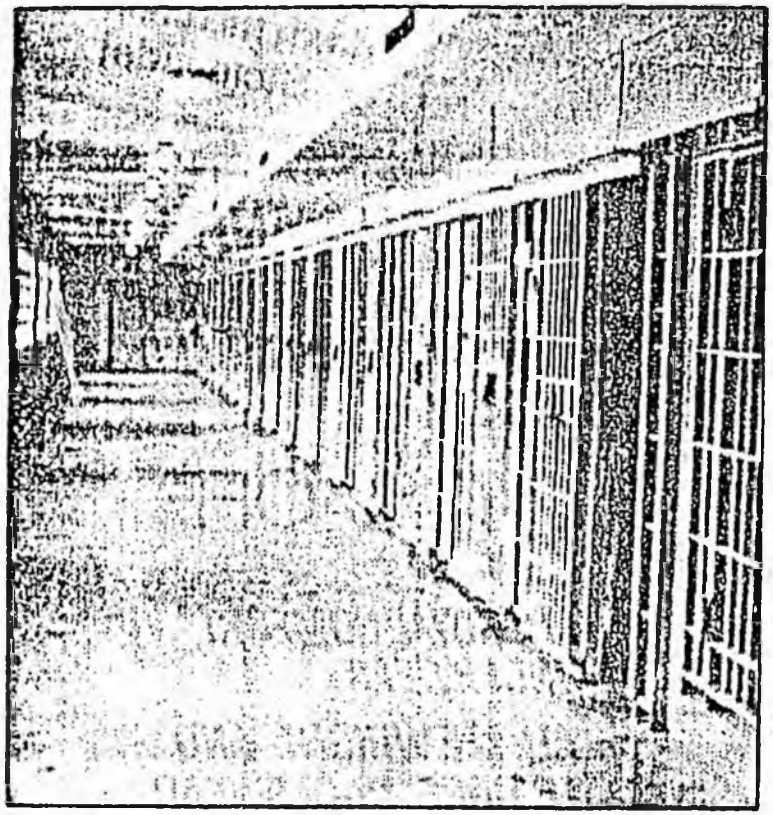
Specifically, the federal courts in California have but a single death penalty case on their dockets. Soon, the caseload will be 80. After the wave hits California, it will hit Ohio. Then Illinois, Pennsylvania, Arizona.

"What was once a Southern problem is soon going to become a national problem," Spangenberg says.

Across the nation, federal judges are looking toward Florida to size up the future. They see a 300-person Death Row. They see a five-year court backlog. They see Charles Proffitt sewing uniforms and Ted Bundy reading legal briefs.

"The judges are beginning to realize what is happening," says Spangenberg. "And they're asking: 'What the hell are we going to do?' "

FLORIDA'S DEATH ROW INMATES



At Starke, more inmates — 296 — await the executioner than in any state. Eighteen have been electrocuted.

14 YEARS ON DEATH ROW: Howard Douglas, Gary Alvord, James McCray, Vernon Cooper.

13 YEARS: Ronald Jackson, Jacob Dougan, Alvin Ford, Levis Aldrich, Charles Messer, Douglas Meeks, William Elledge, Thomas Knight, Lenson Hargrave.

12 YEARS: Carl Jackson, Sampson Armstrong, Charles Foster, Raymond Stone, Eligaah Jacobs, Wardell Riley, Jessie Tafero, Mark Mikenas, William Zeigler, Joseph Spaziano.

11 YEARS: Henry Sireci Jr., Harold Lucas, James Hitchcock.

10 YEARS: James Rose, Amos King, Carl Songer, Ernest Downs, Bennie Demps, Robert Buford, Freddie Hall, Mack Ruffin, Morgan Floyd, James Morgan.

9 YEARS: John Ferguson, Walter Steinhorst, William Thompson, Jimmy Smith, Stephen Booker, Nollie Martin, William Christopher, Raleigh Porter, William White, Marvin Johnson, Aubrey Adams Jr., Leslie Jones, David Delap, McArthur Breedlove, Robert Heiney, Kenneth Griffin, Gary Trawick, Roy Stewart, Terry Sims, Theodore Bundy.

8 YEARS: Gregory Engle, Rufus Stevens, Johnny Copeland, Bryan Jennings.

7 YEARS: Frank Smith, Paul Scott, Larry Johnson, Theodore Bassett, Bobby Lusk, Gregory Mills, Bernard Bolander, Robert Combs, Robert Waterhouse, William Middleton, Terrell Johnson, Robert Teffeteller, Kenneth Quince, James Agan, Dan Poutly, Ernest Fitzpatrick, Sonny Dals Jr., Larry Mand, Oscar Mason, Jeffery Daugherty, Linroy Bolloson, Ian Lightbourn, John Michael, John O'Callaghan, Chester Maxwell, Jim Chandler.

6 YEARS: Manuel Valle, Ed Thomas, Theodore Harris, Robert Preston, Leo Jones, Freddie Williams, Edward Kennedy, Norman Parker Jr., James Card Sr., Phillip Atkins, Ted Herring, William Squires, Daniel Johnson, Robert Patton, Thomas Rope, Roy Harich, Jerry White, Robert Craig, Omar Blanco, Charlie Burr, Ronnie Jones, Davidson James, Milford Byrd, Daniel Doyle, Frank Griffin, Mario Lara, David Gorham, Larry Brown, Robert Henderson, John Rush, Douglas Jackson.

5 YEARS: Alphonso Cave, John Mills, J.B. Parker, Garry Hollman, Tommy Groover, Kenneth Hardwick, Allen Davis, George Lemon, Kayle Sales, Ernest Roman, F.L. Medina, Lloyd Guest, Robert Parker, Clarence Hill, Marion Francis, Milo Rose, William Rutzy, Raymond Koon, Clarence Jackson.

4 YEARS: Harold Hooper, Joel Wright, Ronald Woods, Enrique Garcia, Raymond Dolinsky, Gerald Stano, Fred Way, Andrew Jackson, Harry Phillips, Robert Reese, Richard Cooper, Jason Malloy, Michael Lambrix, Ernesto Suarez, William Kelley, Anthony DeViolotti, Robert Glock, Carl Duluth, David Johnston, Jason Deaton, Donald Lloyd, James Hull, John Marek, Jeffrey Muehleman, Thomas Provenzano, Eduardo Lopez.

3 YEARS: Charles Knight, James Floyd, James Hamblen, Joan Melendez, Gregory Kokal, Oscar Torres-Arboledo, Jerry Rogers, Abron Scott, Nathaniel Jackson, David Gore, Joseph Ramirez, Herbert Spivey, Burley Gilliam, Billy Nibert, Robert Long, Joe Nixon, James Floyd.

2 YEARS: Richard Rhodes, Layne Tompkins, Guy Cochran, Jessie Livingston, William Turner, Roy Swafford, David Cook, Judias Buendano, Martin Grossman, Rickey Roberts, Angel Diaz, Johnny Perry, Jerry Correll, Duane Owen, Gary Tillman, Morris Brown, John Hardwick Jr., Frank Smith, Anthony Bryan, Johnny Williamson, Daniel Remeta, Reinaldo Amoros, Donald Kritzman, Johnny Robinson, Harold Harvey Jr., Hector Fuente, Juan Banda, Jesus Scull.

LESS THAN 2 YEARS: Etheria Jackson, John Merritt, Paul Hildwin, Kenneth Stewart, Robert Roundtree, Walter Brown, Cleo Leroy, Allon Moore, Walter Kyser, Charles Pridgen, Willie Mitchell Jr., John Edwards, Arthur Rutherford, Rudolph Hollon, James Harmon, Leonard Spencer, Grover Reed, Kaysie Dudley, Darryl Barwick, Mark Davis, Timothy Hudson, James Brown, Paul Brown, George Murris, Wilburn Lamb, Carla Caillier, Charlie Thompson, Alberto Farinas, George Hill, Carlos Bello, John Henry, Michael Rivera, Darrell Hallman, Arthur Schafer, Melvin Troller, Jorge Zerquera, James Mack, Samuel Rivera, James Dailey, Manuel Colina, Andrew Williams, William Reaves, Jerry Stokes, Mac Wright, Roger Cherry, James Bryant, William Rhodes, Dee Casteel, Michael Irvine, Michael Bruno Sr., Alphonso Green, Eddie Alvin, Dominick Occhicone, Todd Mendyk, Dennis Sochor, Antonio Carter, Krishna Maharaj, Michael Keen, Doy Christian, John Freeman, Frederick Nowitzke, Clinton Jackson, Peter Ventura, Bradley Scott, Edward Castro, David Pentecost, George South, David Young, Richard Anderson, Raymond Thompson, George Porter Jr., Johnnie Boule Jr., Walter Czubak, Burnell Hegwood, Thewell Hamilton, Jerry Haliburton, Paul Johnson, Randall Jones, Robert Blakley, Edward Ragsdale, Donny Craig, Daniel Burns Jr., James Campbell, Manuel Pardo Jr., Leonard Smalley Jr., James Duckett.

EXECUTED IN 14 YEARS: John Spenkelink, Robert Sullivan, Anthony Antone, Arthur Goode, James Adams, Carl Shriner, David Washington, Earnest Dobbert, James Henry, Timothy Palmes, James Raulerson, Johnny Witt, Marvin Francois, Daniel Thomas, David Funchess, Ronald Straight, Beauford White, Willie Darden.

SOURCE: Florida Department of Corrections

THE MIAMI HERALD
7/10/88/12A

Bottom line: Life in prison one-sixth as expensive

By DAVE VON DREHLE
Herald Staff Writer

At first glance, executions appear cheap.

Funeral suit from Jim Tatum's Fashion Showroom in Jacksonville — "We Fit Them All, Big and Tall" — costs $150. Florida's budget for the last meal: $20. Executioner's fee: $150. Undertaker: $525, box included.

But the true cost of an execution is closer to $3.2 million.

To execute a prisoner, the state of Florida spends six times as much money as it would to keep him in prison until he dies of natural causes.

How come? Why does the death penalty cost so much more than life-without-parole?

Government agencies and independent analysts in eight states have scrutinized the ledgers. Said Michael Gradess, who calculated the cost of a proposed death penalty in New York: "People in states that have the death penalty kept telling me, 'I hope you're ready to go bankrupt.' "

Although the numbers vary, all the studies agree that death penalty cases cost more than life-in-prison cases at every level — from pretrial investigation to last-gasp appeals.

To begin with, death penalty cases almost always require a trial. They usually generate a lot of publicity, making prosecutors reluctant to plea bargain. And only a suicidal defendant pleads guilty when facing death.

And death penalty trials take longer. Attorneys have unusual freedom to question potential jurors one by one — a very time-consuming process. Fighting for their clients' lives, defense attorneys file twice as many pretrial motions as in the average nondeath murder trial, a California study found.

Once the defendant is found guilty, the law requires a second trial to decide if the prisoner should live or die.

To show why they should live, defendants often call as witnesses psychiatrists, family members, former teachers, even accomplices in past crimes. The witnesses have to be located, which can take months of expensive investigation.

To show why the defendant should die, the state tries to persuade the jury that he is hopelessly evil, a permanent danger to society. For this, prosecutors rely heavily on high-priced psychiatrists.

The total additional cost for trial and sentencing over a no-execution murder trial: at least $36,000, a Maryland study showed. A similar study in Kansas figured the additional costs at $116,700.

After sentencing, every death verdict must be reviewed by the state Supreme Court. The U.S. Supreme Court requires it. And every defendant is entitled to a state-paid lawyer.

Bob Spangenberg, a consultant for the American Bar Association, surveyed more than 150 capital cases across the country. For defense alone, these mandatory reviews cost an average of $34,740 each, Spangenberg computed.

That's just the beginning. After the mandatory review there are at least six levels of appeals. Spangenberg calculated these costs. Average cost for government-salaried defense lawyers: $137,410.

This is a bargain compared to costs racked up by prestigious volunteer lawyers handling death penalty appeals. Wilmer, Cutler and Pickering, a big-name Washington firm, figures it has already laid out $1.2 million in attorney time and $173,000 in hard cash arguing federal appeals for serial killer Ted Bundy.

There are two sides, of course, to every appeal. The prosecution needs lawyers, too. Repeated studies show that prosecutors match defense attorneys dollar-for-dollar.

In Florida, state-paid prosecutors and defense attorneys received about $3 million last year — to fuel a system that executed only one man, Willie Darden.

James Rinaman, former president of the Florida Bar Association, has studied the process at length, hoping to speed it up. He believes more lawyers are needed. To keep up with the demands of Florida's enormous death-penalty system, Rinaman estimates, taxpayers should be shelling out $12 million a year for lawyers alone.

"It boggles the mind," he says.

Analyst Spangenberg estimates the cost of appellate lawyers will soon top $30 million a year nationwide.

In the past, states kept costs down by relying on volunteer defense lawyers. Now there are too many cases and too few lawyers.

Says Clearwater's Pat Doherty, one of Florida's busiest volunteer capital attorneys: "It isn't good publicity. If you're going to do volunteer work, you're better off representing the Poor Clares."

Then comes the expense of prison. Death Rows cost more to run than ordinary maximum security cell blocks, according to studies in Kansas and Alaska. Florida prison officials say specific calculations are impossible.

Florida officials calculate one cost, however. When the governor signs a death warrant and an inmate's execution is scheduled, the doomed man is moved to a cell near-

er the electric chair. For 30 days, guards keep a round-the-clock watch to make sure the inmate doesn't kill himself.

The cost in overtime for guards each time a warrant is signed is $13,800.

There have been 199 warrants signed in Florida since 1973. Sometimes the state saves money because the guards can watch several doomed men at once.

Merely feeding and housing a Death Row prisoner long enough to execute him costs, on average, $108,000.

Total it up.

Florida taxpayers have paid more than $57 million for the death penalty since 1973. This number is based on the most conservative figures available. The real cost could easily be twice that or more.

Divide the $57 million by 18 executions. The bottom line: at least $3.2 million per execution. And the cost is growing.

Bob Spangenberg, the bar association consultant: "The costs are going to add and add and add and add. It's going to add up until something gives."

Michael Gradess, who studied the issue for the state of New York: "You're going to see a death penalty that costs a billion dollars nationwide."

THE MIAMI HERALD
7/11/88/1A,8A

Fairness was fatal blow to fast executions

By DAVE VON DREHLE
Herald Staff Writer

Howard Douglas is the Methuselah of Death Row. The jury thought he should live, and the judge thought he should die. Fifteen years later, courts are still trying to sort it out

Douglas may well become the first man in Florida history to live for 20 years in the shadow of the electric chair.

But almost certainly, he won't be the last.

Why does the death penalty take so long? Why is it that 97 percent of the death sentences imposed by America's courts have yet to be carried out — even though the public strongly supports capital punishment and spends millions trying to speed the process?

Lawyers blame the governors. Governors blame the courts. Courts blame the lawyers. But still nothing happens. There is a population explosion on America's Death Row, and no one has a realistic solution.

Legal experts — both for and against capital punishment — are coming to an identical conclusion: The death penalty itself is to blame. It is too complicated to work efficiently.

When the death penalty almost died 16 years ago, advocates rushed to resuscitate it. What they ended up with, many experts now believe, is a monster of litigation — unpredictable, irrational, causing chaos wherever it goes. And impossible to control.

Here's why it is failing:

● When the U.S. Supreme Court decided in 1972 that capital punishment was unconstitutionally arbitrary, state legislatures moved swiftly to restore the death penalty. To eliminate the problem of unfairness, lawmakers established complex standards for determining who should live and who should die.

● The Supreme Court wanted to make sure the new laws worked — that they really were fair. So it initiated an unprecedented level of state and federal court scrutiny.

● Courts eventually discovered that the complicated new laws worked only about half the time. Half of all death sentences, they determined, were mishandled — and ultimately illegal. So the intense level of case-by-case scrutiny persisted.

● As more and more judges looked at more and more cases, they came up with more and more interpretations of the law. With each new interpretation, inmates found more avenues of appeal.

● Judges and juries nevertheless have embraced the new death penalty as never before. The system is now hopelessly behind. For every 30 death sentences, America has executed one person.

A solution, if it comes, would require a virtual revolution in the criminal justice system — a bloodbath of proportions never seen in the nation's history. An execution a day, every day, for decades.

"That's just not going to happen. It's never going to happen," says Carolyn Snurkowski, chief appellate prosecutor for the Florida attorney general.

"We have to figure out a way to dig ourselves out of this mess, or we need to get rid of the death penalty," says Ed Austin, state attorney for Jacksonville, the pro-death penalty dean of Florida prosecutors.

The death penalty used to work *fast* — especially in the South. The jury delivered a verdict, the judge imposed sentence and the warden readied the gallows or the electric chair. Convicted rapist Robert Hinds was executed in Florida seven days after his trial in 1937.

But with speed came outrageous excesses. Small-town judges and juries had the awesome power to decide for themselves who would live and who would die. Not surprisingly, blacks fared poorly in this lottery. Though they comprised less than 20 percent of the population, blacks made up more than half the people executed in America before 1967.

THE LONG ROAD TO EXECUTION

These are the steps every capital case must pass through before execution:

THE DEATH PENALTY

A FAILURE OF EXECUTION
Second of a series

- ▶ **TRIAL** — Defendant guilty or not guilty?
- ▶ **SENTENCING** — Should defendant live or die?
- ▶ **DIRECT APPEAL** — State Supreme Court reviews decision.
- ▶ **U.S. SUPREME COURT** — Process fair thus far?
- ▶ **COLLATERAL APPEAL** — State courts examine trial procedures.
- ▶ **HABEAS CORPUS** — Federal courts look for constitutional violations.
- ▶ **U.S. SUPREME COURT** — Final review.

At any point, the case can be sent back to a lower level. And the process begins again.

Eventually, the abuses soured the public on the death penalty. Executions ground to a halt in 1967, and the Supreme Court agreed to take a long look at the issue. After an anguished debate, the justices ruled in 1972 that all existing capital punishment laws were fundamentally unfair and thus unconstitutional.

Dependent on whim

Justice William Douglas summed up: "No standards govern the selection of the penalty. People live or die, dependent on the whim of one man or 12."

This landmark decision in Furman vs. Georgia was a narrow one — the vote was 5-4. The chief justice at the time, Warren Burger, wrote the dissenting opinion, joined by current Chief Justice William Rehnquist.

Burger complained that the majority decision left the death penalty in "an uncertain limbo" and suggested that state legislatures "bring their laws into compliance . . . by providing standards for judges and juries to follow."

Burger was doubtful, though, that anyone could actually define adequate standards. Defining in advance which cases should get the death penalty, he warned, has "been uniformly unsuccessful." Each passing year shows how right he was.

State legislatures nevertheless took up the challenge to make the death penalty fair. Two approaches emerged: "mandatory" and "guided discretion."

Some states — notably North Carolina and Louisiana — tried to eliminate caprice by making the death penalty mandatory for first-degree murder. Other states — notably Florida, Georgia and Texas — adopted a process called "guided discretion."

"Guided discretion" meant that a judge and jury must weigh every capital defendant on a balance of aggravating and mitigating circumstances.

If the defendant had a prior record, if he murdered in the course of another felony, if his crime was "heinous, atrocious or cruel" — these would count as aggravating circumstances, making him or her more likely to receive the death penalty.

But if the defendant was very young, the product of a savage family or under the influence of a vicious accomplice — these would count as mitigating circumstances, tipping the balance away from death.

When the balancing was done, if the aggravating circumstances outweighed the mitigating, the death penalty would be imposed. Then the state supreme court would be required to review the decision to make sure it met the standards of the law.

The U.S. Supreme Court pondered both approaches and, on July 2, 1976, made its decision. Mandatory death sentences were ruled unconstitutional. But guided discretion passed muster, in a case called Gregg vs. Georgia.

The death penalty was saved.

Planted seeds of failure?

More and more experts are coming to believe that the court inadvertently planted the seeds of failure in its Gregg opinion. By declaring that "death is different" and demanding that *every* death sentence measure up to a complex and vague set of standards, the high court may have doomed the system to tedium and expense.

In a speech last year to the Maryland legislature, the state's chief judge, Robert Murphy, explained the problem. The very heart of the Gregg decision, he said, gives death penalty defendants "protections well beyond those required for noncapital felons." Those safeguards are "extremely difficult and complicated . . . protracted and expensive."

People may wonder, the judge said, "whether the time is close at hand when most of the legal problems will have been ironed out so that death penalty appeals will be treated as routinely as other criminal appeals. I doubt seriously that that day, if it ever comes, is close at hand."

Declares Richard Burr, director of the anti-death penalty Legal Defense Fund of the NAACP: "The Supreme Court has infused through all the lower courts an attitude that says, 'If you're going to have a death penalty, you're going to have to proceed in *each individual case* with as careful a review as is humanly possible.' "

This review takes place at three levels.

First, on "direct appeal," the state courts review each death sentence to be certain that the *facts* of the case justified the ultimate penalty.

Second, on "post-conviction" appeal, the same state courts again review each case, this time to be sure that the *procedures* used to convict the inmate were legal.

Third, on "habeas corpus" appeal, the federal courts determine if any aspect of the case violated the U.S. Constitution.

In theory, most of these reviews were available to doomed inmates even before the new death penalty laws were written. But in fact, in the old days, inmates were routinely executed without a glance from appellate judges.

The Furman and Gregg decisions changed all that. State supreme courts are now required to get involved. And scrutiny by the federal courts has become routine.

This puts a huge strain on the system.

An example: Every time a case hits the the federal level, a U.S. district judge is appointed to hear the appeal. At the same time, three judges of the Circuit Court of Appeals are appointed to review the decision of the first judge. And a U.S. Supreme Court justice is appointed to look over the decisions of the two lower courts.

With each step through the system, clerks must notify every judge. As the hour of doom nears, the process gets frantic.

U.S. District Judge Eugene Spellman remembers deciding one last-minute appeal at midnight. Spellman dialed the U.S. Supreme Court to notify the clerk. Could the clerk notify Justice Lewis Powell?

"He's right here," came the reply. "Why don't you tell him yourself?"

How often must a Supreme Court justice sit in his chambers, poised by the telephone, at midnight? Consider this: There are more than 2,100 cases in America's execution pipeline. The conclusion is inescapable: *Something has to give.*

Death penalty advocates have long hoped that courts will be forced to streamline the process. They have interpreted nearly every important death penalty decision as a sign that courts were abandoning tedious case-by-case review. Again and again, pro-death penalty politicians have predicted that the logjam was broken.

That was the prediction in 1979, when Florida electrocuted John Spenkelink. Officials confidently forecast six more executions in the coming year. But they were wrong — four years passed before the next execution.

Around the nation, death penalty advocates greeted favorable U.S. Supreme Court decisions in 1984 and 1986 as paving the way for quicker executions. Yet the execution rate nationwide hasn't accelerated. Quite the opposite: There were 2.08 executions per month in 1987; 1.17 per month so far in 1988.

In fact, there is little reason to believe that the judges will ever back off. Under the Gregg decision, they feel it is their duty to review every case. And, disturbingly, the judges keep finding major mistakes.

About half of all death sentences have been overturned on appeal since the "guided discretion" concept became law. Federal courts knock out about a quarter of the cases — even after the state's double-barreled review.

"There is a widespread sense that all this is just a matter of delays, that eventually everyone on Death Row is going to be executed. Well, that's just not the case," says Burr, of the NAACP. "How can you cut short someone's appeals when he stands a 50-50 chance of a major error?"

Yet case-by-case review has a disastrous effect on the legal system, prosecutors and defense attorneys agree. Laws are supposed to be predictable, solid as a rock. The failure of death penalty law, lawyers argue, is that it shifts and changes with each new lawyer arguing a new case to a new judge.

Instead of rock-solid, death penalty law is quicksand.

"The essence of the law is its predictability. The law is supposed to be coherent, consistent," says Pat Doherty, a Clearwater attorney who defends Death Row inmates. "Under the death penalty, all this is meaningless. The death penalty is a cancer on the law."

Exhibit A: Charles Proffitt, who murdered a sleeping man with a bread knife in Tampa in 1973.

In 1975, the Florida Supreme Court ruled that the facts of the case justified the death penalty. But over the years, as Proffitt's appeals crawled through the courts, the law subtly shifted.

In 1987, after a federal court ordered a new weighing of the aggravating circumstances, the state Supreme Court — the very court that had turned Proffitt down years before — spoke again.

This time, the court had a new sense of what made a murder especially "heinous, atrocious or cruel." Proffitt — who had not planned his crime, tortured his victim or compounded his crime by attacking his victim's wife — no longer met the test. The court reduced his sentence to life.

So a man who deserved the death penalty in 1975 didn't deserve it 12 years later.

'The law keeps changing'

"We're in a quandary of trying to hit a moving target," says Art Wiedinger, assistant general counsel to former Gov. Bob Graham. "The law keeps changing. The courts may make a ruling today that suddenly means something we did five years ago was wrong."

The changing law affected only one person in Proffitt's case. Often, though, shifts affect scores of condemned men. A U.S. Supreme Court decision last month will mean new appeals for 15 of the 19 inmates on Maryland's Death Row.

Arthur England, former chief justice of the Florida Supreme Court, lost hope of making death penalty law consistent.

"I thought the Supreme Court of Florida would be able to set standards that made sense that we could enforce," he says. "Because the legal system must be predictable. My experience on the court was that it's impossible to set standards and adhere to them. Predictability is not available in this area and it won't be."

One last hope of death penalty advocates: Ronald Reagan's conservative judges will swing the tide toward swifter executions. But even this hope is growing dim.

Seven of the nine U.S. Supreme Court justices support capital punishment. Four are Reagan nominees. Yet they continue to hear capital cases at a rate unimaginable before Furman and Gregg. Already this year, the high court has ruled on nine separate cases — without drastically changing anything.

Even Chief Justice Rehnquist, the most determined pro-death penalty voice on the court, concedes that capital punishment requires "especially careful review of the fairness of the trial, the accuracy of the fact-finding process and the fairness of the sentencing."

"No appeal is a 'mere technicality,'" says Florida Supreme Court Justice Gerald Kogan. "Technicalities are the law. So people can say, 'That's a technicality,' but we have to answer: 'Yeah, but that's what the law is.'"

More and more, it appears that the problem is the law itself

Says Parker Lee McDonald, chief justice of Florida's high court: "The old cases never really go away, and the new ones just keep coming. The way the system is cranked in now, I think we're probably running pretty near maximum speed."

Maximum speed. In the 12 years since the "guided discretion" concept resuscitated the death penalty, America has executed 88 inmates against their will. Twelve more men quit their appeals and went to the death chamber willingly. Total: 100 executions.

Death Row, by comparison, grows at the rate of 300 death sentences a year.

Ed Austin, the pro-death penalty Jacksonville prosecutor, is just about ready to pull the plug.

"If you can't carry out the sentence within a reasonable amount of time, you should abolish the death penalty," Austin says. "The Supreme Court should fix it or get rid of it. If the court doesn't want to come to terms with this, then somebody should step in and say, 'It's a joke. It doesn't work. It's a shell game.'"

PROTECTING THE INNOCENT

The ultimate malfunction of justice is the execution of an innocent person. Fourteen times since 1973, justice in America has come close. Judges sentenced innocent men to die. Only the laborious appeals process saved them. One case took 13 years to correct.

▶ **JOSEPH GREEN BROWN, 23,** Florida: *Sentenced 1974. Freed 1987.*

A petty crook with a conscience, Brown confessed to a burglary he committed with an accomplice. The accomplice got even by accusing Brown of murder. Eventually, experts declared that Brown's gun wasn't the murder weapon. After more than a decade, the accomplice admitted he lied.

▶ **EARL CHARLES, 21,** Georgia: *Sentenced 1975. Freed 1978.*

After conviction, new evidence surfaced establishing his alibi. A federal judge ordered the state to compensate Charles in 1983 because a police officer violated his civil rights.

▶ **NEIL FERBER, 35,** Pennsylvania: *Sentenced 1982. Freed 1986.*

Prosecutors became convinced the star witness against Ferber lied. An eyewitness to the murder came forward to say Ferber was not the killer. When a new trial was ordered, charges were dropped.

▶ **GARY L. BEEMAN, 25,** Ohio: *Sentenced 1976. Freed 1979.*

An escaped prisoner, Clare Liuzzo, was the star witness against Beeman. When an appeals court ordered a new trial, five witnesses testified that Liuzzo bragged about committing the murder himself. Beeman was acquitted.

▶ **LARRY HICKS, 19,** Indiana: *Sentenced 1978. Freed 1980.*

Judge ordered a new trial because Hicks, who had a 'low-to-normal' IQ, had been too confused to assist his lawyer. At the new trial, Hicks' alibi was proved.

▶ **JOHNNY ROSS, 16,** Louisiana: *Sentenced 1975. Freed 1981.*

Convicted of rape. The youthful Ross confessed after police beat him. His trial lasted less than a day. Eventually, defense lawyers established that Ross' blood type did not match the sperm found in the victim.

GLADISH

GREER

KEINE

SMITH

▶ **THOMAS V. GLADISH, 23; RICHARD WAYNE GREER, 31; RONALD B. KEINE, 27; and CLARENCE SMITH JR. 30,** New Mexico: *Sentenced 1974. Freed 1976.*

Convicted of murder, kidnapping, sodomy and rape. Detroit News reporters traced the murder weapon and getaway car to a drifter in South Carolina. The drifter confessed.

JENT

MILLER

▶ **WILLIAM RILEY JENT, 28, and EARNEST LEE MILLER, 23,** Florida: *Sentenced 1980. Freed 1988.*

A federal judge found police withheld key evidence to back up the Jent-Miller alibi. Police overlooked the victim's boyfriend, whose next girlfriend was also beaten to death and burned. When a new trial was ordered, prosecutors offered to free Jent and Miller immediately if they would plead guilty to a lesser charge. While asserting their innocence, the half-brothers accepted the deal.

▶ **DELBERT TIBBS, 35,** Florida: *Sentenced 1974. Freed 1976.*

Victim's girlfriend, who was raped by the killer, gave a description of the attacker — which didn't match Tibbs. But she testified against him anyway. Tibbs, a hitchhiking divinity student, had a motel registration to support his alibi. Florida Supreme Court set him free. Prosecutor admitted the trial wasn't fair.

▶ **JONATHAN CHARLES TREADAWAY JR., 21,** Arizona: *Sentenced 1975. Freed 1978.*

Convicted of sodomy and murder of a 6-year-old boy. At retrial, five pathologists testified that the victim probably wasn't murdered or sodomized — that he probably died of pneumonia.

SOURCES: Herald research and Hugo Adam Bedau's and Michael Radelet's *Miscarriages of Justice* in the Stanford Law Review. These 14 cases are the most clear-cut. In scores of cases, significant doubts remain.

THE MIAMI HERALD
7/12/88/10A

'Judicial override' bogs system down

By DAVE VON DREHLE
Herald Staff Writer

A convicted killer stands before the judge. The jury recommends life in prison. But the judge imposes the death penalty.

This has occurred on 113 occasions in Florida since 1973. In more than 20 percent of the state's 544 death cases, judges sentenced to death defendants whom juries thought should live.

It is called "judicial override." For judges, it can be good publicity. For the legal system, it can be trouble.

In seven out of 10 "judicial overrides," higher courts reverse the trial judge — after long and costly appeals. Every time this happens, Florida taxpayers unwittingly shell out at least $69,480, according to conservative cost estimates — or $5 million thus far.

Says Bennett Brummer, Dade Public Defender: "Juries are supposed to be representative of the community. If a jury recommends that the defendant's life should be spared, then I feel the judge should be bound by that."

Jacksonville Circuit Judge Hudson Olliff is one of only two Florida judges whose override death sentences have actually ended in executions. Child-killer Earnest Dobbert was electrocuted on Olliff's orders on Sept. 7, 1984.

"Only a defense attorney would criticize the override," says Olliff.

Florida lawmakers created the judicial override late in 1972, as they rushed to write a new death penalty law after the U.S. Supreme Court declared the nation's existing capital punishment laws unconstitutional.

Existing death penalty laws gave juries too much power to decide who should live and who should die, the Supreme Court ruled. So in drafting the new law, Florida's legislators gave judges the power to disregard the jury's recommendations.

Now critics argue that the judges have too much power.

"If the people don't want an override, then let the Legislature change it."
Ellen Morphonios,
DADE CIRCUIT JUDGE

Other than Florida, only Alabama and Indiana permit judicial override. Only Florida judges use it extensively — so extensively that the Florida Supreme Court has been forced to set tough standards for policing the use of overrides.

Without these time-consuming standards, "the death penalty would be untenable in Florida," according to Supreme Court Justice Gerald Kogan.

It works the other way — but rarely. Angry citizens picketed Dade Circuit Judge Steven Robinson after he gave a life sentence to Jesse Ramirez in the "Duct Tape Murder" of Mario Portela.

No judge believes in the override more than Dade Circuit Judge Ellen Morphonios, known as "Maximum Morphonios" for her harsh sentences. *60 Minutes* and *NBC Nightly News* have filmed her in action.

"If I feel that's the thing that ought to be done, then I'll do it," she says.

Morphonios overrode the jury and sentenced Anibal Jaramillo to death in a 1981 drug-murder case. The justices of Florida's Supreme Court found her reasoning so unpersuasive they not only reversed the sentence, they turned Jaramillo loose.

In fact, all of Morphonios's nine death sentences have been reversed on appeal. The celebrity judge is unperturbed.

"You know there's a good chance the case is not going to fly, but you've got to live with yourself. If the people don't want an override, then let the Legislature change it."

A lot of people like that idea. Given the high cost and low success rate of judicial overrides, experts are increasingly calling for the elimination of this quirk in Florida's death penalty law.

"Face it," says Larry Spalding, Florida's chief Death Row defense lawyer. "If you can't convince the majority of a jury to impose the death penalty, then it's not a death penalty case."

THE MIAMI HERALD
7/12/88/1A,10A

Political pressure thwarts clemency

By DAVE VON DREHLE
Herald Staff Writer

Meet Vernon Cooper, the man on Death Row no one wants to execute.

Cooper may have murdered a policeman in 1974. Then again, maybe not. Cooper says his accomplice did it. The policeman and the accomplice are both dead. Since there were no other witnesses, no one knows for sure.

THE DEATH PENALTY
A FAILURE OF EXECUTION
Third of a series

In the heyday of the death penalty, Florida's governor probably would have granted executive clemency and reduced death to life in prison. For years, governors used this technique to dispose of marginal cases.

But today, in Florida, executive clemency is just one more aspect of the death penalty that doesn't work right.

Clemency exists only in theory, like UFOs and Bigfoot.

Since 1982, Govs. Bob Graham and Bob Martinez have reviewed 158 clemency requests — and granted zero.

The reason, some experts contend, is politics. No politician ever won an election by dispensing mercy to murderers.

"Theoretically, clemency could be used to clear away all the marginal cases and speed up executions," says Bob Spangenberg, a Boston attorney who has studied criminal law and the death penalty for 24 state and federal agencies.

"In reality, though, it's political."

Paradoxically, political pressure *in favor* of the death penalty is one reason the death penalty doesn't work.

In Florida, this happens three ways:

- By shunning the clemency process, governors have ignored an opportunity to cut court overload and streamline capital punishment.
- By signing a lot of death warrants, governors look tough on crime. But warrants signed willy-nilly merely increase the cost of capital punishment — by at least a third.
- By overriding jury recommendations for life in prison, judges look tough, too. Yet an astonishing number of these cases — seven out of 10 — are reversed after lengthy and expensive litigation.

Across the nation, the death penalty is taking on more and more political significance. Yet in the statistical world of murder, it counts for very little.

The 2,100 inmates on America's Death Rows account for less than two percent of the murders committed in the past 15 years.

Inmates actually executed — 100 — account for less than one-tenth of one percent of the nation's homicides.

The issue flourishes

Still, the death penalty issue flourishes in campaigns for state legislatures, governors' mansions, court benches, the halls of Congress — even the White House.

Strategists for Vice President George Bush already are attacking Democrat Michael Dukakis for opposing the death penalty.

"This is going to be part of the national debate," says Gov. Martinez, a prominent Bush man.

Candidates of every stripe affirm their belief in the death penalty almost as a code, symbolic of their hard line against crime.

People used to call Bob Graham a wimp. Not anymore. His strong support for the death penalty helped transform him into a U.S. senator and a finalist for the Democrats' vice president nomination.

Graham's pro-death penalty record, some say, makes him a perfect running mate for the vulnerable Dukakis.

The death penalty bandwagon is crowded. Witness the most recent race for governor of Florida.

"I voted for the death penalty," boasted candidate Barry Kutun, Miami Beach senator.

"I've always, always supported it," declared candidate Harry Johnston, former Florida Senate president.

"I'll pull the switch personally," said candidate Joan Wolin, Lake County lawyer.

"If I am elected, Florida's electric bill will go up," promised candidate Tom Gallagher, Coconut Grove representative.

Candidate Bob Martinez, mayor of Tampa, won.

"Bob Graham politicized the death penalty and he set the standard for Bob Martinez," says Larry Spalding, a Graham appointee who directs an office of defense attorneys on behalf of Florida's doomed inmates.

Political motives?

Graham calmly denies that his death penalty agenda has been political. He consulted his "inner gyroscope," he says, and found his actions above reproach. Critics nevertheless see political motives behind the strange death of executive clemency in Florida.

Between 1925 and 1965, Florida's governors granted clemency in 57 of 268 capital cases — 21.3 percent.

In his first three years in office, Graham approached that pace. He granted clemency in six of 38 cases — 15.8 percent.

But Graham discovered that granting clemency risks political backlash. After he spared the life of Leanie Leo Alford in 1979, Republicans denounced the governor. Alford's father, the Republicans noted, was a preacher active in Democratic politics.

After he spared the life of Darrell Hoy in 1980, parents of one of Hoy's victims deluged Graham with angry petitions.

In January 1982 — the year Graham ran for a second term — clemency vanished, never to be seen again. Although everyone on Death Row gets a clemency hearing, everyone on Death Row stays there.

Graham and Martinez explain: The system got better. The courts now weed out marginal cases before they get to the clemency board.

"After the first few years I was in office, the courts laid out sufficient standards, so cases that came through the process didn't leave much basis for clemency," says Graham.

Says Martinez: "Cases go through so many judges, they get sorted out pretty well."

In fact, though, marginal cases never stopped popping up. So, in place of clemency, Graham's staff quietly developed a way to sidetrack executions without making headlines.

Shift in tactics

The governor simply neglected to sign death warrants in cases that left him uncertain. No defendant can be executed without a warrant. Graham employed this tactic 20 times.

These cases, says Art Wiedinger, Graham's former assistant general counsel, "go into a sort of limbo."

Thus, Vernon Cooper, sentenced to death 14 years ago for the shooting of a Pensacola sheriff's deputy, remains on Death Row — though no one is trying to execute him. Jacob John Dougan, 13 years on Death Row, is in limbo. Eligaah Jacobs, 12 years on Death Row, is in limbo.

Limbo is politically safe. But at the same time, it does nothing to relieve the burdens of the system.

Martinez says he doesn't expect to grant clemency

> 'Bob Graham politicized the death penalty and he set the standard for Bob Martinez.'
>
> **Larry Spalding,**
> CHIEF OF APPELLATE DEFENSE LAWYERS

any more than Graham did. He can't imagine circumstances that would convince him to reduce even one sentence.

"I guess I'll know it if I hear it," he says.

Today's clemency hearings are a Catch-22: The obvious way to win clemency is to be innocent. But every session begins with an admonition not to argue innocence.

"It is presumed," says Wiedinger, Graham's assistant counsel, "that the defendant is guilty."

In most cases, shortly after the clemency hearing, the governor signs the black-bordered death warrant. A date is set, usually 30 or 60 days later.

But most warrants don't really mean death. The courts issue a "stay of execution" while they weigh emergency appeals. While the judges are pondering, the warrants expire, and new ones must eventually be signed.

For every execution since 1973, Graham and Martinez have signed more than 10 warrants.

Warrants vs. executions

Critics say that the governors use death warrants as a vote-getter — the more warrants, the more votes. But more warrants don't mean more executions.

The Martinez record: 44 warrants, two executions.

Martinez argues that warrants are the only prod he has to keep cases moving. Defense attorneys can't stall if facing a date with the electric chair.

But using warrants to move capital cases is like using a sledgehammer to break an egg — it gets the job done, but makes a terrible mess.

When a warrant is signed, the system lurches into an expensive and inefficient overdrive. Everything costs more. Instead of mailing documents, lawyers use overnight express couriers. Airline tickets to distant courtrooms, booked on short notice, are always full-fare.

Judges must drop everything.

"When a death warrant is signed," says Florida Supreme Court Justice Gerald Kogan, "we get hit with appeals that are — and this is no exaggeration — a *foot* high. A thousand, 1,200 pages each.

"When we are served with this much documentation just a short time before an execution is scheduled, everything grinds to a halt while we deal with it."

Graham signed more death warrants than any Florida governor before him. But he always took care never to have more than four death warrants in effect at one time. "That was as much as the system could handle," Graham says.

Last month, by contrast, Martinez had *nine* warrants alive at the same time.

"That," says Justice Kogan, "creates a tremendous problem for us."

All nine warrants expired without an execution.

"We sign death warrants to move cases along — knowing full well that they're not going to get to the electric chair," Martinez explains. "Without the warrant, the case would just sit there."

Martinez considered Graham's four-warrant limit, but didn't like it. "Every office holder has to use his own judgment," he says.

The court's timetable

To simplify things, the Florida Supreme Court set a timetable for state appeals. This provides a way to keep cases moving without death warrants.

But Martinez has ignored the timetable. "There's nothing magic about the deadline," says Andrea Hillyer, Martinez's top death penalty lawyer.

Each time the timetable is ignored, Martinez sets off a costly warrant panic. An example: Fred Way, a Tampa man convicted of the arson-murder of his wife and daughter. His death warrant was signed last month.

Way had six months left under the timetable. When his warrant was signed, appellate lawyers on both sides had just days to study reams of court documents and write their legal arguments. They dumped everything on the appellate courts.

Costs soared. Judges called emergency hearings, halting the execution long enough to ponder the issues.

After weeks of frenzied labor, the warrant expired. Way's case stalled again. All this for a case that would have moved by itself in a couple of months anyway.

For years, people have talked about fixing the warrant problem.

Spalding, chief of the appellate defense lawyers, says he proposed a compromise with the governor: Both sides agree to deadlines for all appeals. As long as the deadlines are met, the governor would lay off the warrants.

"He'd sign fewer warrants and get more executions," Spalding says. But the governor wouldn't buy it.

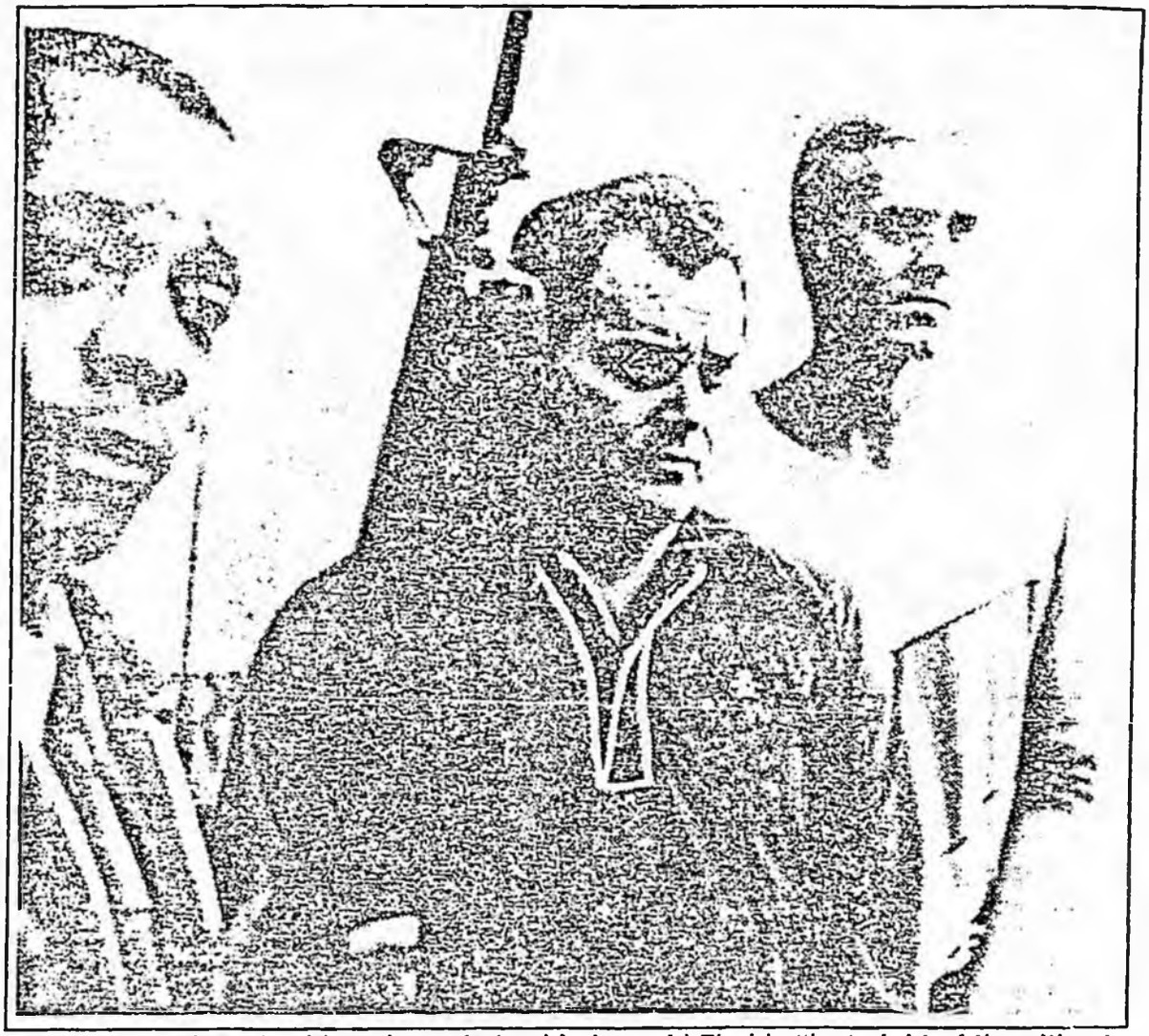
Baloney, answers the governor.

"We tried to work with him," says Joe Spicola, the governor's general counsel. "We are perfectly willing to work things out. But we are not going to sit back and let them prostitute the process."

The feud is poisoning an already ailing system. Martinez ordered an investigation of Spalding. Spalding bashes Martinez to judges and the press.

And each week in Florida, another killer steps into the costly line to the seldom-used electric chair.

CLEMENCY CONFUSION



The clemency board said no, but a federal judge said Florida "lost sight of the ultimate goal" of justice in the case of William Riley Jent (center) and Earnest Miller.

IT'S NOT easy to tell the winners from the losers

YES: Leatie Leo Alford won clemency in 1979 because there was no physical evidence linking him to the rape-murder of a 13-year-old girl. And Alford's lawyer produced a witness who testified that Alford was innocent. Serving life in prison.

NO: Lawyers for William Riley Jent and Earnest Lee Miller stood before Graham and the cabinet to ask for clemency in 1983. No physical evidence linked the half-brothers to the torch-murder of an unidentified young woman. And three witnesses came forward to say that Jent and Miller were innocent. In 1988, Jent and Miller were freed, after a federal judge said Florida "lost sight of the ultimate goal" of justice

YES: Darrell Edwin Hoy's case reached the clemency board in 1979. Two facts stood out Hoy's jury had recommended a life sentence and Hoy's accomplice had won a new trial on appeal. Serving life in prison.

NO: Beauford James White's case reached the board in 1982. White didn't kill anyone -- he was an accomplice to a Carol City mass murder. Two facts stood out: White's jury had recommended a life sentence and one accomplice was sentenced to just 20 years. In 1987, White was executed.

YES: Jesse Raymond Rutledge pleaded for mercy in early 1982. His lawyers argued Rutledge was innocent — that the key witness was pressured to finger the wrong killer. Serving life in prison.

NO: Joseph Green Brown asked for mercy late in 1982. His lawyers argued he was innocent — that the key witness blamed him because of a grudge. In 1986, a new trial was ordered. The next year, charges were dropped.

Former Gov. Bob Graham won't discuss these cases. But he argues that clemency cases are not necessarily supposed to make sense from one to the next. 'They are not meant to set precedents,' he says. Instead, he compares the governor's power to grant clemency to the power of kings in old England, not to be used 'on a wholesale basis.'

NO MERCY

In Florida, every doomed inmate has the right to a hearing before the governor and Cabinet prior to being executed. Circumstances overlooked, or undervalued, at the trial may convince the governor and Cabinet to reduce the death sentence to life in prison. Between 1925 and 1965, Florida's executives found more than one case in five worthy of clemency.

Under Bob Graham and Bob Martinez, however, the clemency process has withered and died.

		CLEMENCY		
Governor	Term	Requests	Granted	Pct.
Martin	1925-29	48	7	14.6
Carlton	1929-33	19	8	42.1
Sholtz	1933-37	24	3	12.5
Cone	1937-41	30	12	40.0
Holland	1941-45	39	4	10.3
Caldwell	1945-49	27	4	14.8
Warren	1949-53	19	2	10.5
Johns	1953-55	8	2	25.0
Collins	1955-61	38	9	23.7
Bryant	1961-65	16	6	37.5
TOTAL		268	57	21.3
Graham	1978-86	144	6	4.1
Martinez	1986-	58	0	0.0
TOTAL		202	6	3.0

THE MIAMI HERALD
7/13/88/1A,12A

Cries for change

Both sides see flaws in capital punishment

By DAVE VON DREHLE
Herald Staff Writer

THE DEATH PENALTY
A FAILURE OF EXECUTION
Last of a series

In 1974, the year President Nixon left the White House and Americans lined up at the gasoline pumps, Charles Proffitt waited for the executioner on Florida's Death Row. Proffitt had stabbed a sleeping man with a bread knife.

Nearby waited Howard Douglas, the killer a jury thought should live and a judge thought should die. Vernon Cooper, who may or may not have killed a policeman, waited, too.

The executioner never came. In fact, if Florida's Death Row Class of '74 held a reunion, two-thirds of the inmates could attend.

In bluntest terms, the death penalty was supposed to kill these men. It failed, as it has failed in 97 percent of America's death cases in the past 15 years.

Scholars, lawyers, judges — even pro-death penalty politicians — conclude that such a dramatic failure demands change: Fix it or get rid of it. They propose a bunch of solutions, most of which would do neither.

Proffitt, Douglas and Cooper were among the first killers sentenced to die under new laws intended to make the death penalty rational and swift.

But just one in 30 people sentenced to death under those laws has been executed — leading some experts to argue that the laws aren't very rational. As for swift — consult the Class of '74.

America's death penalty enterprise has cost millions. Courts and legislatures have anguished uncounted hours. Capital punishment has driven an emotional wedge through the ranks of the law-abiding.

Now, attention is focused on a few highly publicized

cases — Ted Bundy's, for example. Undoubtedly, much of an angry public would hail the execution of Bundy as the triumph of capital punishment — cost, delay and frustration be damned.

And yet, the truth is that the death penalty is a failure in the overwhelming majority of cases. Almost everyone is dissatisfied, from advocates who demand vengeance to opponents who mourn each death.

Without dramatic change, America's capital punishment paralysis is going to get much worse. Here are the most discussed solutions:

Limit those eligible for execution

In most states, it is legal to execute juveniles and the mentally retarded.

But most Americans strongly oppose the idea of executing the mentally retarded. For example, a 1985 poll conducted in Florida showed eight of 10 people opposed. Americans also tend to oppose executions of juveniles — though many are undecided.

James Terry Roach was 17 and had an IQ of just 64 when he and two pals murdered a young couple in Columbia, South Carolina in 1976. A decade later, in 1986, Roach was electrocuted — despite pleas for mercy from Mother Teresa and the United Nations.

Increasingly, people argue that killers like Roach should not be executed. The Georgia Legislature recently outlawed executions of the retarded, and next year, the U.S. Supreme Court will take up the question of the death penalty for juveniles.

But eliminating juveniles wouldn't reduce the numbers noticeably: Only 32 of the more than 2,100 inmates on America's Death Rows were sentenced before their 18th birthday.

Joe Spicola, general counsel to Florida Gov. Bob Martinez, balks on principle. "A lot of our worst criminals are juveniles," he says. "You wouldn't believe some of the things they do."

No one knows how many condemned inmates are retarded. Some experts say hundreds. Even so, removing them from the process would not make a crucial difference to the nation's overloaded courts.

Executing the insane is a more difficult problem. Although laws forbid it, judges differ drastically on who's crazy and who isn't.

Anthony Antone, 66, his brain damaged by syphilis, did not meet the standard. He went to Florida's electric chair in 1984 convinced that when the surge went through him, his spirit would emerge via his pineal gland, ascend through the nine layers of the Universe, and come to rest on a throne from which he would rule the world.

David Funchess, executed by Florida in 1986, was diagnosed as suffering an uncontrollable violent reaction to the stress of Vietnam.

Criminologists have argued for decades over what constitutes insanity. Even if they agreed, the cost of thousands of lengthy psychiatric evaluations would be staggering.

Take politics out of the system

Florida's governors have not recommended clemency in a capital case since 1982. Their explanation is that the appeals process has become so refined that no marginal case gets as far as a clemency hearing.

In fact, though, Bob Graham and Bob Martinez acknowledge they have had substantial "problems" with 10 percent to 20 percent of the cases they have reviewed. Rather than reducing these sentences to life in prison, they have pitched them into limbo by refusing to sign death warrants.

Critics say Florida's governors don't grant clemency because it is politically unpopular. They believe the political dangers are exaggerated.

One of America's most popular governors, New York's Mario Cuomo, has twice vetoed capital punishment bills. When advocates complain, Cuomo answers: "If you like capital punishment so much, don't vote for me." Cuomo won re-election in a landslide.

Larry Spalding, director of the state agency that handles Death Row appeals, says Florida could "dramatically improve" the situation in another way: Eliminate "judicial override."

In more than 20 percent of Florida's capital cases judges have imposed the death penalty after juries recommended life. High courts have reversed seven out of 10 of these "judicial overrides."

Combined, elimination of judicial override and a meaningful clemency process could cut Florida's death penalty overload by 30 percent to 40 percent.

Florida could further reduce the overload by requiring jurors to agree unanimously on the death penalty, as most death penalty states do. This is less extreme than it appears at first, because prosecutors may exclude any potential juror who is categorically opposed to the death penalty.

Guarantee first-rank lawyers at trial

Death penalty laws are extremely complicated, and most criminal defense lawyers don't have much experience with capital cases. "Law schools don't teach about the death penalty because there's no money in it," says Clearwater defense attorney Pat Doherty, a veteran Death Row lawyer.

And because the vast majority of defendants are poor, they are represented by court-appointed attorneys.

"They tend to be lawyers who have small general practices — a real estate closing Monday, an uncontested divorce Tuesday and a capital murder case Wednesday," says Bob Mahler, director of a North Carolina agency that offers advice to death penalty defense attorneys. "It's the equivalent of going to a general practitioner for neurosurgery. No matter how good the general practitioner is, he can't do it."

Statistics show that first-rank lawyers lose fewer cases. Defense lawyer Doherty cites Steven Benson, the tobacco heir who pipebombed the family car.

"He blew up his family, *for money*, and didn't get the death penalty. The only difference between Benson and people on Death Row is that Benson had the greatest of all mitigating circumstances: He was rich, and rich people don't get the death penalty."

Hiring top lawyers for capital defendants would reduce the Death Row population. It would also reduce the enormous energy courts expend on appeals based on incompetency of defense lawyers.

New York proposed such a law several years ago. Predictably, it failed because taxpayers would have to pay millions for hot-shot lawyers.

Set time limits for federal appeals

Death Row defense attorneys have a favorite tactic for exploiting the federal courts to keep their clients alive, and their critics want to tighten up the rules.

Instead of filing one appeal that includes every imaginable argument for reducing the defendant's sentence, the lawyers file a separate appeal for each argument.

One at a time.

"If they have, say, three issues for the federal courts, they bring federal issue No. 1 first," explains former Florida Gov. Bob Graham. "When that appeal is completely finished, they bring federal issue No. 2. *Then* federal issue No. 3. And so on."

For six years, Southern legislators — including Florida's U.S. Sen. Lawton Chiles — have backed a bill to put a stop to that. Appeals would be lost forever if they weren't filed within a year after state appeals were exhausted.

Says Gov. Martinez, a strong proponent of Chiles' bill: "Let's agree on a time line. I think that would greatly enhance the whole system."

Defense attorneys fear the concept is flawed. In some cases, alibi witnesses refuse to talk until years after a trial. In others, facts that might exonerate a doomed inmate remain buried in old police files.

Earnest Lee Miller was convicted of the 1979 torch-murder of a Pasco County woman. Six years passed before fingerprints were located to show that the prosecutors had the wrong victim. Another year passed before a judge ordered police to turn over their files — which contained hidden testimony that supported Miller's alibi.

"I'm not going to argue about whether the death penalty is right or wrong," says Sandy Weinberg, a Tampa attorney who represented Miller. "But there is no question the system can't go faster as long as we've got cases like Earnie Miller's."

The Chiles bill — which has yet to get out of committee — contains provisions that address these fears. But defense attorneys argue that the provisions will not do much good if information surfaces after the defendant is dead.

Limit death penalty crimes

If the death penalty applied to fewer crimes, there would be fewer inmates on Death Row, fewer appeals burdening the courts, and more likelihood that condemned criminals would actually be executed.

Capital murders are supposed to be the most gruesome and vicious. People generally agree this makes sense in theory — but in practice, courts have had a very hard time distinguishing one murder from the next.

Some experts have proposed more specific laws. A death penalty only for killers of police officers, for example. Or a death penalty only for people who kill while serving a life sentence. Or a death penalty only for serial murderers — such as Ted Bundy.

These severe restrictions would permit society to keep the death penalty as an "ultimate penalty" — while greatly reducing the overload.

Abolish the death penalty, establish tougher life sentences

More and more people are asking whether something so costly, slow and inefficient as the death penalty is worth the trouble.

Florida Supreme Court Justice Parker Lee McDonald: "I think society needs to ask itself if the results justify the cost."

Former Florida Supreme Court Chief Justice Arthur England: "Is the value derived really worth all the trouble?"

Public confidence erodes as America pours millions each year into a system that doesn't work. And people wonder if the money couldn't be better spent.

"The same people who are saying, 'What about the victim?' are actually depriving the victims of services," says Jonathan Gradess, who studied the cost of the death penalty for the New York Assembly.

"We're spending millions on the death penalty. Why don't we put that money into counseling and compensation for the survivors who have lost a loved one and a breadwinner?"

The New York lawyer took note of Florida's most recent execution: "It's fine for Bob Martinez to stand up and pull the switch on Willie Darden, but I don't see him writing any checks to the widow."

In place of the death penalty, North Carolina's Mahler proposes a tough alternative: Lock 'em up and throw away the key.

"There are people on Death Rows who should never see the light of day," he says. "But this can be accomplished without a death penalty, and much, much cheaper — through life-without-parole that *really means* life-without-parole."

Such sentences are rare in America. Opponents argue it would be more cruel than execution. Some prison officials worry that these lifers would wreak havoc because they would have no incentive for good behavior.

But the idea of an ironclad life sentence instead of death is popular among Americans, according to several recent polls.

When asked simply whether or not they support capital punishment, 70 percent of Americans say yes. But when asked whether they prefer the death penalty over life-without-parole, the answers are evenly split.

And by a narrow majority, Americans *prefer* a life sentence — provided the defendant is made to work and his prison wages go to a fund for survivors of murder victims.

Some individuals, of course, stand by the death penalty as a matter of principle. No failures of execution will ever convince them to abandon it.

Gov. Martinez makes the case: "There must be an ultimate penalty. The death penalty is an expensive instrument — but it's an instrument of justice. And there should not be a cost factor on justice. You can't put a value on it.

"Even just one execution in a year shows that justice is being done, that it can work," says the governor.

For others, though, the time has arrived to put the death penalty on trial.

"It is a public policy question that must be decided," says Bob Spangenberg, a Boston lawyer who has advised 24 state and federal agencies on legal costs and the death penalty.

"The question is: When it gets down to decisions about health, education, law enforcement, highways — is the death penalty worth it?"

Price tag changed minds in Kansas

By DAVE VON DREHLE
Herald Staff Writer

Kansas state senators voted for the death penalty when they knew the governor would veto it. But when they got a new governor, pro-death penalty, the senators decided they had better take a hard look at the price tag.

What they saw made them change their minds.

Faced with a sagging farm economy, the conservative senators couldn't stomach the waste and expense of the modern-day American death penalty.

"I voted against it, and some people have tried to say I coddle criminals. Well, I don't coddle criminals," drawls Frank Gaines, a 16-year Senate veteran, one of the last of a dying breed of populist Kansas stump orators.

"It costs a lot more money to have capital punishment, and frankly, I think life in prison is just as tough a penalty," says Gaines. "You just get yourself a confining building and put all them animals in there together. If it was me, I'd rather be put out of my damn misery than have to live like that."

Senators who voted no had nightmares of political disaster. After all, the new governor, Mike Hayden, had made support of the death penalty a major part of his campaign. And voters gave him a solid victory.

But the backlash hasn't come.

"I never received as much mail as I did on that issue — but it was thank-you mail. That's real unusual," says Senate President Ross Doyen, who changed his mind after years of supporting the death penalty. "I think a lot of people say they favor it, but when you pin 'em down on the specifics, they're not so sure."

The most eye-opening specific was the bottom line: $11.5 million for the first year of the death penalty alone, according to the Legislature's researchers.

"And those costs are deceptive," says researcher Mary Galligan. "They stack up over the years."

The Senate killed the death penalty initiative. Doyen, the Senate president, doesn't expect the issue to decide any future elections.

"Some people will be upset with you because you support it, and some will be upset because you don't. But it's no pendulum swinger.

"I think this issue is greatly overplayed."

IS THE DEATH PENALTY DOOMED?

When judges, prosecutors and governors talk about the death penalty, more and more they talk about failure. Even staunch supporters are saying it may be time to give up.

'It is a quagmire. If the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short. If a criminal feels that even if he's sentenced to death, the punishment won't be carried out, then that removes the rationale for capital punishment.'

Bob Graham, former governor of Florida, who signed more death warrants than any other Florida governor

'[We] have gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts and appellate courts must . . . rely has been all but completely sacrificed.'

William Rehnquist, chief justice of the U.S. Supreme Court, the court's strongest supporter of the death penalty

'If you can't carry out the sentence within a reasonable amount of time, you should abolish the death penalty. When the execution comes 12 years after the crime, nobody remembers why you're doing it. The Supreme Court has a duty to fix it or get rid of it.'

Ed Austin, pro-death penalty state attorney for Jacksonville

'I think society needs to ask itself if the results justify the cost.'

Parker Lee McDonald, chief justice of the Florida Supreme Court

'The way things are now, it's a surprise when anybody goes to the chair. If they're not going to go through with it, then why have a death penalty on the books? It's the Legislature's job to decide.'

Ellen Morphonios, Dade circuit judge, who has sentenced nine people to die

DEMANDING CHANGE

Nationwide, polls show that 70 percent of Americans favor the death penalty. In Florida, the number is higher. But Floridians also favor substantial changes in the law.

Do Floridians favor or oppose capital punishment?

Strongly favor 67%
Somewhat favor 19%
Somewhat oppose 3%
Strongly oppose 10%
Don't know 1%

How do Floridians feel about the death penalty for the mentally retarded?

Favor 14%
Oppose 79%
Don't know 8%

How do Floridians feel about the death penalty for juveniles?

Favor 38%
Oppose 46%
Don't know 17%

Do Floridians prefer life in prison over the death penalty, provided the inmate works in a prison industry and his wages go to a fund for the survivors of murder victims?

Yes: 53%
No: 38%
Don't know: 10%

SOURCES: The Gallup poll, Cambridge Survey Research.

[428 US 242]

CHARLES WILLIAM PROFFITT, Petitioner,

v

STATE OF FLORIDA

428 US 242, 49 L Ed 2d 913, 96 S Ct 2960, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198

[No. 75–5706]

Argued March 31, 1976. Decided July 2, 1976.

SUMMARY

In response to the United States Supreme Court's decision in Furman v Georgia (1972) 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726—which held that the imposition of the death sentence under certain state statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because under such statutes the juries had untrammeled discretion to impose or withhold the death penalty—the Florida legislature adopted new statutes that authorized the imposition of the death penalty on those convicted of first-degree murder. Under the new Florida statutes, (1) if a defendant is found guilty of first-degree murder, a separate presentence hearing is held before the jury, where arguments may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to eight aggravating and seven mitigating circumstances specified in the statutes, (2) the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence, to be determined by a majority vote, (3) the actual sentence is determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances, (4) if a death sentence is imposed, the trial court must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances, and (5) a death sentence is automatically reviewed by the Supreme Court of Florida, which considers its function to be to guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. Upon a jury trial in a Florida state court under the new statutory scheme, the defendant was found guilty of first-degree murder and, after the statutory presentence hearing, was sentenced to death by the trial judge, who found as aggravating circumstances that (1) the murder was premeditated

Briefs of Counsel, p 1411, infra.

and occurred in the course of a felony (burglary), (2) the defendant had the propensity to commit murder, (3) the murder was especially heinous, atrocious, and cruel, and (4) the defendant knowingly, through his intentional act, had created a great risk of serious bodily harm and death to many persons. The trial judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed (315 So 2d 461).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, seven members of the court agreed that the imposition of the death penalty for the crime of murder under the Florida statutes did not violate the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments.

STEWART, POWELL, and STEVENS, JJ., announced the judgment of the court and filed an opinion, delivered by POWELL, J., expressing the view that (1) the death penalty did not, under all circumstances, constitute cruel and unusual punishment, (2) the Florida procedures satisfied the constitutional concerns identified in the Furman decision that the death penalty not be imposed in an arbitrary or capricious manner, since under the Florida statutes, the trial judge was required to weigh the aggravating and mitigating factors, thus focusing on the circumstances of the crime and the character of the individual defendant, and since any risk of arbitrary or capricious sentencing was minimized by the appellate review system ensuring that a death sentence was consistent with other sentences imposed in similar circumstances, (3) the Florida statutes were not rendered unconstitutional merely because the state's criminal justice system allowed discretion to be exercised with regard to the prosecutor's decision whether to charge a capital offense in the first place, his decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, or the Executive's decision whether to commute a death sentence, and (4) the statutory provisions specifying "aggravating" and "mitigating" circumstances were not so vague or overbroad as to fail to adequately guide the trial court's sentencing discretion, since the Florida Supreme Court had construed the challenged provisions as to "aggravating" circumstances in such a manner as to provide adequate guidance, and since the challenged provisions as to "mitigating" circumstances required no more line-drawing than was commonly required of a factfinder in a law suit.

WHITE, J., joined by BURGER, Ch. J., and REHNQUIST, J., concurred in the judgment, expressing the view that (1) although the statutory aggravating and mitigating circumstances were not susceptible to mechanical application, they were not so vague and overbroad as to leave the discretion of the sentencing authority unfettered, (2) the Florida statutory scheme did not run afoul of the holding in the Furman case, since under Florida law, the sentencing judge was required to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweighed the mitigating factors, and it thus could be anticipated that as to such categories of murderers, the penalty would not be imposed freakishly or

rarely, but would be imposed with regularity, (3) the possibility that some murderers might escape the death penalty solely through exercise of prosecutorial discretion or executive clemency was immaterial, and (4) there was no merit to the defendant's argument that under the Eighth Amendment, the death penalty could never be imposed under any circumstances.

BLACKMUN, J., concurred in the judgment, referring to his dissenting opinion in the Furman case.

BRENNAN, J., dissenting in an opinion appearing at page 904, supra, expressed the view that (1) the cruel and unusual punishment clause must draw its meaning from evolving standards of decency that marked the progress of a maturing society, (2) the consideration of "evolving standards of decency" required focusing upon the essence of the death penalty itself, and not primarily or solely upon the procedure under which the determination to inflict the penalty upon a particular person was made, (3) the death penalty served no penal purpose more effectively than a less severe punishment would, and (4) our civilization and the law had progressed to the point where the court should hold that the punishment of death, for whatever crime and under all circumstances, was cruel and unusual, in violation of the Eighth and Fourteenth Amendments.

MARSHALL, J., dissented in an opinion appearing at page 907, supra, expressing the view that the death penalty was cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments because it was excessive, being unnecessary to promote the goal of deterrence of crime or to further any legitimate notion of retribution.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

1a–1d. The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) if a defendant is found guilty of first-degree murder, a separate pre-sentence hearing is held before the jury, where argument may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to eight aggravating and seven mitigating circumstances specified in the statutes, (2) the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence, to be determined by majority vote, (3) the actual sentence is determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances, (4) if a death sentence is imposed, the trial court must set forth in writing its factfindings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances, and (5) a death sentence is automatically reviewed by the state's highest court, which considers its function to be to guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., Rehnquist, J., and Blackmun, J.]

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21 AM JUR 2d, Criminal Law § 613

USCS, Constitution, 8th and 14th Amendments

US L ED DIGEST, Criminal Law §§ 82, 83

ALR DIGESTS, Criminal Law § 181

L ED INDEX TO ANNOS, Criminal Law; Cruel and Unusual Punishment

ALR QUICK INDEX, Capital Cases; Cruel and Unusual Punishment

FEDERAL QUICK INDEX, Capital Punishment; Cruel and Unusual Punishment

ANNOTATION REFERENCES

The federal constitutional guaranty against cruel and unusual punishment. 33 L Ed 2d 932.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death—post-Furman decisions. 71 ALR3d 453.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 ALR3d 504.

Manner of inflicting death sentence as cruel or unusual punishment. 30 ALR 1452.

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

2a, 2b. The death penalty does not, under all circumstances, constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

3a, 3b. A state's statutory provisions governing the imposition of the death penalty for the crime of murder are not rendered unconstitutional as being violative of the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments merely because the state prosecutor has discretion in selecting cases to be prosecuted as capital offenses and in plea bargaining, or merely because of the possibility of executive clemency. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

4a, 4b. The provisions of a state's death penalty statutes which specify "aggravating" and "mitigating" circumstances that must be weighed by the trial judge in determining whether a defendant convicted of first-degree murder shall be sentenced to death—particularly the "aggravating" circumstances that the crime was "especially heinous, atrocious, or cruel," and that the defendant "knowingly created a great risk of death to many persons," and particularly the "mitigating" circumstances that the defendant acted "under the influence of extreme mental or emotional disturbance," that the defendant's participation as an accomplice was "relatively minor," that the defendant's capacity "to conform his conduct to the requirements of law was substantially impaired," and that the defendant had no "significant history of prior criminal activity"—are not so vague and overbroad as to render the statutory scheme violative of the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments for failing adequately to guide the trial court's sentencing discretion. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

SYLLABUS BY REPORTER OF DECISIONS

Petitioner, whose first-degree murder conviction and death sentence were affirmed by the Florida Supreme Court, attacks the constitutionality of the Florida capital-sentencing procedure, that was enacted in response to Furman v Georgia, 408 US 238. Under the new statute, the trial judge (who is the sentencing authority) must weigh eight statutory aggravating factors against seven statutory mitigating factors to determine whether the death penalty should be imposed, thus requiring him to focus on the circumstances of the crime and the character of the individual defendant. The Florida system resembles the Georgia system upheld in Gregg v Georgia, ante, p 153, 49 L Ed 2d 859, except for the basic difference that in Florida the sentence is determined by the trial judge rather than by the jury, which has an advisory role with respect to the sentencing phase of the trial. *Held:* The judgment is affirmed.

315 So 2d 461, affirmed.

Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, concluded that:

1. The imposition of the death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Gregg, ante, at 168–187, 49 L Ed 2d 859.

2. On its face, the Florida procedures for imposition of the death penalty satisfy the constitutional deficiencies identified in Furman, supra. Florida trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or

imprisonment for life, and their decisions are reviewed to ensure that they comport with other sentences imposed under similar circumstances. Petitioner's contentions that the new Florida procedures remain arbitrary and capricious lack merit.

(a) The argument that the Florida system is constitutionally invalid because it allows discretion to be exercised at each stage of the criminal proceeding fundamentally misinterprets Furman. Gregg, ante, at 199, 49 L Ed 2d 859.

(b) The aggravating circumstances authorizing the death penalty if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons," as construed by the Florida Supreme Court, provide adequate guidance to those involved in the sentencing process and as thus construed are not overly broad.

(c) Petitioner's argument that the imprecision of the mitigating circumstances makes them incapable of determination by a judge or jury and other contentions in a similar vein raise questions about line-drawing evaluations that do not differ from factors that juries and judges traditionally consider. The Florida statute gives clear and precise directions to judge and jury to enable them to weigh aggravating circumstances against mitigating ones.

(d) Contrary to petitioner's contention, the State Supreme Court's review role is neither ineffective nor arbitrary, as evidenced by the careful procedures it has followed in assessing the imposition of death sentences, over a third of which that court has vacated.

Mr. Justice White, joined by The Chief Justice and Mr. Justice Rehnquist, concluded that under the Florida law the sentencing judge is required to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors, and as to those categories the penalty will not be freakishly or rarely, but will be regularly, imposed; and therefore the Florida scheme does not run afoul of the Court's holding in Furman. Petitioner's contentions about prosecutorial discretion and his argument that the death penalty may never be imposed under any circumstances consistent with the Eighth Amendment are without substance. See, Gregg v Georgia, ante, at 224–225, 49 L Ed 2d 859 (White, J., concurring in judgment) and Roberts v Louisiana, post, at 348–350; 350–356, 49 L Ed 2d 974 (White, J., dissenting).

Mr. Justice Blackmun concurred in the judgment. See Furman v Georgia, 408 US 238, 405–414 (Blackmun, J., dissenting), and id., at 375, 414, and 465, 33 L Ed 2d 346, 92 S Ct 2726.

Judgment of the Court, and opinion of Stewart, Powell, and Stevens, JJ., announced by Powell, J. White, J., filed an opinion concurring in the judgment, in which Burger, C. J., and Rehnquist, J., joined, post, p 260, 49 L Ed 2d, p 927. Blackmun, J., filed a statement concurring in the judgment, post, p 261, 49 L Ed 2d, p 928. Brennan, J., ante, p 227, 49 L Ed 2d, p 904, and Marshall, J., ante, p 231, 49 L Ed 2d, p 907, filed dissenting opinions.

APPEARANCES OF COUNSEL

Clinton A. Curtis argued the cause for petitioner.

Robert L. Shevin argued the cause for respondent.

Briefs of Counsel, p 1411, infra.

SEPARATE OPINIONS

Judgment of the Court, and opinion of Mr. Justice **Stewart**, Mr. Justice **Powell**, and Mr. Justice Stevens announced by Mr. Justice **Powell**.

[1a] The issue presented by this case is whether the imposition of the sentence of death for the crime of murder under the law of Florida violates the Eighth and Fourteenth Amendments.

I

The petitioner, Charles William Proffitt, was tried, found guilty, and sentenced to death for the first-degree

[428 US 245]

murder of Joel Medgebow. The circumstances surrounding the murder were testified to by the decedent's wife, who was present at the time it was committed. On July 10, 1973, Mrs. Medgebow awakened around 5 a. m. in the bedroom of her apartment to find her husband sitting up in bed, moaning. He was holding what she took to be a ruler.[1] Just then a third person jumped up, hit her several times with his fist, knocked her to the floor, and ran out of the house. It soon appeared that Medgebow had been fatally stabbed with a butcher knife. Mrs. Medgebow was not able to identify the attacker, although she was able to give a description of him.[2]

The petitioner's wife testified that on the night before the murder the petitioner had gone to work dressed in a white shirt and gray pants, and that he had returned at about 5:15 a.m. dressed in the same clothing but without shoes. She said that after a short conversation the petitioner had packed his clothes and departed. A young woman boarder, who overheard parts of the petitioner's conversation with his wife, testified that the petitioner had told his wife that he had stabbed and killed a man with a butcher knife while he was burglarizing a place, and that he had beaten a woman. One of the petitioner's coworkers testified that they had been drinking together until 3:30 or 3:45 on the morning of the murder and that the petitioner had then driven him home. He said that the petitioner at this time was wearing gray pants and a white shirt.

The jury found the defendant guilty as charged. Subsequently,

[428 US 246]

as provided by Florida law, a separate hearing was held to determine whether the petitioner should be sentenced to death or to life imprisonment. Under the state law that decision turned on whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist.[3] At that hearing it was shown that the petitioner had one prior conviction, a 1967 charge of breaking and entering. The State also introduced the testimony of the physician (Dr. Crumbley) at the jail where the petitioner had been held pending trial. He testified that the petitioner had come to him as a physician, and told him that he was concerned that he would harm other people in the future, that he had had an uncontrollable desire to kill that had already resulted in his killing one man, that this desire was building up again, and that he wanted psychiatric help so he would not kill again. Dr. Crumbley also testified that, in his opinion, the petitioner was dangerous and would be a danger to his fellow inmates if imprisoned, but that his condition could be treated successfully.

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1. It appears that the "ruler" was actually the murder weapon which Medgebow had pulled from his own chest.

2. She described the attacker as wearing light pants and a pinstriped shirt with long sleeves rolled up to the elbow. She also stated that the attacker was a medium-sized white male.

3. See infra, at 248–250, 49 L Ed 2d 921–922.

The jury returned an advisory verdict recommending the sentence of death. The trial judge ordered an independent psychiatric evaluation of the petitioner, the results of which indicated that the petitioner was not, then or at the time of the murder, mentally impaired. The judge then sentenced the petitioner to death. In his written findings supporting the sentence, the judge found as aggravating circumstances that (1) the murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious, and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious

[428 US 247]

bodily harm and death to many persons. The judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed. 315 So 2d 461 (1975). We granted certiorari, 423 US 1082, 47 L Ed 2d 94, 96 S Ct 1090 (1976), to consider whether the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

II

[2a] The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in Gregg v Georgia, ante, at 168–187, 49 L Ed 2d 859, 96 S Ct 2909.

III

A

In response to Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972), the Florida Legislature adopted new statutes that authorize the imposition of the death penalty on those convicted of first-degree murder. Fla Stat Ann § 782.04(1) (Supp 1976–1977).[4] At the same time Florida

[428 US 248]

adopted a new capital-sentencing procedure, patterned in large part on the Model Penal Code. See § 921.141 (Supp 1976–1977).[5] Under the new statute, if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the

4. The murder statute under which petitioner was convicted reads as follows:

"(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s 775.082.

"(b) In all cases under this section, the procedure set forth in s 921.141 shall be followed in order to determine sentence of death or life imprisonment." Fla Stat Ann § 782.04 (Supp 1976–1977).

Another Florida statute authorizes imposition of the death penalty upon conviction of sexual battery of a child under 12 years of age. § 794.011(2) (Supp 1976–1977). We do not in this opinion consider the constitutionality of the death penalty for any offense other than first-degree murder.

5. See Model Penal Code § 210.6 (Proposed Official Draft, 1962) (set out in Gregg v Georgia, ante, at 193–194, n 44, 49 L Ed 2d 859, 96 S Ct 2909).

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

At the conclusion of the hearing the jury is directed to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." §§ 921.141(2)(b) and (c) (Supp 1976–1977).[6] The jury's verdict is determined by

[428 US 249]

majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v State, 322 So 2d 908, 910 (1975). Accord, Thompson v State, 328 So 2d 1, 5

[428 US 250]

(1976). Cf. Spinkellink v State, 313 So 2d 666, 671 (1975).[7]

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

6. The aggravating circumstances are:
"(a) The capital felony was committed by a person under sentence of imprisonment.
"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
"(c) The defendant knowingly created a great risk of death to many persons.
"(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
"(f) The capital felony was committed for pecuniary gain.
"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
"(h) The capital felony was especially heinous, atrocious, or cruel."
§ 921.141(5) (Supp 1976–1977).
The mitigating circumstances are:
"(a) The defendant has no significant history of prior criminal activity.
"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
"(c) The victim was a participant in the defendant's conduct or consented to the act.
"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
"(e) The defendant acted under extreme duress or under the substantial domination of another person.
"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
"(g) The age of the defendant at the time of the crime." § 921.141(6) (Supp 1976–1977).

7. Tedder has not always been cited when the Florida court has considered a judge-imposed death sentence following a jury recommendation of life imprisonment. See, e.g., Thompson v State, 328 So 2d 1 (1976); Douglas v State, 328 So 2d 18 (1976); Dobbert v State, 328 So 2d 433 (1976). But in the latter case two judges relied on Tedder in separate opinions, one in support of reversing the death sentence and one in support of affirming it.

stances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the aggravating circumstances." § 921.141(3) (Supp 1976–1977).[8]

The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141(4) (Supp 1976–1977). The law differs from that of Georgia in that it does

[428 US 251]

not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v Dixon, 283 So 2d 1, 10 (1973).

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

[428 US 252]

those considered by a Georgia sentencing jury, see Gregg v Georgia, at 197, 49 L Ed 2d 859, 96 S Ct 2909, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge

8. In one case the Florida court upheld a death sentence where the trial judge had simply listed six aggravating factors as justification for the sentence he imposed. Sawyer v State, 313 So 2d 680 (1975). Since there were no mitigating factors, and since some of these aggravating factors arguably fell within the statutory categories, it is unclear whether the Florida court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so, since the capital-sentencing statute explicitly provides that "[a]ggravating circumstances shall be *limited* to the following [eight specified factors.]." § 921.141(5) (Supp 1976–1977). (Emphasis added.) There is no such limiting language introducing the list of statutory mitigating factors. See § 921.141(6) (Supp 1976–1977). See also n 14, infra.

rather than by the jury.[9] This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v Illinois, 391 US 510, 519 n 15, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.[10]

The Florida capital-sentencing procedures thus seek to
[428 US 253]
assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v State, 322 So 2d 481, 484 (1975). See also Sullivan v State, 303 So 2d 632, 637 (1974). The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated eight of the 21 death sentences that it has reviewed to date. See Taylor v State, 294 So 2d 648 (1974); Lamadline v State, 303 So 2d 17 (1974); Slater v State, 316 So 2d 539 (1975); Swan v State, 322 So 2d 485 (1975); Tedder v State, 322 So 2d 908 (1975); Halliwell v State, 323 So 2d 557 (1975); Thompson v State, 328 So 2d 1 (1976); Messer v State, 330 So 2d 137 (1976).

Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is "'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Gregg v Georgia, at 188, 49 L Ed 2d 859, 96 S Ct 2909, quoting Furman v Georgia, 408 US, at 313, 33 L Ed 2d 346, 92 S Ct 2726 (White, J., concurring). On its face the Florida system thus satisfies the constitutional deficiencies identified in Furman.

9. Because the trial judge imposes sentence, the Florida court has ruled that he may order preparation of a presentence investigation report to assist him in determining the appropriate sentence. See Swan v State, 322 So 2d 485, 488–489 (1975); Songer v State, 322 So 2d 481, 484 (1975). These reports frequently contain much information relevant to sentencing. See Gregg v Georgia, ante, at 189, n 37, 49 L Ed 2d 859, 96 S Ct 2909.

10. See American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 1.1, Commentary, pp 43–48 (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). See also Gregg v Georgia, ante, at 189–192, 49 L Ed 2d 859, 96 S Ct 2909. In the words of the Florida court, "a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants." State v Dixon, 283 So 2d, 1, 8 (1973).

[428 US 254]
B

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

(1)

[3a] The petitioner first argues that arbitrariness is inherent in the Florida criminal justice system because it allows discretion to be exercised at each stage of a criminal proceeding—the prosecutor's decision whether to charge a capital offense in the first place, his decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, and, after conviction and unsuccessful appeal, the Executive's decision whether to commute a death sentence. As we noted in Gregg, this argument is based on a fundamental misinterpretation of Furman, and we reject it for the reasons expressed in Gregg. See ante, at 199, 49 L Ed 2d 859.

(2)

[4a] The petitioner next argues that the new Florida sentencing procedures in reality do not eliminate the arbitrary infliction of death that was condemned in Furman. Basically he contends that the statutory aggravating and mitigating circumstances are vague and overbroad,[11] and that the statute gives no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case.

[428 US 255]
(a)

Initially the petitioner asserts that the enumerated aggravating and mitigating circumstances are so vague and so broad that virtually "any capital defendant becomes a candidate for the death penalty . . . ." In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorize the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons." §§ 921.141(5)(h), (c) (Supp 1976–1977). These provisions must be considered as they have been construed by the Supreme Court of Florida.

That court has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v State, 322 So 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v Dixon, 283 So 2d, at 9. See also Alford v State, 307 So 2d 433, 445 (1975); Halliwell v State, supra, at 561.[12]

11. As in Gregg, we examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the Florida capital-sentencing system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty. See Gregg v Georgia, ante, at 201, n 51, 49 L Ed 2d 859, 96 S Ct 2909.

12. The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was "pitiless" or "torturous to the victim." See,

We

[428 US 256]

cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v Georgia, ante, at 200–203, 49 L Ed 2d 859, 96 S Ct 2909.

In the only case, except for the instant case, in which the third aggravating factor—"[t]he defendant knowingly created a great risk of death to many persons"—was found, Alvord v State, 322 So 2d 533 (1975), the State Supreme Court held that the defendant created a great risk of death because he "obviously murdered two of the victims in order to avoid a surviving witness to the [first] murder." Id., at 540.[13] As construed by the Supreme Court of Florida these provisions are not impermissibly vague.[14]

[428 US 257]

(b)

The petitioner next attacks the imprecision of the mitigating circumstances. He argues that whether a defendant acted "under the influence of extreme mental or emotional disturbance," whether a defendant's capacity "to conform his conduct to the requirements of law was substantially impaired," or whether a defendant's participation as an accomplice in a capital felony was "relatively minor," are questions beyond the capacity of a jury or judge to determine. See §§ 921.141(6)(b), (f), (d) (Supp 1976–1977).

He also argues that neither a jury

e.g., Hallman v State, 305 So 2d 180 (1974) (victim's throat slit with broken bottle); Spinkellink v State, 313 So 2d 666 (1975) ("career criminal" shot sleeping traveling companion); Gardner v State, 313 So 2d 675 (1975) (brutal beating and murder); Alvord v State, 322 So 2d 533 (1975) (three women killed by strangulation, one raped); Douglas v State, 328 So 2d 18 (1976) (depraved murder); Henry v State, 328 So 2d 430 (1976) (torture murder); Dobbert v State, 328 So 2d 433 (1976) (torture and killing of two children). But the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that the Florida Court has abandoned the definition that it announced in Dixon and applied in Alford, Tedder, and Halliwell.

13. While it might be argued that this case broadens that construction, since only one person other than the victim was attacked at all and then only by being hit with a fist, this would be to read more into the State Supreme Court's opinion than is actually there. That court considered 11 claims of error advanced by the petitioner, including the trial judge's finding that none of the statutory mitigating circumstances existed. It did not, however, consider whether the findings as to each of the statutory aggravating circumstances were supported by the evidence. If only one aggravating circumstance had been found, or if some mitigating circumstance had been found to exist but not to outweigh the aggravating circumstances, we would be justified in concluding that the State Supreme Court had necessarily decided this point even though it had not expressly done so. However, in the circumstances of this case, when four separate aggravating circumstances were found and where each mitigating circumstance was expressly found not to exist, no such holding on the part of the State Supreme Court can be implied.

14. The petitioner notes further that Florida's sentencing system fails to channel the discretion of the jury or judge because it allows for consideration of nonstatutory aggravating factors. In the only case to approve such a practice, Sawyer v State, 313 So 2d 680 (1975), the Florida court recast the trial court's six nonstatutory aggravating factors into four aggravating circumstances—two of them statutory. As noted earlier, it is unclear that the Florida court would ever approve a death sentence based entirely on nonstatutory aggravating circumstances. See n 8, supra.

nor a judge is capable of deciding how to weigh a defendant's age or determining whether he had a "significant history of prior criminal activity." See §§ 921.141(6)(g), (a) (Supp 1976–1977). In a similar vein the petitioner argues that it is not possible to make a rational determination whether there are "sufficient" aggravating circumstances that are not outweighed by the mitigating circumstances, since the state law assigns no specific weight to any of the various circumstances to be considered. See § 921.141 (Supp 1976-1977).

While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned

[428 US 258]

mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

(c)

Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.[15]

Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of

[428 US 259]

rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. See, e. g., Alford v State, 307 So 2d, at 445; Alvord v State, 322 So 2d, at 540–541. By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute. Cf. Gregg v Georgia, at 204–206, 49 L Ed 2d 859, 96 S Ct 2909. And any suggestion that

15. State v Dixon, 283 So 2d, at 10.

the Florida court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it. See supra, at 253, 49 L Ed 2d 923.[16]

IV

[1b] Florida, like Georgia, has responded to Furman by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of

[428 US 260]

its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed. See Furman v Georgia, 408 US, at 310, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring). Accordingly, the judgment before us is affirmed.

It is so ordered.

Mr. Justice White, with whom The Chief Justice and Mr. Justice Rehnquist join, concurring in the judgment.

[1c, 4b] There is no need to repeat the statement of the facts of this case and of the statutory procedure under which the death penalty was imposed, both of which are described in detail in the opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens. I agree with them, see Part III-B(2)(a) and (b), ante, at 255–258, 49 L Ed 2d 924–926, that although the statutory aggravating and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered. Under Florida law, the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. There is good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely but will be imposed with regularity; and consequently it cannot be said that the death penalty in

[428 US 261]

Florida as to those categories has ceased "to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." Furman v Georgia, 408 US 238, 311, 33 L Ed 2d 346, 92 S Ct 2726 (1972) (White, J., concur-

16. The petitioner also argues that since the Florida Court does not review sentences of life imprisonment imposed in capital cases or sentences imposed in cases where a capital crime was charged but where the jury convicted of a lesser offense, it will have an unbalanced view of the way that the typical jury treats a murder case and it will affirm death sentences under circumstances where the vast majority of judges would have imposed a sentence of life imprisonment. As we noted in Gregg v Georgia, ante, at 204, n 56, 49 L Ed 2d 859, 96 S Ct 2909, this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty.

ring). Accordingly, the Florida statutory scheme for imposing the death penalty does not run afoul of this Court's holding in Furman v Georgia.

[2b, 3b] For the reasons set forth in my concurring opinion in Gregg v Georgia, ante at 224–225, 49 L Ed 2d 859, 96 S Ct 2909, and my dissenting opinion in Roberts v Louisiana, post, at 348–350, 49 L Ed 2d 974, 96 S Ct 3001, this conclusion is not undercut by the possibility that some murderers may escape the death penalty solely through exercise of prosecutorial discretion or executive clemency. For the reasons set forth in my dissenting opinion in Roberts v Louisiana, post, at 350–356, 49 L Ed 2d 974, 96 S Ct 3001, I also reject petitioner's argument that under the Eighth Amendment the death penalty may never be imposed under any circumstances.

I concur in the judgment of affirmance.

Mr. Justice **Blackmun**, concurring in the judgment.

[1d] I concur in the judgment. See Furman v Georgia, 408 US 238, 405–414, 35 L Ed 2d 346, 92 S Ct 2726 (1972) (Blackmun, J., dissenting), and id., at 375, 414, and 465, 35 L Ed 2d 346, 92 S Ct 2726.

Mr. Justice **Brennan** dissented in an opinion appearing at p 904, supra.

Mr. Justice **Marshall** dissented in an opinion at p 907, supra.

[428 US 153]

TROY LEON GREGG, Petitioner,

v

STATE OF GEORGIA

428 US 153, 49 L Ed 2d 859, 96 S Ct 2909, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198

[No. 74–6257]

Argued March 31, 1976. Decided July 2, 1976.

SUMMARY

After the United States Supreme Court's decision in Furman v Georgia (1972) 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726—which held that the imposition of the death sentence under Georgia (and Texas) statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because under such statutes the juries had untrammeled discretion to impose or withhold the death penalty—the Georgia legislature amended its statutory scheme. Under the new statutory provisions with regard to imposition of the death penalty for the crime of murder and other offenses, (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by the evidence, (2) after a verdict, finding, or plea of guilty, a presentence hearing is conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of ten aggravating circumstances specified in the statutes must be found to exist beyond a reasonable doubt, and must be designated in writing, before the jury (or judge) may impose the death sentence on a defendant convicted of murder, the trial judge in jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the Supreme Court of Georgia must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the Georgia Supreme Court must include reference to similar cases that the court considered. Upon a jury trial in a Georgia state court under the new statutory

Briefs of Counsel, p 1410, infra.

fication procedure[18] "does, of course, in the long run save time,

[428 US 151]

energy, and resources and helps build a cooperative judicial federalism." Lehman Brothers v Schein, 416 US 386, 391, 40 L Ed 2d 215, 94 S Ct 1741 (1974). This Court has utilized certification procedures in the past, as have courts of appeals. Ibid. and cases cited therein at 390 nn 5 and 6, 40 L Ed 2d 215, 94 S Ct 1741.

The importance of speed in resolution of the instant litigation is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis. Further, in light of our disapproval of a "parental veto" today in Planned Parenthood, we must assume that the lower Massachusetts courts, if called upon to enforce the statute pending interpretation by the Supreme Judicial Court, will not impose this most serious barrier. Insofar as the issue thus ceases to become one of total denial of access and becomes one rather of relative burden, the cost of abstention is reduced and the desirability of that equitable remedy accordingly increased.

V

[1c, 9b] We therefore hold that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12P and the procedure it imposes. In regard to the claim of impermissible discrimination due to the 1975 statute, a claim not raised in the District Court but subject to inquiry through an amended complaint, or perhaps by other means, we believe that it would not be inappropriate for the District Court, when any procedural requirement

[428 US 152]

has been complied with, also to certify a question concerning the meaning of the new statute, and the extent to which its procedures differ from the procedures that must be followed under § 12P.

The judgment of the District Court is vacated, and the cases are remanded to that court for proceedings consistent with this opinion.

It is so ordered.

18. There is no indication that the Massachusetts certification procedure is inadequate. Indeed, the dissent in the District Court cited a prior case in which the procedure was employed with no apparent difficulty. 393 F Supp, at 864 n 15, citing Hendrickson v Sears, 495 F2d 513 (CA1 1974).

scheme, the defendant was convicted of two counts of armed robbery and two counts of murder, and the jury, after the penalty hearing in the bifurcated procedure, returned a sentence of death on each count, finding as statutory aggravating conditions that the murder offenses were committed while the defendant was engaged in the commission of the two other capital felonies of armed robbery of the murder victims, and that the defendant committed the murders for the purpose of receiving money and an automobile of one of the victims. After reviewing the trial record and comparing the evidence and sentence in similar cases, the Georgia Supreme Court affirmed the convictions and the imposition of the death sentences for murder, although the Georgia Supreme Court vacated the death sentences imposed for armed robbery on the grounds that the death penalty had rarely been imposed for that offense and the jury had improperly considered the murders as aggravating circumstances for the robberies after having considered the robberies as aggravating circumstances for the murders (233 Ga 117, 210 SE2d 659).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, seven members of the court agreed that the imposition of the death penalty for the crime of murder under the Georgia statutes did not violate the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments.

STEWART, POWELL, and STEVENS, JJ., announced the judgment of the court and filed an opinion, delivered by STEWART, J., expressing the view that (1) the death penalty did not, under all circumstances, constitute cruel and unusual punishment, since (a) the Eighth Amendment was not to be regarded as a static concept, but was to draw its meaning from the evolving standards of decency that marked the progress of a maturing society, (b) although public perceptions of standards of decency were not conclusive—the Eighth Amendment requiring that punishment must accord with the dignity of man and not be excessive either as to its form or severity—nevertheless a legislature was not required to select the least severe penalty possible, so long as the penalty selected was not cruelly inhumane or disproportionate to the crime involved, and a heavy burden rested on those attacking the judgment of the representatives of the people, (c) at the time the Constitution and its amendments were adopted, capital punishment was accepted as a common sanction, and the Supreme Court, for nearly 200 years, had repeatedly recognized that capital punishment was not invalid per se, (d) after the decision in the Furman case, at least 35 states enacted new statutes providing for the death penalty for certain crimes, thus indicating society's endorsement of the death penalty, (e) retribution and deterrence, as social purposes served by the death penalty, were matters that could properly be considered by legislatures in terms of their own local conditions, and (f) capital punishment for murder could not be said to be invariably disproportionate to the crime, but instead was an extreme sanction, suitable to the most extreme of crimes; (2) the concerns expressed in the Furman decision that the death penalty not be imposed in an arbitrary or capricious manner could be met by a carefully drafted statute ensuring that the sentencing authority was given adequate guidance and information for determining the appropriate sentence, a bifurcated sentenc-

ing proceeding being preferable as a general proposition; (3) the Georgia capital—sentencing procedures were constitutional, since they required the jury to consider the circumstances of the crime and the character of the defendant before recommending sentence, and required the Georgia Supreme Court to determine whether a death sentence was the result of passion or prejudice, was supported by evidence establishing a statutory aggravating circumstance, and was not disproportionate in comparison with sentences imposed on similarly situated defendants in other cases; (4) the Georgia statutes were not rendered unconstitutional merely because of the opportunities for discretionary action inherent in the processing of any murder case under Georgia law with regard to the prosecutor's unfettered authority to select those persons who would be prosecuted for a capital offense and to plea bargain with them, the jury's power to convict a defendant of a lesser included offense, or the authority of the Governor and the Georgia Board of Pardons and Paroles to commute a death sentence; (5) the Georgia statutes, particularly the provisions specifying aggravating circumstances, were not so vague or overbroad as to leave juries free to act arbitrarily and capriciously in imposing the death penalty, there being no reason to assume that the statutes would be given open-ended construction by the Georgia Supreme Court, which had already held that certain provisions were impermissibly vague; and (6) the state court properly allowed a wide scope of evidence and argument at presentence hearings, it being desirable for the jury to have as much information before it as possible when it made the sentencing decision.

WHITE, J., joined by BURGER, Ch. J., and REHNQUIST, J., concurred in the judgment, expressing the view that (1) the death penalty imposed for murder under the new Georgia statutory scheme could be constitutionally carried out, since (a) the statutes not only guided the jury in its exercise of discretion in determining whether it would impose the death penalty, but also gave the Georgia Supreme Court the power and duty to decide whether in fact the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion, and (b) the defendant had failed to establish that the Georgia Supreme Court had not performed its task in the instant case or that it was incapable of performing its task adequately in all cases; (2) the statutory scheme was not unconstitutional on the ground that the prosecutor's decisions in negotiating pleas or in declining to charge capital murder were standardless, since it could not be assumed that prosecutors would be motivated by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicted; and (3) the defendant's contention that the death penalty, however imposed and for whatever crime, constituted cruel and unusual punishment was without merit.

BURGER, Ch. J., and REHNQUIST, J., filed a statement joining the opinion of WHITE, J., agreeing with its analysis that Georgia's system of capital punishment comported with the holding in the Furman case.

BLACKMUN, J., concurred in the judgment, referring to his dissenting opinion in the Furman case.

BRENNAN, J., dissenting, expressed the view that (1) the cruel and unusual punishment clause must draw its meaning from evolving standards of decency that marked the progress of a maturing society, (2) the consideration of "evolving standards of decency" required focusing upon the essence of the death penalty itself, and not primarily or solely upon the procedure under which the determination to inflict the penalty upon a particular person was made, (3) the death penalty served no penal purpose more effectively than a less severe punishment would, and (4) our civilization and the law had progressed to the point where the court should hold that the punishment of death, for whatever crime and under all circumstances, was cruel and unusual, in violation of the Eighth and Fourteenth Amendments.

MARSHALL, J., dissented, expressing the view that the death penalty was cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments because it was excessive, being unnecessary to promote the goal of deterrence of crime or to further any legitimate notion of retribution.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

1a–1d. The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21 AM JUR 2d, Criminal Law § 613

USCS, Constitution, 8th and 14th Amendments

US L ED DIGEST, Criminal Law §§ 82, 83

ALR DIGESTS, Criminal Law § 181

L ED INDEX TO ANNOS, Criminal Law; Cruel and Unusual Punishment

ALR QUICK INDEX, Capital Cases; Cruel and Unusual Punishment

FEDERAL QUICK INDEX, Capital Punishment; Cruel and Unusual Punishment

ANNOTATION REFERENCES

The federal constitutional guaranty against cruel and unusual punishment. 33 L Ed 2d 932.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death—post-Furman decisions. 71 ALR3d 453.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 ALR3d 504.

Manner of inflicting death sentence as cruel or unusual punishment. 30 ALR 1452.

Amendments is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by any view of the evidence, (2) after a verdict, finding, or plea of guilty, a presentence hearing is conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of 10 aggravating circumstances specified in the statutes must be found to exist beyond a reasonable doubt, and must be designated in writing, before the jury (or judge) may elect to impose the death sentence on a defendant convicted of murder, the trial judge in jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the state's highest court must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the state's highest court must include reference to similar cases that the court considered. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., Rehnquist, J., and Blackmun, J.]

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

2a, 2b. The death penalty does not, under all circumstances, constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

3a, 3b. A state's statutory provisions governing the imposition of the death penalty for the crime of murder are not rendered unconstitutional as violative of the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments merely because the state prosecutor has discretion in selecting cases to be prosecuted as capital offenses and in plea bargaining. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

SYLLABUS BY REPORTER OF DECISIONS

Petitioner was charged with committing armed robbery and murder on the basis of evidence that he had killed and robbed two men. At the trial stage of Georgia's bifurcated procedure, the jury found petitioner guilty of two counts of armed robbery and two counts of murder. At the penalty stage, the judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count; that the jury was free to consider mitigating or aggravating circumstances, if any, as presented by the parties; and that the jury would not be authorized to consider imposing the death sentence unless it first found beyond a reasonable doubt (1) that the murder was committed while the offender was engaged in the commission of other capital felonies, viz., the armed robberies of the victims; (2) that he committed the murder for the purpose of receiving the victims' money and automobile; or (3) that the murder was "outrageously and wantonly vile, horrible and inhuman" in that it "involved the depravity of [the] mind of the defendant." The jury found the first and second of these aggravating circumstances and returned a sentence of death. The Georgia Supreme Court affirmed the convictions. After reviewing the trial transcript and record and comparing the evidence and sentence in similar cases the court upheld the death sentences for the murders, concluding that they had not resulted from prejudice or

any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases, but vacated the armed robbery sentences on the ground, inter alia, that the death penalty had rarely been imposed in Georgia for that offense. Petitioner challenges imposition of the death sentence under the Georgia statute as "cruel and unusual" punishment under the Eighth and Fourteenth Amendments. That statute, as amended following Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (where this Court held to be violative of these Amendments death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty), retains the death penalty for murder and five other crimes. Guilt or innocence is determined in the first stage of a bifurcated trial, and if the trial is by jury, the trial judge must charge lesser included offenses when supported by any view of the evidence. Upon a guilty verdict or plea a presentence hearing is held where the judge or jury hears additional extenuating or mitigating evidence and evidence in aggravation of punishment if made known to the defendant before trial. At least one of 10 specified aggravating circumstances must be found to exist beyond a reasonable doubt and designated in writing before a death sentence can be imposed. In jury cases, the trial judge is bound by the recommended sentence. In its review of a death sentence (which is automatic), the State Supreme Court must consider whether the sentence was influenced by passion, prejudice, or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." If the court affirms the death sentence it must include in its decision reference to similar cases that it has considered. *Held:* The judgment is affirmed.

233 Ga 117, 210 SE2d 659, affirmed.

Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens concluded that:

(1) The punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments.

(a) The Eighth Amendment, which has been interpreted in a flexible and dynamic manner to accord with evolving standards of decency, forbids the use of punishment that is "excessive" either because it involves the unnecessary and wanton infliction of pain or because it is grossly disproportionate to the severity of the crime.

(b) Though a legislature may not impose excessive punishment, it is not required to select the least severe penalty possible, and a heavy burden rests upon those attacking its judgment.

(c) The existence of capital punishment was accepted by the Framers of the Constitution, and for nearly two centuries this Court has recognized that capital punishment for the crime of murder is not invalid per se.

(d) Legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency; and the argument that such standards require that the Eighth Amendment be construed as prohibiting the death penalty has been undercut by the fact that in the four years since Furman, supra, was decided, Congress and at least 35 States have enacted new statutes providing for the death penalty.

(e) Retribution and the possibility of deterrence of capital crimes by prospective offenders are not impermissible considerations for a legislature to weigh in determining whether the death penalty should be imposed, and it cannot be said that Georgia's legislative judgment that such a penalty is necessary in some cases is clearly wrong.

(f) Capital punishment for the crime of murder cannot be viewed as invariably disproportionate to the severity of that crime.

2. The concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures

that the sentencing authority is given adequate information and guidance, concerns 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 that information.

3. The Georgia statutory system under which petitioner was sentenced to death is constitutional. The new procedures on their face satisfy the concerns of Furman, since before the death penalty can be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant, and the State Supreme Court thereafter reviews the comparability of 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. Petitioner's contentions that the changes in Georgia's sentencing procedures have not removed the elements of arbitrariness and capriciousness condemned by Furman are without merit.

(a) The opportunities under the Georgia scheme for affording an individual defendant mercy—whether through the prosecutor's unfettered authority to select those whom he wishes to prosecute for capital offenses and to plea bargain with them; the jury's option to convict a defendant of a lesser included offense; or the fact that the Governor or pardoning authority may commute a death sentence—do not render the Georgia statute unconstitutional.

(b) Petitioner's arguments that certain statutory aggravating circumstances are too broad or vague lack merit, since they need not be given overly broad constructions or have been already narrowed by judicial construction. One such provision was held impermissibly vague by the Georgia Supreme Court. Petitioner's argument that the sentencing procedure allows for arbitrary grants of mercy reflects a misinterpretation of Furman and ignores the reviewing authority of the Georgia Supreme Court to determine whether each death sentence is proportional to other sentences imposed for similar crimes. Petitioner also urges that the scope of the evidence and argument that can be considered at the presentence hearing is too wide, but it is desirable for a jury to have as much information as possible when it makes the sentencing decision.

(c) The Georgia sentencing scheme also provides for automatic sentence review by the Georgia Supreme Court to safeguard against prejudicial or arbitrary factors. In this very case the court vacated petitioner's death sentence for armed robbery as an excessive penalty.

Mr. Justice White, joined by The Chief Justice and Mr. Justice Rehnquist, concluded that:

1. Georgia's new statutory scheme, enacted to overcome the constitutional deficiencies found in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726, to exist under the old system, not only guides the jury in its exercise of discretion as to whether or not it will impose the death penalty for first-degree murder, but also gives the Georgia Supreme Court the power and imposes the obligation to decide whether in fact the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion. If that court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish that the Georgia Supreme Court failed properly to perform its task in the instant case or that it is incapable of performing its task adequately in all cases. Thus the death penalty may be carried out under the Georgia legislative scheme consistently with the Furman decision.

2. Petitioner's argument that the prosecutor's decisions in plea bargaining or in declining to charge capital murder are standardless and will result in the wanton or freakish imposition of the death penalty condemned in Furman, is without merit, for the assumption cannot be made that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and

the likelihood that a jury would impose the death penalty if it convicts; the standards by which prosecutors decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence.

3. Petitioner's argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment is untenable for the reasons stated in Mr. Justice White's dissent in Roberts v Louisiana, post, p 337, 49 L Ed 2d 974.

Mr. Justice Blackmun concurred in the judgment. See Furman v Georgia, 408 US, at 405–414 (Blackmun, J., dissenting), and id., at 375 (Burger, C. J., dissenting); id., at 414 (Powell, J., dissenting); id., at 465, 33 L Ed 2d 346, 92 S Ct 2726 (Rehnquist, J., dissenting).

Judgment of the Court, and opinion of Stewart, Powell, and Stevens, JJ., announced by Stewart, J. Burger, C. J., and Rehnquist, J., filed a statement concurring in the judgment, post, p 226, 49 L Ed 2d, p 904. White, J., filed an opinion concurring in the judgment, in which Burger, C. J., and Rehnquist, J., joined, post, p 207, 49 L Ed 2d, p 893. Blackmun, J., filed a statement concurring in the judgment, post, p 227, 49 L Ed 2d, p 904. Brennan, J., post, p 227, 49 L Ed 2d, p 904, and Marshall, J., post, p 231, 49 L Ed 2d, 907, filed dissenting opinions.

APPEARANCES OF COUNSEL

G. Hughel Harrison argued the cause for petitioner.

G. Thomas Davis argued the cause for respondent.

Briefs of Counsel, p 1410, infra

SEPARATE OPINIONS

[428 US 158]

Judgment of the Court, and opinion of Mr. Justice **Stewart**, Mr. Justice **Powell**, and Mr. Justice **Stevens**, announced by Mr. Justice **Stewart**.

[1a] 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.

[428 US 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 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio

Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974 (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

[428 US 160]

and abrasions about the face and head which probable 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.[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.

[428 US 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

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.

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 SE2d 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.[2] The death

[428 US 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 SE2d, 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 US 1082, 47 L Ed 2d 93, 96 S Ct 1090 (1976).

II

Before considering the issues presented it is necessary to understand the Georgia statutory scheme for the imposition of the death penalty.[3] The Georgia statute, as amended after our decision in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972), retains the death penalty for six categories of crime: murder,[4]

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.

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.

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.

kidnaping for ransom or where
[428 US 163]
the victim is harmed, armed robbery,[5] rape, treason, and aircraft hijacking.[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 SE2d 862 (1948). See Linder v State, 132 Ga App 624, 625, 208 SE2d 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
[428 US 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 644, 647–650, 220 SE2d 922, 925–926 (1975).[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 SE2d 12, 17 (1974).[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

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

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."

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).

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").

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 SE2d 900 (1975).

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

[428 US 165]

in the statute.[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

[428 US 166]

impose that sentence. § 26-3102 (Supp 1975). If the verdict is death the jury or judge must specify the aggravating circumstance(s) found. § 27-2534.1(c) (Supp 1975). In jury cases, the trial judge is bound by the jury's recommended sentence. §§ 26-3102, 27-2514 (Supp 1975).

In addition to the conventional appellate process available in all criminal cases, provision is made for spe-

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 SE2d 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.'"

cial 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

[428 US 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 1975).[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 6½-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

[428 US 168]

the defendant's 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.[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 Part IV of this opinion, we will consider the sentence of death imposed under the Georgia statutes at issue in this case.

[2a] 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

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).

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).

was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment.[12] But until Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (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

[428 US 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;[13] two Justices would have reached the opposite conclusion;[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.[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.[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

[428 US 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.[17]

12. Louisiana ex rel. Francis v Resweber, 329 US 459, 464, 91 L Ed 422, 67 S Ct 374 (1947); In re Kemmler, 136 US 436, 447, 34 L Ed 519, 10 S Ct 930 (1890); Wilkerson v Utah, 99 US 130, 134–135, 25 L Ed 345 (1879). See also McGautha v California, 402 US 183, 28 L Ed 2d 711, 91 S Ct 1454 (1971); Witherspoon v Illinois, 391 US 510, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368 (1968); Trop v Dulles, 356 US 86, 100, 2 L Ed 2d 630, 78 S Ct 590 (1958) (plurality opinion).

13. 408 US, at 375, 33 L Ed 2d 346, 92 S Ct 2726 (Burger, C. J., dissenting); id., at 405, 33 L Ed 2d 346, 92 S Ct 2726 (Blackmun, J., dissenting); id., at 414, 33 L Ed 2d 346, 92 S Ct 2726 (Powell, J., dissenting); id., at 465, 33 L Ed 2d 346, 92 S Ct 2726 (Rehnquist, J., dissenting).

14. Id., at 257, 33 L Ed 2d 346, 92 S Ct 2726 (Brennan, J., concurring); id., at 314, 33 L Ed 2d 346, 92 S Ct 2726 (Marshall, J., concurring).

15. Id., at 240, 33 L Ed 2d 346, 92 S Ct 2726 (Douglas, J., concurring); id., at 306, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring); id., at 310, 33 L Ed 2d 346, 92 S Ct 2726 (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.

16. 408 US, at 316–328, 33 L Ed 2d 346, 92 S Ct 2726 (Marshall, J., concurring).

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

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 US 130, 136, 25 L Ed 345 (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 US 436, 447, 34 L Ed 519, 10 S Ct 930 (1890) ("Punishments are cruel when they involve torture or a lingering death . . ."). See also Louisiana ex rel. Francis v Resweber, 329 US 459, 464, 91 L Ed 422, 67 S Ct 374 (1947) (second attempt at electrocution found not to violate the

[428 US 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 US 349, 373, 54 L Ed 793, 30 S Ct 544 (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 378, 54 L Ed 793, 30 S Ct 544. See also Furman v Georgia, 408 US, at 429–430, 33 L Ed 2d 346, 92 S Ct 2726 (Powell, J., dissenting); Trop v Dulles, 356 US 86, 100–101, 2 L Ed 2d 630, 78 S Ct 590 (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 US, at 366, 54 L Ed 793, 30 S Ct 544, 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 368, 54 L Ed 793, 30 S Ct 544. 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

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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.

to even its offending citizens from the practice

[428 US 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 366–367, 54 L Ed 793, 30 S Ct 544.[18]

Later, in Trop v Dulles, supra, 2 L Ed 2d 630, 78 S Ct 590, 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 US, at 100, 2 L Ed 2d 630, 78 S Ct 590.

The substantive limits imposed by the Eighth Amendment on what can be made criminal and punished were discussed in Robinson v California, 370 US 660, 8 L Ed 2d 758, 82 S Ct 1417 (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 667, 8 L Ed 2d 758, 82 S Ct 1417. Most recently, in Furman v Georgia, supra, 33 L Ed 2d 346, 92 S Ct 2726, 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

[428 US 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 101, 2 L Ed 2d 630, 78 S Ct 590. See also Jackson v Bishop, 404 F2d 571, 579 (CA8 1968). Cf. Robinson v California, supra, at 666, 8 L Ed 2d 758, 82 S Ct 1417. 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 175–176, 49 L Ed 2d 875–876 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 100, 2 L Ed 2d 630, 78 S Ct 590 (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

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 US, at 377, 54 L Ed 793, 30 S Ct 544.

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 392–393, 33 L Ed 2d 346, 92 S Ct 2726 (Burger, C. J., dissenting). See Wilkerson v Utah, 99 US, at 136, 25 L Ed 345; Weems v United States, supra, at 381, 54 L Ed 793, 30 S Ct 544. Second, the punishment must not be grossly out of proportion to the severity of the crime. Trop v Dulles, supra, at 100, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion) (dictum); Weems v United States, supra, at 367, 54 L Ed 793, 30 S Ct 544.

[428 US 174]

B

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

> "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 US, at 313–314, 33 L Ed 2d 346, 92 S Ct 2726 (White, J., concurring).

See also id., at 433, 33 L Ed 2d 346, 92 S Ct 2726 (Powell, J., dissenting).[19]

But, while we have an obligation to insure that constitutional

[428 US 175]

bounds 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 US 494, 525, 95 L Ed 1137, 71 S Ct 857 (1951) (Frank-

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 US 349, 371–373, 54 L Ed 793, 30 S Ct 544 (1910); Furman v Georgia, 408 US, at 258–269, 33 L Ed 2d 346, 92 S Ct 2726 (Brennan, J., concurring). Robinson v California, 370 US 660, 8 L Ed 2d 758, 82 S Ct 1417 (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 666, 8 L Ed 2d 758, 82 S Ct 1417. 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, No. 554, OT 1961, p 15.

furter, J., concurring in affirmance of judgment).[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."

[428 US 176]

Furman v Georgia, supra, at 383, 33 L Ed 2d 346, 92 S Ct 2726 (Burger, C.J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system, id., at 465–470, 33 L Ed 2d 346, 92 S Ct 2726 (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 US 386, 393, 2 L Ed 2d 1405, 78 S Ct 1280 (1958). Cf. Robinson v California, 370 US, at 664–665, 8 L Ed 2d 758, 82 S Ct 1417; Trop v Dulles, 356 US, at 103, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion); In re Kemmler, 136 US, at 447, 34 L Ed 519, 10 S Ct 930. 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 US 514, 533, 20 L Ed 2d 1254, 88 S Ct 2145 (1968). 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 461–462, 33 L Ed 2d 346, 92 S Ct 2726 (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

[428 US 177]

imposed a mandatory death sentence on all convicted

20. See also Furman v Georgia, supra, at 411, 33 L Ed 2d 346, 92 S Ct 2726 (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."

murderers. McGautha v California, 402 US 183, 197–198, 28 L Ed 2d 711, 91 S Ct 1454 (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 199–200, 28 L Ed 2d 711, 91 S Ct 1454. See Woodson v North Carolina, post, at 289–292, 49 L Ed 2d 944, 96 S Ct 2978.

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

[428 US 178]

often expressly, has recognized that capital punishment is not invalid per se. In Wilkerson v Utah, 99 US, at 134–135, 25 L Ed 345, 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, 136 US, at 447, 34 L Ed 519, 10 S Ct 930, 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 US, at 464, 91 L Ed 422, 67 S Ct 374, 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 US, at 99, 2 L Ed 2d 630, 78 S Ct 590, 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."

[428 US 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.[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.[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[23] have enacted new statutes that provide for the

[428 US 180]

death penalty for at least some crimes that result in the death of another person. And the Congress of the United

21. See concurring opinions of Mr. Justice Brennan and Mr. Justice Marshall, 408 US, at 257 and 314, 33 L Ed 2d 346, 92 S Ct 2726.

22. See concurring opinions of Mr. Justice Douglas, Mr. Justice Stewart, and Mr. Justice White, 408 US, at 240, 306, and 310, 33 L Ed 2d 346, 92 S Ct 2726.

23. Ala HB 212, §§ 2-4, 6-7 (1975); Ariz Rev Stat Ann §§ 13-452 to 13-454 (Supp 1973); Ark Stat Ann § 41-1706 (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); NH Rev Stat Ann § 630:1 (1974); NM Stat Ann § 40A-29-2 (Supp 1975); NY Penal Law § 60.06 (1975); NC 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; RI Gen Laws Ann § 11-23-2 (Supp 1975); SC 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).

States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death.[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

[428 US 181]

itself has not been rejected by the elected representatives of the people.

In the only statewide 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 P2d 880, cert denied, 406 US 958, 32 L Ed 2d 344, 92 S Ct 2060 (1972), that the death penalty violated the California Constitution.[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 US, at 439–440, 33 L Ed 2d 346, 92 S Ct 2726 (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 US 510, 519 n 15, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368 (1968). It may be true that evolving standards have influenced juries in

[428 US 182]

recent decades to be more discriminating in imposing the sentence of death.[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 388, 33 L Ed 2d 346, 92 S Ct 2726 (Burger,

24. Antihijacking Act of 1974, 49 USC §§ 1472(i), (n) (1970 ed Supp IV) [49 USCS §§ 1472(i), (n).]

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 339 NE2d 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).

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 295–296, n 31, 49 L Ed 2d 944, 96 S Ct 2978.

C.J., dissenting). Indeed, the actions of juries in many States since Furman is 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,[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 US, at 100, 2 L Ed 2d 630, 78 S Ct 590. Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," Furman

[428 US 183]

v Georgia, supra, at 451. 33 L Ed 2d 346, 92 S Ct 2726 (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 US, at 135–136, 25 L Ed 345; In re Kemmler, 136 US, at 447, 34 L Ed 519, 10 S Ct 930.

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.[28]

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct.[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 308, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring).

"Retribution is no longer the dominant objective of the criminal law," Williams v New York, 337 US 241, 248, 93 L Ed 1337, 69 S Ct 1079 (1949), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.

[428 US 184]

Furman v Georgia, 408 US, at 394–395, 33 L Ed 2d 346, 92 S Ct 2726 (Burger, C.J., dissenting); id., at 452–454, 33 L Ed 2d 346, 92 S Ct 2726 (Powell, J., dissenting); Powell v Texas, 392 US, at 531, 535–536, 20 L Ed 2d 1254, 88 S Ct 2145. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief

27. Department of Justice, national Prisoner Statistic Bulletin, Capital Punishment 1974, pp 1, 26–27 (Nov. 1975).

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 P2d 880, 896, cert denied, 406 US 958, 32 L Ed 2d 344, 92 S Ct 2060 (1972); Commonwealth v O'Neal, supra, at ——, 339 NE2d, at 685–686.

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

that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.[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.[31] The results

[428 US 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 25–26 (1974).

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties,[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

[428 US 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

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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 wrong doing: 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 wrong-doer deserves it, irrespective of whether it is a 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.

31. See, e.g., Peck, The Deterrent Effect of Capital Punishment: Ehrlich and His Critics, 85 Yale LJ 359 (1976); Baldus & Cole, A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale LJ 170 (1975); Bowers & Pierce, The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment, 85 Yale LJ 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).

32. See, e.g., The Death Penalty in America supra, at 258–332; Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd 8932.

decision to act.[33] And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.[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 403–405, 33 L Ed 2d 346, 92 S Ct 2726 (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

[428 US 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 US, at 286–291, 33 L Ed 2d 346, 92 S Ct 2726 (Brennan, J., concurring); id., at 306, 33 L Ed 2d 346, 92 S Ct 2726 (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 US 45, 71, 77 L Ed 158, 53 S Ct 55, 84 ALR 527 (1932); Reid v Covert, 354 US 1, 77, 1 L Ed 2d 1148, 77 S Ct 1222 (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,[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

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.

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.

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.

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.

[428 US 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 US, at 313, 33 L Ed 2d 346, 92 S Ct 2726 (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 309–310, 33 L Ed 2d 346, 92 S Ct 2726. (Stewart, J., concurring).[36]

[428 US 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 US 51, 55, 82 L Ed 43, 58 S Ct 59 (1937). See also Williams v Oklahoma, 358 US 576, 585, 3 L Ed 2d 516, 79 S Ct 421 (1959); Williams v New York, 337 US, at 247, 93 L Ed

36. This view was expressed by other Members of the Court who concurred in the judgments. See 408 US, at 255–257, 33 L Ed 2d 346, 92 S Ct 2726 (Douglas, J.); id., at 291–295, 33 L Ed 2d 346, 92 S Ct 2726 (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 even-handed justice; . . . that the selection process has followed no rational pattern." Id., at 398–399, 33 L Ed 2d 346, 92 S Ct 2726 (Burger, C. J., dissenting).

1337, 69 S Ct 1079.[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 (Approved 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).[38]

[428 US 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.' "[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.[40] This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure—one in which the

[428 US 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 that 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 preju-

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. Fed Rule Crim Proc 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).

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 303–305, 49 L Ed 2d 944, 96 S Ct 2978.

39. Witherspoon v Illinois, 391 US, at 519 n 15, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368, quoting Trop v Dulles, 356 US, at 101, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion). See also Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd 8932, ¶ 571.

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 US 123, 20 L Ed 2d 476, 88 S Ct 1620 (1968); Jackson v Denno, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205 (1964).

dicial 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 US 554, 567–569, 17 L Ed 2d 606, 87 S Ct 648 (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

[428 US 192]

system is more likely to ensure elimination of the constitutional deficiencies identified in Furman.[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 46–47 (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 correctible. 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

[428 US 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

41. In United States v Jackson, 390 US 570, 20 L Ed 2d 138, 88 S Ct 1209 (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 581, 20 L Ed 2d 138, 88 S Ct 1209.

fixed rules of law.[42] See Gasoline Products Co. v Champlin Refining Co. 283 US 494, 498, 75 L Ed 1188, 51 S Ct 513 (1931); Fed Rul 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,[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).[44] While such standards are by

[428 US 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

[428 US 195]

called capricious or arbitrary.[45] Where the sentencing au-

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 A2d 824 (1965).

43. See McGautha v California, 402 US, at 204–207, 28 L Ed 2d 711, 91 S Ct 1454; Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd 8932, ¶ 595.

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).

45. As Mr. Justice Brennan noted in McGautha v California, supra, at 285–286 28 L Ed 2d 711, 91 S Ct 1454 (dissenting):
"[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."

thority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

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

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

[428 US 196]
B

[1b] 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 nar-

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.

47. In McGautha v California, supra, 28 L Ed 2d 711, 91 S Ct 1454, 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.

row the class of murderers subject to capital punishment by specifying 10

[428 US 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.[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).[49] As a result, while

[428 US 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 SE2d 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

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

49. See Moore v State, 233 Ga 861, 865, 213 SE2d 829, 832 (1975).

from the many cases in which it is not." 408 US, at 313, 33 L Ed 2d 346, 92 S Ct 2726 (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.

[428 US 199]
1

[3a] 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.[50]

[428 US 200]
2

The petitioner further contends that the capital-sentencing procedures adopted by Georgia in response

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 280, 49 L Ed 2d 944, 96 S Ct 2978, and Roberts v Louisiana, post, p 325, 49 L Ed 2d 974, 96 S Ct 3001. 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.

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.

[428 US 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.[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.[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 SE2d 577 (1974), and that homicide was a horrifying torture-murder.[53]

[428 US 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 ju-

51. In light of the limited grant of certiorari, see supra, at 162, 49 L Ed 2d, 868. 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.

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 255-256. 49 L Ed 2d 913, 96 S Ct 2960.

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 SE2d 258 (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 SE2d 810 (1974) (found to have committed a capital felony—armed robbery—in the course of the murder, § 27-2534.1(b)(2)).

ries.[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 impermissably vague in Arnold v State, 236 Ga 534, 540, 224 SE2d 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 to 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

[428 US 203]

Chenault v State, 234 Ga 216, 215 SE2d 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 SE2d 258, 269 (1975).[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 198–199, 49 L Ed 2d 888–889. 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 as such a hearing and to approve open and far-ranging argument. See, e. g., Brown v State, 235 Ga 644, 220 SE2d 922 (1975). So long as the

[428 US 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 de-

54. The petitioner also attacks § 27-2534.1(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 255–256, 49 L Ed 2d 913, 96 S Ct 2960.

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.

cision. See supra, at 189–190, 49 L Ed 2d 883–884, supra.

3

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).[56] In performing

[428 US 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 SE2d, 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 SE2d 829, 832 (1975). See also Jarrell v State, supra, at 425, 216 SE2d, at 270 (standard is whether "juries generally throughout the state have imposed the death penalty"); Smith v State, 236 Ga 12, 24, 222 SE2d 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 SE2d, 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 co[illegible]ncluded that the death senten[illegible]posed in this case for that cri[illegible]ere "unusual in that they ar[illegible]ly imposed for [armed robbery] [illegible] under the test provided by s[illegible] . . . they must be considered [illegible]cessive or

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. §§ 27-2537(f)–(h) (Supp 1975). See generally supra, at 166–168, 49 L Ed 2d 871.

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 [illegible]eorgia uses for comparative purposes. [illegible]rgia court has the authority to conside[illegible]ases, see Ross v State, 233 Ga 361, 36[illegible] SE2d 356, 359 (1974), and it does cons[illegible]ealed murder cases where a life sentenc[illegible]been imposed. We do not think that the peti[illegible]er's argument establishes that the Georgia c[illegible]rts 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.

cision. See supra, at 189–190, 49 L Ed 2d 883–884, supra.

3

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).[56] In performing

[428 US 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 SE2d, 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 SE2d 829, 832 (1975). See also Jarrell v State, supra, at 425, 216 SE2d, at 270 (standard is whether "juries generally throughout the state have imposed the death penalty"); Smith v State, 236 Ga 12, 24, 222 SE2d 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 SE2d, 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

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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 SE2d 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 courts 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.

disproportionate to the penalties imposed in similar cases." 233
[428 US 206]
Ga, at 127, 210 SE2d, 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 SE2d 810, 814 (1974); Jarrell v State, 234 Ga, at 424–425, 216 SE2d, at 270 (1975). See Dorsey v State, 236 Ga 521, 225 SE2d 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
[428 US 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.

Mr. Justice **White**, with whom The **Chief Justice** and Mr. Justice **Rehnquist** join, concurring in the judgment.

[1c] In Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972), this Court held the death penalty as then administered in Georgia to be unconstitutional. That same year the Georgia Legislature enacted a new statutory scheme under which the death penalty may be imposed for several offenses, including murder. The issue in this case is whether the death penalty imposed for murder on petitioner Gregg under the new Georgia statutory scheme may constitutionally be carried out. I agree that it may.

I

Under the new Georgia statutory scheme a person convicted of murder may receive a sentence either of death or of life imprisonment. Ga Code Ann § 26-1101 (1972).[1] Under Georgia Code Ann § 26-3102 (Supp 1975), the sentence will be life imprisonment unless the jury at a separate evidentiary proceeding immediately following the verdict finds unanimously and beyond a reasonable doubt at least one statutorily defined "aggravating circumstance."[2]

1. Section 26-1101 provides, as follows:

"Murder.

"(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."

The death penalty may also be imposed for kidnaping, Ga Code Ann § 26-1311; armed robbery, § 26-1902; rape, § 26-2001; treason, § 26-2201; and aircraft hijacking, § 26-3301.

2. Section 26-3102 (Supp 1975) provides:

"Capital offenses; jury verdict and sentence.

"Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Georgia Laws, 1973, Act No. 74, p 162, provides:

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge 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 such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

The aggravating circumstances are:

"(1) The offense of murder, rape, armed robbery,

[428 US 209]

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

[428 US 210]

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.

[428 US 211]

"(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." § 27-2534.1(b) (Supp 1975).

Having found an aggravating circumstance, however, the jury is not required to impose the death penalty. Instead, it is merely authorized to impose it after considering evidence of "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the [enumerated] statutory aggravating circumstances . . ." § 27-2534.1(b) (Supp 1975). Unless the jury unanimously determines that the death penalty should be imposed, the defendant will be sentenced to life imprisonment. In the event that the jury does impose the death penalty, it must designate in writing the aggravating circumstance which it found to exist beyond a reasonable doubt.

An important aspect of the new

Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed. To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionnaire. § 27-2537(a) (Supp 1975). The questionnaire contains, inter alia, six questions designed to disclose whether race played a role in the case and one question asking the trial judge whether the evidence forecloses "all doubt respecting the defendant's

[428 US 212]

guilt."

In deciding whether the death penalty is to be sustained in any given case, the court shall determine:

> "(1) Whether the sentence of death was imposed 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. . . ."

In order that information regarding "similar cases" may be before the court, the post of Assistant to the Supreme Court was created. The Assistant must "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate." § 27-2537(f).[3] The court is required to include in its decision a reference to "those similar cases which it took into consideration." § 27-2537(e).

II

Petitioner Troy Gregg and a 16-year-old companion, Sam Allen, were hitchhiking from Florida to Asheville, N. C., on November 21, 1973. They were picked up in an automobile driven by Fred Simmons and Bob Moore, both of whom were drunk. The car broke down and Simmons purchased a new one—a 1960 Pontiac—using

[428 US 213]

part of a large roll of cash which he had with him. After picking up another hitchhiker in Florida and dropping him off in Atlanta, the car proceeded north to Gwinnett County, Ga., where it stopped so that Moore and Simmons could urinate. While they were out of the car Simmons was shot in the eye and Moore was shot in the right cheek and in the back of the head. Both died as a result.

On November 24, 1973, at 3 p.m., on the basis of information supplied by the hitchhiker, petitioner and Allen were arrested in Asheville, N. C. They were then in possession of the car which Simmons had purchased; petitioner was in possession of the

3. Section 27-2537(g) provides:

"The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence. . . ."

gun which had killed Simmons and Moore and $107 which had been taken from them; and in the motel room in which petitioner was staying was a new stereo and a car stereo player.

At about 11 p.m., after the Gwinnett County police had arrived, petitioner made a statement to them admitting that he had killed Moore and Simmons, but asserting that he had killed them in self-defense and in defense of Allen. He also admitted robbing them of $400 and taking their car. A few moments later petitioner was asked why he had shot Moore and Simmons and responded: "By God, I wanted them dead."

At about 1 o'clock the next morning, petitioner and Allen were released to the custody of the Gwinnett County police and were transported in two cars back to Gwinnett County. On the way, at about 5 a.m., the car stopped at the place where Moore and Simmons had been killed. Everyone got out of the car. Allen was asked, in petitioner's presence, how the killing occurred. He said that he had been sitting in the back seat of the 1960 Pontiac and was about half asleep. He woke up when the car stopped. Simmons and Moore got out, and as soon as they did petitioner turned around and told Allen: "Get out, we're going to rob them." Allen said that he

[428 US 214]

got out and walked toward the back of the car, looked around and could see petitioner, with a gun in his hand, leaning up against the car so he could get a good aim. Simmons and Moore had gone down the bank and had relieved themselves and as they were coming up the bank petitioner fired three shots. One of the men fell, the other staggered. Petitioner then circled around the back and approached the two men, both of whom were now lying in the ditch, from behind. He placed the gun to the head of one of them and pulled the trigger. Then he went quickly to the other one and placed the gun to his head and pulled the trigger again. He then took the money, whatever was in their pockets. He told Allen to get in the car and they drove away.

When Allen had finished telling this story, one of the officers asked petitioner if this was the way it had happened. Petitioner hung his head and said that it was. The officer then said: "You mean you shot these men down in cold blooded murder just to rob them," and petitioner said yes. The officer then asked him why and petitioner said he did not know. Petitioner was indicted in two counts for murder and in two counts for robbery.

At trial, petitioner's defense was that he had killed in self-defense. He testified in his own behalf and told a version of the events similar to that which he had originally told to the Gwinnett County police. On cross-examination, he was confronted with a letter to Allen recounting a version of the events similar to that to which he had just testified and instructing Allen to memorize and burn the letter. Petitioner conceded writing the version of the events, but denied writing the portion of the letter which instructed Allen to memorize and burn it. In rebuttal, the State called a handwriting expert who testified that the entire letter was written by the same person.

[428 US 215]

The jury was instructed on the ele-

ments of murder[4] and robbery. The trial judge gave an instruction on self-defense, but refused to submit the lesser included

[428 US 216]

offense of manslaughter to the jury. It returned verdicts of guilty on all counts.

No new evidence was presented at the sentencing proceeding. However, the prosecutor and the attorney for petitioner each made arguments to the jury on the issue of punishment. The prosecutor emphasized the strength of the case against petitioner and the fact that he had murdered in order to eliminate the witnesses to the robbery. The defense attorney emphasized the possibility that a mistake had been made and that petitioner was not guilty. The trial judge instructed the jury on

[428 US 217]

their sentencing function and in so doing submitted to them three statu-

4. The court said:

"And, I charge you that our law provides, in connection with the offense of murder the following. 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 of the circumstances of the killing show an abandoned and malignant heart.

"Section B of this Code Section, our law provides that 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.

"Now, then, I charge you that if you find and believe beyond a reasonable doubt that the defendant did commit the homicide in the two counts alleged in this indictment, at the time he was engaged in the commission of some other felony, you would be authorized to find him guilty of murder.

"In this connection, I charge you that in order for a homicide to have been done in the perpetration of a felony, there must be some connection between the felony and the homicide. The homicide must have been done in pursuance of the unlawful act not collateral to it. It is not enough that the homicide occurred soon or presently after the felony was attempted or committed, there must be such a legal relationship between the homicide and the felony that you find that the homicide occurred by reason of and a part of the felony or that it occurred before the felony was at an end, so that the felony had a legal relationship to the homicide and was concurrent with it in part at least, and a part of it in an actual and material sense. A homicide is committed in the perpetration of a felony when it is committed by the accused while he is engaged in the performance of any act required for the full execution of such felony.

"I charge you that if you find and believe beyond a reasonable doubt that the homicide alleged in this indictment was caused by the defendant while he, the said accused was in the commission of a felony as I have just given you in this charge, you would be authorized to convict the defendant of murder.

"And this you would be authorized to do whether the defendant intended to kill the deceased or not. A homicide, although unintended, if committed by the accused at the time he is engaged in the commission of some other felony constitutes murder.

"In order for a killing to have been done in perpetration or attempted perpetration of a felony, or of a particular felony, there must be some connection as I previously charged you between the felony and the homicide.

"Before you would be authorized to find the defendant guilty of the offense of murder, you must find and believe beyond a reasonable doubt that the defendant did, with malice aforethought either express or implied cause the deaths of [Simmons or Moore] or you must find and believe beyond a reasonable doubt that the defendant, while in the commission of a felony caused the death of these two victims just named.

"I charge you, that if you find and believe that, at any time prior to the date this indictment was returned into this court that the defendant did, in the county of Gwinnett, State of Georgia, with malice aforethought kill and murder the two men just named in the way and manner set forth in the indictment or that the defendant caused the deaths of these two men in the way and manner set forth in the indictment, while he, the said accused was in the commission of a felony, then in either event, you would be authorized to find the defendant guilty of murder."

tory aggravating circumstances. He stated:

"Now, as to counts one and three, wherein the defendant is charged with the murders of—has been found guilty of the murders of [Simmons and Moore], the following aggravating circumstances are some that you can consider, as I say, you must find that these existed beyond a reasonable doubt before the death penalty can be imposed.

"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 involved the depravity of mind of the defendant.

"Now, so far as the counts two and four, that is the counts of armed robbery, of which you have found the defendant guilty, then you may find—inquire into these aggravating circumstances.

"That the offense of armed robbery was committed while the offender was engaged in the commission of two capital felonies, to-wit the murders of [Simmons and Moore] or that the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in the indictment, or three, that the offense of armed robbery was outrageously and wantonly vile, horrible and inhuman in that they involved the depravity of the mind of the defendant.

[428 US 218]

"Now, if you find that there was one or more of these aggravating circumstances existed beyond a reasonable doubt, then and I refer to each individual count, then you would be authorized to consider imposing the sentence of death.

"If you do not find that one of these aggravating circumstances existed beyond a reasonable doubt, in either of these counts, then you would not be authorized to consider the penalty of death. In that event, the sentence as to counts one and three, those are the counts wherein the defendant was found guilty of murder, the sentence could be imprisonment for life." Tr 476–477.

The jury returned the death penalty on all four counts finding all the aggravating circumstances submitted to it, except that it did not find the crimes to have been "outrageously or wantonly vile," etc.

On appeal the Georgia Supreme Court affirmed the death sentences on the murder counts and vacated the death sentences on the robbery counts. 233 Ga 117, 210 SE2d 659 (1974). It concluded that the murder sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor; that the evidence supported the finding of a statutory aggravating factor with respect to the murders; and, citing several cases in which the death penalty had been imposed previously for murders of persons who had witnessed a robbery, held:

"After considering both the crimes and the defendant and after comparing the evidence and the sentences in this case with those of previous murder cases, we are also of the opinion that these two sentences of death are not excessive or disproportionate to the penalties imposed in similar cases

[428 US 219]

which are hereto attached."[5] Id., at 127, 210 SE2d, at 667.

However, it held with respect to the robbery sentences:

"Although there is no indication that these two

[428 US 220]

sentences were imposed under the influence of passion, prejudice or any other arbitrary factor, the sentences imposed here are unusual in that they are rarely imposed for this offense. Thus, under the test provided by statute for comparison (Code Ann § 27-2537(c), (3)), they must be considered to be excessive or disproportionate to the penalties imposed in similar cases." Ibid.

Accordingly, the sentences on the robbery counts were vacated.

III

The threshold question in this case

5. In a subsequently decided robbery-murder case, the Georgia Supreme Court had the following to say about the same "similar cases" referred to in this case:

"We have compared the evidence and sentence in this case with other similar cases and conclude the sentence of death is not excessive or disproportionate to the penalty imposed in those cases. Those similar cases we considered in reviewing the case are: Lingo v State, 226 Ga 496 (175 SE2d 657), Johnson v State, 226 Ga 511 (175 SE2d 840), Pass v State, 227 Ga 730 (182 SE2d 779), Watson v State, 229 Ga 787 (194 SE2d 407), Scott v State, 230 Ga 413 (197 SE2d 338), Kramer v State, 230 Ga 855 (199 SE2d 805), and Gregg v State, 233 Ga 117 (210 SE2d 659).

"In each of the comparison cases cited, the records show that the accused was found guilty of murder of the victim of the robbery or burglary committed in the course of such robbery or burglary. In each of those cases, the jury imposed the sentence of death. In Pass v State, supra, the murder took place in the victim's home, as occurred in the case under consideration.

"We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann § 27-2537(c)(3). Notwithstanding the fact that there have been cases in which robbery victims were murdered and the juries imposed life sentences (see Appendix), the cited cases show that juries faced with similar factual situations have imposed death sentences. Compare Coley v State, 231 Ga 829, 835, supra. Thus the sentence here was not 'wantonly and freakishly imposed' (see above)." Moore v State, 233 Ga 861, 865–866, 213 SE2d 829, 833 (1975).

In another case decided after the instant case the Georgia Supreme Court stated:

"The cases reviewed included all murder cases coming to this court since January 1, 1970. All kidnapping cases were likewise reviewed. The comparison involved a search for similarities in addition to the similarity of offense charged and sentence imposed.

"All of the murder cases selected for comparison involved murders wherein all of the witnesses were killed or an attempt was made to kill all of the witnesses, and kidnapping cases where the victim was killed or seriously injured.

"The cases indicate that, except in some special circumstance such as a juvenile or an accomplice driver of a get-away vehicle, where the murder was committed and trial held at a time when the death penalty statute was effective, juries generally throughout the state have imposed the death penalty. The death penalty has also been imposed when the kidnap victim has been mistreated or seriously injured. In this case the victim was murdered.

"The cold blooded and callous nature of the offenses in this case are the types condemned by death in other cases. This defendant's death sentences for murder and kidnapping are not excessive or disproportionate to the penalty imposed in similar cases. Using the standards prescribed for our review by the statute, we conclude that the sentences of death imposed in this case for murder and kidnapping were not imposed under the influence of passion, prejudice or any other arbitrary factor." Jarrell v State, 234 Ga 410, 425–426, 216 SE2d 258, 270 (1975).

is whether the death penalty may be carried out for murder under the Georgia legislative scheme consistent with the decision in Furman v Georgia, supra. In Furman, this Court held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discriminatorily,[6]

[426 US 221]

wantonly and freakishly,[7] and so infrequently[8] that any given death sentence was cruel and unusual. Petitioner argues that, as in Furman, the jury is still the sentencer; that the statutory criteria to be considered by the jury on the issue of sentence under Georgia's new statutory scheme are vague and do not purport to be all-inclusive; and that, in any event, there are no circumstances under which the jury is required to impose the death penalty.[9] Consequently, the petitioner argues that the death penalty will inexorably be imposed in as discriminatory, standardless, and rare a manner as it was imposed under the scheme declared invalid in Furman.

The argument is considerably overstated. The Georgia Legislature has made an effort to identify those aggravating factors which it considers necessary and relevant to the question whether a defendant convicted of capital murder should be sentenced to death.[10] The

[428 US 222]

jury which imposes sentence is instructed on all statutory aggravating factors which are supported by the evidence, and is told that it may not impose the death penalty unless it unanimously finds at least one of those factors to have been established beyond a reasonable doubt. The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given dis-

6. See Furman v Georgia, 408 US, at 240, 33 L Ed 2d 346, 92 S Ct 2726 (Douglas, J., concurring).

7. See id., at 306, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring).

8. See id., at 310, 33 L Ed 2d 346, 92 S Ct 2726 (White, J., concurring).

9. Petitioner also argues that the differences between murder—for which the death penalty may be imposed—and manslaughter—for which it may not be imposed—are so difficult to define and the jury's ability to disobey the trial judge's instructions so unfettered that juries will use the guilt-determination phase of a trial arbitrarily to convict some of a capital offense while convicting similarly situated individuals only of noncapital offenses. I believe this argument is enormously overstated. However, since the jury has discretion not to impose the death penalty at the sentencing phase of a case in Georgia, the problem of offense definition and jury nullification loses virtually all its significance in this case.

10. The factor relevant to this case is that the "murder . . . was committed while the offender was engaged in the commission of another capital felony." The State in its brief refers to this type of murder as "witness-elimination" murder. Apparently the State of Georgia wishes to supply a substantial incentive to those engaged in robbery to leave their guns at home and to persuade their coconspirators to do the same in the hope that fewer victims of robberies will be killed.

cretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device. There is, therefore, reason to expect that Georgia's current system would escape the infirmities which invalidated its previous system under Furman. However, the Georgia Legislature was not satisfied with a system which might, but also might not, turn out in practice to result in death sentences being imposed with reasonable consistency for certain serious murders. Instead, it gave the Georgia Supreme Court the power and the obligation to perform precisely the task which three Justices of this Court, whose opinions were necessary to the result, performed

[428 US 223]

in Furman: namely, the task of deciding whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion.

In considering any given death sentence on appeal, the Georgia Supreme Court is to determine whether the sentence imposed was consistent with the relevant statutes—i.e., whether there was sufficient evidence to support the finding of an aggravating circumstance. Ga Code Ann § 27-2537(c)(2) (Supp 1975). However, it must do much more than determine whether the penalty was lawfully imposed. It must go on to decide—after reviewing the penalties imposed in "similar cases"—whether the penalty is "excessive or disproportionate" considering both the crime and the defendant. § 27-2537(c)(3) (Supp 1975). The new Assistant to the Supreme Court is to assist the court in collecting the records of "all capital felony cases"[11] in the State of Georgia in which sentence was imposed after January 1, 1970. § 27-2537(f) (Supp 1975). The court also has the obligation of determining whether the penalty was "imposed under the influence of passion, prejudice, or any other arbitrary factor." § 27-2537(c)(1) (Supp 1975). The Georgia Supreme Court has interpreted the appellate review statute to require it to set aside the death sentence whenever juries across the State impose it only rarely for the type of crime in question; but to require it to affirm death sentences whenever juries across the State generally impose it for the crime in question.

[428 US 224]

Thus, in this case the Georgia Supreme Court concluded that the death penalty was so rarely imposed for the crime of robbery that it set aside the sentences on the robbery counts, and effectively foreclosed that penalty from being imposed for that crime in the future under the legislative scheme now in existence. Similarly, the Georgia Supreme Court has determined that juries impose the death sentence too rarely with respect to certain classes of rape. Compare Coley v State, 231 Ga 829, 204 SE2d 612 (1974), with Coker v State, 234 Ga 555, 216 SE2d 782 (1975). However, it concluded that juries "generally throughout the state" have imposed the death penalty for those who murder witnesses to armed robberies. Jarrell v State, 234 Ga 410,

11. Petitioner states several times without citation that the only cases considered by the Georgia Supreme Court are those in which an appeal was taken either from a sentence of death or life imprisonment. This view finds no support in the language of the relevant statutes. Moore v State, 233 Ga, at 863–864, 213 SE2d, at 832.

425, 216 SE2d 258, 270 (1975). Consequently, it affirmed the sentences in this case on the murder counts. If the Georgia Supreme Court is correct with respect to this factual judgment, imposition of the death penalty in this and similar cases is consistent with Furman. Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish, and has not even attempted to establish, that the Georgia Supreme Court failed properly to perform its task in this case or that it is incapable of performing its task adequately in all cases; and this Court should not assume that it did not do so.

[3b] Petitioner also argues that decisions made by the prosecutor—either in negotiating a plea to some offense lesser than capital murder or in simply declining to charge capital murder—are standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in Furman. I address this

[428 US 225]

point separately because the cases in which no capital offense is charged escape the view of the Georgia Supreme Court and are not considered by it in determining whether a particular sentence is excessive or disproportionate.

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

Petitioner's argument that there is an unconstitutional

[428 US 226]

amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punish-

ment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

IV

[2b] For the reasons stated in dissent in Roberts v Louisiana, post, at 350, 49 L Ed 2d 974, 96 S Ct 3001, neither can I agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment.

I therefore concur in the judgment of affirmance.

Statement of The Chief Justice and Mr. Justice Rehnquist:

We concur in the judgment and join the opinion of Mr. Justice White, agreeing with its analysis that Georgia's system of capital punishment comports with

[428 US 227]

the Court's holding in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972).

Mr. Justice Blackmun, concurring in the judgment.

[1d] I concur in the judgment. See Furman v Georgia, 408 US 238, 405–414, 33 L Ed 2d 346, 92 S Ct 2726 (1972) (Blackmun, J., dissenting), and id., at 375, (Burger, C.J., dissenting); id., at 414, (Powell, J., dissenting); id., at 465 (Rehnquist, J., dissenting), 33 L Ed 2d 346, 92 S Ct 2726.

Mr. Justice Brennan, dissenting.*

The Cruel and Unsual Punishments Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[1] The opinions of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens today hold that "evolving standards of decency" require focus not on the essence of the death penalty itself but primarily upon the procedures employed by the State to single out persons to suffer the penalty of death. Those opinions hold further that, so viewed, the Clause invalidates the mandatory infliction of the death penalty but not its infliction under sentencing procedures that Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens conclude adequately safeguard against the risk that the death penalty was imposed in an arbitrary and capricious manner.

In Furman v Georgia, 408 US 238, 257, 33 L Ed 2d 346, 92 S Ct 2726 (1972)(concurring) I read "evolving standards of decency" as requiring focus upon the essence of the death penalty itself and not primarily or solely upon the procedures under

[428 US 228]

which the determination to inflict the penalty upon a particular person was made. I there said:

* Editor's Note: This opinion also applies to Jurek v Texas (No. 75-5394), p 929, infra, and Proffitt v Florida (No. 75-5706), p 913, infra.

1. Trop v Dulles, 356 US 86, 101, 2 L Ed 2d 630, 78 S Ct 590 (1958) (plurality opinion of Warren, C. J.).

"From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.' It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime." Id., at 296, 33 L Ed 2d 346, 92 S Ct 2726.[2]

That continues to be my view. For the Clause forbidding cruel and unusual punishments under our constitutional

[428 US 229]

system of government embodies in unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws. Thus, I too say: "For myself, I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw, and the wheel is the development of moral concepts, or, as stated by the Supreme Court . . . the application of 'evolving standards of decency' . . . ."[3]

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.[4] My opinion in Furman v Georgia concluded that our civilization and the law had progressed to this point and that therefore the punishment of death, for whatever crime and under all circumstances, is "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that conclusion. I emphasize only that foremost among the "moral concepts" recognized in

2. Quoting T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute 15 (1959).

3. Novak v Beto, 453 F2d 661, 672 (CA5 1971) (Tuttle, J., concurring in part and dissenting in part).

4. Tao, Beyond Furman v Georgia: The Need for a Morally Based Decision on Capital Punishment, 51 Notre Dame Law 722, 736 (1976).

our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity. A judicial determination

[428 US 230]

whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the Clause. 408 US, at 270, 33 L Ed 2d 346, 92 S Ct 2726.

I do not understand that the Court disagrees that "[i]n comparison to all other punishments today . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." Id., at 291, 33 L Ed 2d 346, 92 S Ct 2726. For three of my Brethren hold today that mandatory infliction of the death penalty constitutes the penalty cruel and unusual punishment. I perceive no principled basis for this limitation. Death for whatever crime and under all circumstances "is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have rights.' " Id., at 290, 33 L Ed 2d 346, 92 S Ct 2726. Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. Id., at 279, 33 L Ed 2d 346, 92 S Ct 2726.

The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity." Id., at 273, 33 L Ed 2d 346, 92 S Ct 2726. As such it is a penalty that "subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause]."[5] I therefore would hold,

[428 US 231]

on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first."[6]

I dissent, from the judgments in No. 74-6257, Gregg v Georgia, No. 75-5706, Proffitt v Florida, and No. 75-5394, Jurek v Texas, insofar as each upholds the death sentences challenged in those cases. I would set aside the death sentences imposed in those cases as violative of

5. Trop v Dulles, 356 US, at 99, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion of Warren, C. J.).

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

the Eighth and Fourteenth Amendments.

Mr. Justice Marshall, dissenting.*

In Furman v Georgia, 408 US 238, 314, 33 L Ed 2d 346, 92 S Ct 2726 (1972) (concurring), I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view.

I have no intention of retracing the "long and tedious journey," id, at 370, 33 L Ed 2d 346, 92 S Ct 2726, that led to my conclusion in Furman. My sole purposes here are to consider the suggestion that my conclusion in Furman has been undercut by developments since then, and briefly to evaluate the basis for my Brethren's holding that the extinction of life is a permissible form of punishment under the Cruel and Unusual Punishments Clause.

In Furman I concluded that the death penalty is constitutionally invalid for two reasons. First, the death penalty is excessive. Id., at 331–332, 342–359, 33 L Ed 2d 346, 92 S Ct 2726. And

[428 US 232]

second, the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable. Id., at 360–369, 33 L Ed 2d 346, 92 S Ct 2726.

Since the decision in Furman, the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes, and Congress has enacted a law providing the death penalty for air piracy resulting in death. 49 USC §§ 1472(i), (n)(1970 ed, Supp IV) [49 USCS §§ 1472(i), (n)]. I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people. But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an *informed* citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. In Furman, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable. 408 US, at 360–369, 33 L Ed 2d 346, 92 S Ct 2726. A recent study, conducted after the enactment of the post-Furman statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.[1]

Even assuming, however, that the post-Furman enactment of statutes authorizing the death penalty renders the prediction of the views of an informed citizenry an

[428 US 233]

uncertain basis for a constitutional decision, the enactment of those statutes has no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive. An excessive penalty is invalid under the Cruel and Unusual Punishments Clause "even though popular senti-

* Editor's Note: This opinion also applies to Jurek v Texas (No. 75-5394), p 929, infra, and Proffitt v Florida (No. 75-5706), p 913, infra.

1. Sarat & Vidmar, Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis, 1976 Wis L Rev 171.

ment may favor" it. Id., at 331, 33 L Ed 2d 346, 92 S Ct 2726; ante, at 173, 182–183, 49 L Ed 2d 874–875. (opinion of Stewart, Powell, and Stevens, JJ.); Roberts v Louisiana, post, at 353–354, 49 L Ed 2d 974, 96 S Ct 3001 (White, J., dissenting). The inquiry here, then, is simply whether the death penalty is necessary to accomplish the legitimate legislative purposes in punishment, or whether a less severe penalty—life imprisonment—would do as well. Furman, supra, at 342, 33 L Ed 2d 346, 92 S Ct 2726 (Marshall, J., concurring).

The two purposes that sustain the death penalty as nonexcessive in the Court's view are general deterrence and retribution. In Furman, I canvassed the relevant data on the deterrent effect of capital punishment. 408 US, at 347–354, 33 L Ed 2d 346, 92 S Ct 2726.[2] The state of knowledge at that point, after literally centuries of debate, was summarized as follows by a United Nations Committee:

> "It is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime."[3]

The available evidence, I concluded in Furman, was convincing that "capital punishment is not necessary as a deterrent to crime in our society." Id., at 353, 33 L Ed 2d 346, 92 S Ct 2726.

The Solicitor General in his amicus brief in these cases

[428 US 234]

relies heavily on a study by Isaac Ehrlich,[4] reported a year after Furman, to support the contention that the death penalty does deter murder. Since the Ehrlich study was not available at the time of Furman and since it is the first scientific study to suggest that the death penalty may have a deterrent effect, I will briefly consider its import.

The Ehrlich study focused on the relationship in the Nation as a whole between the homicide rate and "execution risk"—the fraction of persons convicted of murder who were actually executed. Comparing the differences in homicide rate and execution risk for the years 1933 to 1969, Ehrlich found that increases in execution risk were associated with increases in the homicide rate.[5] But when he employed the statistical technique of multiple regression analysis to control for the influence of other variables posited to have an impact on the homicide rate,[6] Ehrlich found a negative correlation between changes in the homicide rate and changes in execution risk. His tentative conclusion was that for the period from 1933 to 1967 each additional execution in the

2. See e.g., T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (1959).

3. United Nations, Department of Economic and Social Affairs, Capital Punishment, pt II, ¶ 159, p 123 (1968).

4. I. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death (Working Paper No. 18, National Bureau of Economic Research, Nov. 1973); Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am Econ Rev 397 (June 1975).

5. Id., at 409.

6. The variables other than execution risk included probability of arrest, probability of conviction given arrest, national aggregate measures of the percentage of the population between age 14 and 24, the unemployment rate, the labor force participation rate, and estimated per capita income.

United States might have saved eight lives.[7]

The methods and conclusions of the Ehrlich study

[428 US 235]

have been severely criticized on a number of grounds.[8] It has been suggested, for example, that the study is defective because it compares execution and homicide rates on a nationwide, rather than a state-by-state, basis. The aggregation of data from all States—including those that have abolished the death penalty—obscures the relationship between murder and execution rates. Under Ehrlich's methodology, a decrease in the execution risk in one State combined with an increase in the murder rate in another State would, all other things being equal, suggest a deterrent effect that quite obviously would not exist. Indeed, a deterrent effect would be suggested if, once again all other things being equal, one State abolished the death penalty and experienced no change in the murder rate, while another State experienced an increase in the murder rate.[9]

The most compelling criticism of the Ehrlich study is

[428 US 236]

that its conclusions are extremely sensitive to the choice of the time period included in the regression analysis. Analysis of Ehrlich's data reveals that all empirical support for the deterrent effect of capital punishment disappears when the five most recent years are removed from his time series—that is to say, whether a decrease in the execution risk corresponds to an increase or a decrease in the murder rate depends on the ending point of the sample period.[10] This finding has cast severe doubts on the reliability of Ehrlich's tentative conclusions.[11] Indeed, a recent regression study, based on Ehrlich's theoretical model but using cross-section state data for the years 1950 and 1960, found no support for the conclusion that executions act as a deterrent.[12]

The Ehrlich study, in short, is of little, if any, assistance in assessing the deterrent impact of the death penalty. Accord, Commonwealth v O'Neal, — Mass —, —, 339 NE2d 676, 684 (1975). The evidence I reviewed in Furman[13] remains convincing, in my view, that "capital punishment is not

7. Id., at 398, 414.

8. See Passell & Taylor, The Deterrent Effect of Capital Punishment: Another View (unpublished Columbia University Discussion Paper 74-7509, Mar. 1975), reproduced in Brief for Petitioner App E in Jurek v Texas No. 75-5844, OT 1975; Passell, The Deterrent Effect of the Death Penalty: A Statistical Test, 28 Stan L Rev 61 (1975); Baldus & Cole, A Comparison of the Work of Thorsten Sellin & Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale LJ 170 (1975); Bowers & Pierce, The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment, 85 Yale LJ 187 (1975); Peck, The Deterrent Effect of Capital Punishment: Ehrlich and His Critics, 85 Yale LJ 359 (1976). See also Ehrlich, Deterrence: Evidence and Inference, 85 Yale LJ 209 (1975); Ehrlich, Rejoinder, 85 Yale LJ 368 (1976). In addition to the items discussed in text, criticism has been directed at the quality of Ehrlich's data, his choice of explanatory variables, his failure to account for the interdependence of those variables, and his assumptions as to the mathematical form of the relationship between the homicide rate and the explanatory variables.

9. See Baldus & Cole, supra, at 175–177.

10. Bowers & Pierce, supra, n 8, at 197–198. See also Passell & Taylor, supra, n 8, at 2–66—2–68.

11. See Bowers & Pierce, supra, n 8, at 197–198; Baldus & Cole, supra, n 8, at 181, 183–185; Peck, supra, n 8, at 366–367.

12. Passell, supra, n 8.

13. See also Bailey, Murder and Capital Punishment: Some Further Evidence, 45 Am J Orthopsychiatry 669 (1975); W. Bowers, Executions in America 121–163 (1974).

necessary as a deterrent to crime in our society." 408 US, at 353, 33 L Ed 2d 346, 92 S Ct 2726. The justification for the death penalty must be found elsewhere.

The other principal purpose said to be served by the death penalty is retribution.[14] The notion that retribution

[428 US 237]

can serve as a moral justification for the sanction of death finds credence in the opinion of my Brothers Stewart, Powell, and Stevens, and that of my Brother White in Roberts v Louisiana post, p 337, 49 L Ed 2d 974, 96 S Ct 3001. See also Furman v Georgia, 408 US, at 394–395, 33 L Ed 2d 346, 92 S Ct 2726 (Burger, C. J., dissenting). It is this notion that I find to be the most disturbing aspect of today's unfortunate decisions.

The concept of retribution is a multifaceted one, and any discussion of its role in the criminal law must be undertaken with caution. On one level, it can be said that the notion of retribution or reprobation is the basis of our insistence that only those who have broken the law be punished, and in this sense the notion is quite obviously central to a just system of criminal sanctions. But our recognition that retribution plays a crucial role in determining who may be punished by no means requires approval of retribution as a general justification for punishment.[15] It is the question whether retribution can provide a moral justification for punishment —in particular, capital punishment —that we must consider.

My Brothers Stewart, Powell, and Stevens offer the following explanation of the retributive justification for capital punishment:

> " '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
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> [428 US 238]
>
> 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.' " Ante, at 183, 49 L Ed 2d 880, quoting from Furman v Georgia, supra, at 308, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring).

This statement is wholly inadequate to justify the death penalty. As my Brother Brennan stated in Furman, "[t]here is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders." 408 US, at 303, 33 L Ed 2d 346, 92 S Ct 2726 (concurring).[16] It simply defies belief to suggest that the death penalty is necessary to pre-

14. In Furman, I considered several additional purposes arguably served by the death penalty. 408 US, at 314, 342, 355–358, 33 L Ed 2d 346, 92 S Ct 2726. The only additional purpose mentioned in the opinions in these cases is specific deterrence—preventing the murderer from committing another crime. Surely life imprisonment and, if necessary, solitary confinement would fully accomplish this purpose. Accord, Commonwealth v O'Neal, —— Mass ——, ——, 339 NE2d 676, 685 (1975); People v Anderson, 6 Cal 3d 628, 651, 493 P2d 880, 896, cert denied, 406 US 958, 32 L Ed 2d 344, 92 S Ct 2060 (1972).

15. See, e. g., H. Hart, Punishment and Responsibility 8–10, 71–83 (1968); H. Packer, Limits of the Criminal Sanction 38–39, 66 (1968).

16. See Commonwealth v O'Neal, supra, at 236, 339 NE2d, at 687; Bowers, supra, n 13, at 335; Sellin, supra, n 2, at 79.

vent the American people from taking the law into their own hands.

In a related vein, it may be suggested that the expression of moral outrage through the imposition of the death penalty serves to reinforce basic moral values—that it marks some crimes as particularly offensive and therefore to be avoided. The argument is akin to a deterrence argument, but differs in that it contemplates the individual's shrinking from antisocial conduct, not because he fears punishment, but because he has been told in the strongest possible way that the conduct is wrong. This contention, like the previous one, provides no support for the death penalty. It is inconceivable that any individual concerned about conforming his conduct to what society says is "right" would fail to realize that murder is "wrong" if the penalty were simply life imprisonment.

The foregoing contentions—that society's expression of moral outrage through the imposition of the death penalty pre-empts the citizenry from taking the law into its

[428 US 239]

own hands and reinforces moral values—are not retributive in the purest sense. They are essentially utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think, not necessary to the accomplishment of those results.

There remains for consideration, however, what might be termed the purely retributive justification for the death penalty—that the death penalty is appropriate, not because of its beneficial effect on society, but because the taking of the murderer's life is itself morally good.[17] Some of the language of the opinion of My Brothers Stewart, Powell, and Stevens in No. 74–6257 appears positively to embrace this notion of retribution for its own sake as a justification for capital punishment.[18] They state:

> "[T]he 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." Ante, at 184, 49 L Ed 2d 880–881 (footnote omitted).

[428 US 240]

The plurality then quotes with approval from Lord Justice Denning's remarks before the British Royal Commission on Capital Punishment:

> " 'The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.' " Ante, at 184, n 30, 49 L Ed 2d 881.

Of course, it may be that these statements are intended as no more than observations as to the popular

17. See Hart, supra, n 15, at 72, 74–75, 234–235; Packer, supra, n 15, at 37–39.

18. Mr. Justice White's view of retribution as a justification for the death penalty is not altogether clear. "The widespread reenactment of the death penalty," he states at one point; "answers any claims that life imprisonment is adequate punishment to satisfy the need for reprobation or retribution." Roberts v Louisiana, post, at 354, 49 L Ed 2d 974, 96 S Ct 3001 (White, J., dissenting). But Mr. Justice White later states: "It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons." Post, at 355, 49 L Ed 2d 974.

demands that it is thought must be responded to in order to prevent anarchy. But the implication of the statements appears to me to be quite different—namely, that society's judgment that the murderer "deserves" death must be respected not simply because the preservation of order requires it, but because it is appropriate that society make the judgment and carry it out. It is this latter notion, in particular, that I consider to be fundamentally at odds with the Eighth Amendment. See Furman v Georgia, 408 US, at 343–345, 33 L Ed 2d 346, 92 S Ct 2726 (Marshall, J., concurring). The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty, for as the plurality reminds us, "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society." Ante, at 182, 49 L Ed 2d 880. To be sustained under the Eighth Amendment, the death penalty must "[comport] with the basic concept of human dignity at the core of the Amendment," ibid.; the objective of imposing it must be "[consistent] with our respect for the dignity of [other] men." Ante, at 183, 49 L Ed 2d 880. See Trop v Dulles, 356 US 86, 100, 2 L Ed 2d 630, 78 S Ct 590 (1958)(plurality opinion). Under these standards, the taking of life "because the wrongdoer deserves it" surely must fall, for such a punishment

[428 US 241]

has as its very basis the total denial of the wrongdoer's dignity and worth.[19]

The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments. I respectfully dissent from the Court's judgment upholding the sentences of death imposed upon the petitioners in these cases.

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19. See Commonwealth v O'Neal, supra, at 236, 339 NE2d, at 687; People v Anderson 6 Cal 3d, at 651, 493 P2d, at 896.

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General arguments for and against the death penalty

Deterrence

An argument commonly used in support of capital punishment is that it acts as a deterrent to violent crime. However, detailed research in the USA and other countries has provided no evidence that the death penalty deters crime more effectively than other punishments. In some countries, the number of homicides actually declined after abolition. In Canada, for example, the murder rate fell from 3.09 per 100,000 in 1975 (the year before abolition) to 2.74 in 1983.[1] A United Nations study published in 1980 found that: "Despite much more advanced research efforts mounted to determine the deterrent value of the death penalty, no conclusive evidence has been obtained on its efficacy."[2]

US studies have shown that, under past and present death penalty statutes, the murder rate in death penalty states has differed little from that in other states with similar populations and social and economic conditions.

One of the first to conduct research in this field was Thorsten Sellin, who compared homicide rates from 1920 to 1974 in groups of contiguous US abolitionist and retentionist states with similar social and demographic characteristics. He found that most of these states had similar homicide rates. The rates were unaffected by changes such as the abolition or reintroduction of the death penalty in some states. He found that, where a difference existed, abolitionist states (particularly those which had not had the death penalty over a long

1. A study published in 1983 examined short, medium and long-term homicide rates in 14 countries after they had abolished the death penalty and found that more than half the countries showed a decline in homicides after abolition. It also examined data to see whether homicide rates had fallen more slowly than other crimes, and found that this was not so. Dane Archer, Rosemary Gartner and Marc Beittel, "Homicide and the Death Penalty: A Cross National Test of a Deterrence Hypothesis", *Journal of Criminal Law and Criminology*, vol. 74, 1983, pp. 991-1013.

2. *Capital Punishment: Working Paper Prepared by the Secretariat*, Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August to 5 September 1980. A-CONF. 87-9, para 65.

period) tended to have lower homicide rates than retentionist states.[3]

The relative homicide rates of many of the neighbouring states studied by Sellin and other researchers before 1974 remain similar in the 1980s. For example, the states of Virginia, Washington and Vermont, each of which have the death penalty, had higher homicide rates in 1983 than their neighbouring abolitionist states of West Virginia, Oregon and Maine. North Dakota, a state without the death penalty, had an almost identical homicide rate to the neighbouring death penalty state of South Dakota.

Some research has suggested that the use of the death penalty may even increase the crime rate. William J. Bowers and Glenn L. Pierce analyzed monthly homicide rates from 1907 to 1963 in New York State (which carried out more executions than any other state during this period). They found that there had been, on average, two additional homicides in the month after an execution. They suggested that this momentary rise in homicides might be due to a "brutalizing" effect of executions, similar to the effect of other violent events such as publicized suicides, mass murders and assassinations.[4] Although their findings are not conclusive, similar findings have been made by other studies.[5] A rise in homicides has occurred in other jurisdictions after executions, including Florida after 1979 (see below).

Opinion polls indicate that public support for capital punishment in the USA, which had been declining, increased significantly during the 1970s. This is believed to have been in response to a marked increase in violent crime during the past 25 years. Between 1960 and 1974, after a period of relative stability in the 1950s, the US homicide rate doubled from 4.7 to 9.8 murders per 100,000 people. The rate rose again nationally (by seven to 11 per cent, depending on region) in 1978 and 1979. There was an increase from 21,460 reported homicides in 1979 to 23,000 homicides in 1980.

One of the few studies purporting to show that the death penalty had a special deterrent effect was published by Isaac Ehrlich in 1975. He measured the aggregate number of homicides in the USA for each year from 1933 to 1969 against a range of variables he thought likely to affect the homicide rate, including unemployment and per

3. Thorsten Sellin, "The Death Penalty", *Philadelphia: The American Law Institute, 1959* and *The Sage Library of Social Research*, vol. 102, 1980

4. William J. Bowers and Glenn L. Pierce, "Deterrence or Brutalization: What is the Effect of Executions?", *Crime and Delinquency*, Oct. 1980, pp. 453-484.

5. A monthly time-series analysis of executions and first-degree murders in Chicago, Illinois, from 1915 to 1921, produced findings consistent with those of Bowers and Pierce: William C. Bailey, "Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago", *The Journal of Criminal Law and Criminology*, vol. 74, No. 3, 1983, pp. 827-859.

capita income rates, demographic factors, arrest, conviction and execution rates. By using a complex econometric approach, he concluded that each execution had deterred seven to eight murders that would otherwise have occurred.[6] His findings (which were contrary to all previous studies) roused considerable attention at the time, and were included in an *amicus curiae* brief filed by the US Solicitor General in a death penalty case then pending before the Supreme Court.[7]

However, the overwhelming majority of studies on deterrence conducted after 1975 discredit Ehrlich's findings. Several studies, using his method of analysis, found that his inclusion of the five years from 1964 to 1969 — when homicide rates almost doubled and executions virtually ceased — had produced a distorted statistical effect on his overall findings. When these years were removed from the analysis, the effect of executions on the homicide rate disappeared. These and other studies found that the rise in homicides after 1960 was unrelated to the decline in the use of the death penalty (see below). Ehrlich was found, among other things, to have omitted some important factors from his analysis, such as the relative rates of other crimes, the incidence of gun ownership and the length of prison terms. He had also failed to take account of the relative homicide rates in states which had never had the death penalty and those which (in the 1960s) had only recently ceased to use it. In presenting aggregate data, Ehrlich had also failed to account for possible differences between states in the causes of murder.[8]

Other studies analysing relative crime rates during this period have found that the sharpest increase after 1960 was largely confined to a few states only: those with rapidly growing urban ghetto populations

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6. Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death", *American Economic Review*, 65(3): 387-417, 1975. Ehrlich's analysis was based on the theory that the act of murder depends on the relative "costs" and "benefits" perceived by the potential murderer in response to factors such as unemployment and poverty (which may lead to crimes involving homicides) and the probability of apprehension, conviction and execution. He used complex mathematical equations to measure each variable against the aggregate annual US homicide rates in an attempt to isolate the effect of executions.

7. *Fowler* v. *North Carolina*, 96 s. Ct. 3212 (1976).

8. Major challenges to Ehrlich's work include: William J. Bowers and Glenn L. Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment", *The Yale Law Journal* 85(2), pp. 187-208, 1975; Peter Passell and John Taylor, "The Deterrent Effect of Capital Punishment: Another View", *American Economic Review* 67(3), pp. 445-451, 1977; Lawrence Klein, Brian Forst and Victor Filatov, "The Deterrent Effect of Capital Punishment: An Assessment of the Estimates", in *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, edited by A. Blumstein, J. Cohen and D. Nagin; Washington, DC: National Academy of Sciences, 1978, pp. 336-360).

(such as Michigan, Illinois and parts of the Pacific West).[9] States in which the use of the death penalty had declined after the 1950s showed no greater increase in homicides than states which had never had the death penalty.[10] Were the death penalty to act as a unique deterrent to violent crime, a faster increase would be expected in states where the death penalty had previously been available. Moreover, other crimes increased faster than homicides during this period. Federal Bureau of Investigation (FBI) crime statistics for the years 1960 to 1970 show, for example, that while murders and non-negligent manslaughters increased by 74 per cent during this period, burglaries increased by 142 per cent, car thefts by 183 per cent and larcenies by 245 per cent.[11]

There was also an increase in the 15- to 30-year age group among the general population after 1960, following the post-war birth boom. Youths from their mid-teens to late 20s have been found more likely to commit crimes than any other sector of the population. Males between the ages of 15 and 24, for example, accounted for 44 per cent of homicide arrests during the 1970s; men aged from 18 to 30 were also most likely to be the victims of homicides. The increase in these crime-prone age groups together with the rise in urban populations (and an increase in poverty and unemployment in some areas) are believed to have contributed significantly to the overall rise in crime during this period.

Other factors leading to an increase in homicides must also include the availability of handguns, possession of which quadrupled between 1962 and 1968. Between 1961 and 1970, murders in which firearms were used more than doubled, rising from 2.5 to 6.1 per 100,000 of the population.[12]

It has also been suggested that the increased crime rate may have led to a lower rate of detection as pressures on law enforcement

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9. See Daniel Glaser, "Capital Punishment — Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties", *University of Toledo Law Review*, 10(2), pp. 317-333, 1979. (In this article Glaser examines various factors contributing to the rise in crime in the 1960s and 1970s.)

10. Brian Forst, "The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s", *Minnesota Law Review*, 61(5): 743-767, 1977.

11. Figures taken from FBI Uniform Crime Reports, cited in Klein, Forst and Filatov, "The Deterrent Effect of Capital Punishment" (*op. cit.*).

12. Figures on the 1961 to 1970 increase in firearms murders given by D.P. Phillips (1973) cited in Klein, Forst and Filatov's "The Deterrent Effect of Capital Punishment" (*op. cit.*). The same article also cites a 1969 study by Newton and F.E. Zimring, indicating that the rise in handgun possession contributed to the rise in homicides in the 1960s. See also Gary Kleck, "Capital Punishment and Gun Ownership, and Homicide", *American Journal of Sociology* 84(4), 1979, pp. 882-910.

agencies grew, thus lessening the deterrent effect of any punishment. Statistics show that the rise in crime during the 1960s was accompanied by a drop in the US prison population. There is also evidence that the time served by convicted murderers in prison fell during the 1960s. A study conducted in the late 1970s found that, although the arrest rate for homicides in the USA was high compared to other crimes, the time served in prison (both for homicides and other offences that often result in homicides) had declined in the 10 years from 1960 to 1970: a higher proportion of convicted homicide offenders released in 1970 had served less than five years than similar offenders released in 1960. The research team suggested that lenient prison sanctions, rather than the absence of the death penalty, had contributed to the rise in homicides.[13]

It is also noteworthy that the national homicide rate rose considerably during the economic depression in the 1930s, reaching almost as high a level as in the mid-1970s, despite the high number of executions in most areas during this period.[14] After the 1930s, when the use of the death penalty started to decline, the murder rate did not rise, but declined, remaining at a relatively stable level until the early 1960s.

Recent crime trends

Statistics from the US Justice Department reveal that, nationally, homicides dropped from 23,000 in 1980 to 19,000 in 1983 and declined by a further five per cent in 1984 to 18,050. There was a corresponding fall in most other crimes during this period. The general fall in crime is believed to be due partly to a fall in the number of men in the high crime age groups and partly to an increase in the length of prison terms imposed on convicted offenders. At the end of 1984 there were twice as many people in prison as in 1972, due largely to an increase in the length of sentences and time served.[15]

There is no evidence that the resumption of executions in some states contributed in any way to the fall in homicides (which appears to have levelled off or even decreased in the period 1984 to 1985). In fact, the two states which have carried out the most executions since 1979 — Florida and Georgia — had an increase in homicides in the period immediately following the resumption of executions.

Florida had carried out no executions for nearly 15 years when John Spenkelink was executed in May 1979. Although the murder rate had risen in the late 1960s and early 1970s, in line with the national trend, the three years 1976, 1977 and 1978 had the lowest murder rates on record in the state. However, the three years following the resumption of executions (1980, 1981 and 1982) had the highest murder rates in the state's recent history, with a 28 per cent increase in homicides in 1980 (see Appendix 7). Although the homicide rate fell in 1982 and 1983, it remained higher than in the period immediately before 1979, and rose again slightly in 1984.

In Georgia (where executions resumed in 1983), the homicide rate increased by 20 per cent in 1984, a year in which the national homicide rate fell by five per cent. Although these samples are too small to prove that the death penalty actually increases the rate of homicide, they at least do not show that the homicide rate falls when the death penalty is reintroduced.

Limiting capital crimes

Some government officials have expressed the belief that the death penalty, while having no special deterrent effect on homicides as a whole, should nevertheless be retained for certain categories of murder. The most commonly cited crimes were murders of police or prison officers and murders committed by prisoners already serving life sentences for homicide.

Yet there is no evidence that the death penalty has a special deterrent effect on this type of crime. Police and prison officers are not murdered more frequently in the states which have abolished the death penalty; in the United Kingdom and other countries, there was no increase in the rate of police killings after the abolition of the death penalty.[16] Murders of police officers are often "spontaneous", committed when the perpetrator is surprised in the course of

13. Klein, Forst and Filatov, "The Deterrent Effect of Capital Punishment", 1978 (*op. cit.*). Their study examined cross-state data over several periods.

14. Daniel Glaser, in an article in the *Toledo Law Review*, 1979 (*op. cit.*), cited US Public Health Service compilations showing the annual homicide rate in the early 1930s exceeded nine per 100,000. FBI records, based on police reports, show a rate of 7.1 per 100,000 in 1933 (the first year that such records were kept).

15. The *Washington Post* reported on 18 August 1985 that there were 463,000 people in prison at the end of 1984, compared with 196,000 12 years previously. The increase in the number of prisoners started in the mid-1970s. During this period several states introduced mandatory life terms for habitual offenders, and there is evidence that the length of other sentences and time served in prison in most states also increased.

16. Thorsten Sellin compared US cities with populations of more than 10,000 in six abolitionist and 11 retentionist states between 1919 and 1954 and found that the rate of police homicides was slightly lower in abolitionist states. ("The Death Penalty and Police Safety", *Minutes of Proceedings and Evidence of the Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment*, No. 20, Ottawa Queen's Printer, Ottawa, 1955, pp. 718-728.) In a later comparison of police killings in 1975, Sellin found that risk rates were still generally lower in abolitionist states ("The Penalty of Death", *Sage Library of Social Research*, vol. 102, 1980, pp. 171-172).

committing another crime and is unlikely to be deterred by the thought of the death penalty. There is no evidence that the death penalty has deterred criminals from carrying potential murder weapons, and tighter gun laws and arms control would probably be far more effective in this regard.

FBI crime reports for 1970 to 1979 showed that killings of state and federal police officers amounted to a tiny fraction (0.006 per cent) of all murders reported for these years and that nearly one in seven of the killers were themselves killed by the police.[17]

A 1981 study of US prison murders committed by inmates serving life sentences showed that the murder rate differed little among states with and without death penalty laws.[18] The study also found that prison murders tended to be either spontaneous (and thus unlikely to be deterred by the punishment) or carefully planned against other inmates for retributive purposes, in circumstances in which the prisoner was unlikely to get caught (in about a third of the prison murders studied, the assailant was, in fact, unidentified).

Opinion polls show that many members of the public favour retaining the death penalty for especially heinous murders, such as those against children or "serial murders" (a series of apparently motiveless murders committed over a period of time). However, these types of killings are among the least likely to be deterred by any penalty. The most appalling and senseless killings are most likely to be committed by people who are seriously mentally disturbed and incapable of considering the consequences of their actions: some may even have "suicidal" tendencies and may actually wish to be executed.[19]

Recidivism

It has been argued that, even if the death penalty has no special effect in deterring others, the execution of the worst offenders is needed to protect society from the risk of their repeating their crimes.

However, the evidence suggests that, among offenders released on parole, convicted murderers present one of the lowest risks of

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17. Figures cited in Bedau, *The Death Penalty in America*, taken from the *Uniform Crime Reports 1970-1979*.

18. Wendy Phillips Wolfson: *The Deterrent Effect of the Death Penalty upon Prison Murder*, reproduced in Bedau, *op. cit.*

19. Clinical studies by psychiatrists have revealed examples of suicidal murderers: people who are afraid to take their own lives and kill in the hope — subconsciously or otherwise — that their own lives will be taken by the state. See articles by Diamond, "Murder and the Death Penalty", and Solomon, "Capital Punishment as Suicide and Murder", both published in the *American Journal of Orthopsychiatry*, vol. 45, No. 44, July 1975, pp. 701-711, 712-722.

recidivism. In Michigan (a state without the death penalty), over 400 inmates serving life sentences for murder were released on parole between 1938 and 1972, after serving an average of 22 years in prison. Not one had committed another murder by 1976 (the year in which the figures were released). In California, a 10-year study of 342 first-degree murderers paroled after an average of 11 years in prison showed that 90 per cent completed parole successfully. Only one was subsequently convicted of criminal homicide.

The above figures are taken from research on recidivism by Hugo Adam Bedau, who found that, of 2,646 murderers released in 12 states during the years 1900 to 1976 inclusive, only 16 were returned for conviction of a subsequent criminal homicide. Commenting on his findings, Bedau stated:

> ". . . Both with regard to the commission of felonies generally and the crime of homicide, no other class of offender has such a low rate of recidivism. So we are left to choose among clear alternatives. If we cannot improve release and parole procedures so as to turn loose *no one* who will commit a further murder or other felony, we have three choices. Either we can undertake to *execute every* convicted murderer; or we can undertake to *release none* of them; or we can reconcile ourselves to the fact that release procedures, like all other human institutions, are not infallible, and continue to try to improve rehabilitation and prediction during incarceration."[20] (emphasis in original)

Other punishments may, in fact, be equally effective in protecting society from the small proportion of offenders convicted of capital crimes who are sentenced to death. The death penalty laws introduced in the 1970s included maximum alternative penalties for convicted capital offenders who did not receive the death penalty. Many of the statutes now provide mandatory minimum terms of 25 years' imprisonment before capital offenders serving life sentences may be even considered for parole, which is by no means automatic in such cases. Other states have introduced alternative penalties of life without parole.[21]

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20. Bedau, *The Death Penalty in America*, pp. 175-176, 180.

21. It may be noted, however, that some countries without the death penalty do not impose sentences of life imprisonment without parole. For example, in the United Kingdom, which has effectively abolished the death penalty for peacetime offences, procedures for executive review apply to all cases. In other countries, there is a maximum term of imprisonment, imprisonment for life having been abolished. In some US states sentences of life without parole may still be subject to executive review, although there is no minimum period after which the prisoner is to be considered for parole.

Although the death penalty has been supported by some people on the grounds that executions serve to "incapacitate" even a small proportion of offenders, it is doubtful whether this is the most effective means of doing so. It has been suggested that the death penalty may actually reduce the number of murderers serving maximum alternative penalties for their crimes, by encouraging guilty pleas to lesser charges. As noted earlier in this report, the cost and length of capital proceedings may discourage prosecutors from seeking first-degree murder indictments in many cases.

This latter argument is without regard to the possibility, mentioned above, that the death penalty may actually encourage murder by its brutalizing effect.

Costs of the death penalty

The death penalty in the USA is extremely costly. The US Supreme Court has recognized that — given the unique finality of the penalty — capital cases require greater procedural safeguards against possible error than other cases. The two-phased trial, automatic state review, post-conviction hearings and petitions to the Supreme Court which are routine in capital cases, mean that they cost far more than ordinary criminal proceedings in terms both of time and money. Jury selection and pre-trial motions also take longer in capital trials and issues such as insanity claims are also more likely to be raised at this stage in such cases, requiring experts to be retained to give psychiatric testimony for the state and defence. A 1982 study in New York calculated the cost of reinstating the death penalty there and concluded that the average capital trial and first stage of appeals would cost the tax-payer about $1.8 million, more than twice as much as it cost to keep a person in prison for life.[22] Added to this must be the cost of maintaining maximum security on death rows, clemency hearings and the execution itself.

A number of judges, prosecutors and other law officials oppose the death penalty on precisely these grounds, believing that the enormous concentration of judicial services on a relative handful of cases (many of which will, in any event, result in life imprisonment)

22. *Capital Losses: the Price of the Death Penalty for New York State*, a report from the New York State Defence Association to the Senate Finance Committee and other sections of the legislature, April 1982. The costs estimated in this study included provision for adequate defence services contained in New York's death penalty bill, which went beyond the services provided in many other states. Although this added to the cost of reinstating the death penalty in New York, most of the overall expenses would apply to other states as well. If other states provided better defence services for capital defendants, the costs of the death penalty nationally would escalate still further.

diverts valuable resources from other, more effective, areas of law enforcement.

'Just retribution'

Many of the government officials whom the mission met acknowledged doubts about the deterrent value of the death penalty, but said they believed that the death penalty was, nevertheless, the deserved punishment for the most heinous crimes.

Amnesty International rejects this argument on the grounds that no crime, however heinous, can justify the infliction of cruel and inhuman punishment. Contemporary standards of justice, moreover, have rejected the notion that "just retribution" may be achieved by repeating the acts which society condemns. Just as criminal codes do not sanction the raping of rapists or the burning of arsonists' homes, still less is the deliberate taking of a life by the state an appropriate punishment for murder.

Concern for the victims' relatives

It has been argued that the death penalty is the only way to acknowledge the suffering caused to the family and friends of the victims of murder and to ensure "just retribution" for their loss. An execution, however, cannot restore life or lessen the loss to the victim's family. In fact, far from relieving the pain, the lengthy procedures and uncertain outcome of capital cases may instead prolong the anguish and suffering caused to victims' families and hinder any healing process. Executions often also draw attention away from the victims, and focus it on the prisoner killed by the state, thereby increasing the feelings of rejection often experienced by victims' relatives.

While some families have said that the execution of the killer of a relative or friend brought a sense of relief, others have said that they believed no useful purpose was served by the death penalty in such cases. In either event, executions only add to the total amount of suffering by causing another innocent family — the prisoner's — to experience the pain and loss of having their relative killed by the state. In at least two cases where people have been executed since 1977, relatives of the victims actually appealed for clemency.

Laws authorizing the death penalty for certain crimes foster the belief that it is the appropriate penalty in such cases. The imposition of alternative penalties or the vacation of death sentences on appeal, albeit on valid legal grounds, may nevertheless cause families of the victims to feel that they have somehow been cheated of justice,

creating unnecessary frustration and disillusionment with the law, and reinforcing their anguish.

There is no easy answer to the question of how best to respond to the deep and legitimate needs of the relations of murder victims, most of which are overlooked by the criminal justice system. However, execution is not an available remedy in the vast majority of murder cases. The diversion of resources into more effective law enforcement, ensuring swift and certain penalties, must surely be of greater benefit both to victims' relatives and to future potential victims of crime. Greater resources might also be spent on compensation and counselling.

Execution of the Innocent

One of the strongest arguments against the death penalty is that it is irrevocable and, despite the most stringent safeguards, can be inflicted on the innocent.

A recent study has produced evidence of 349 US cases in which innocent people were wrongly convicted of offences punishable by death.[23] The cases — from 1900 to 1985 — concerned people who were either sentenced to death or to terms of imprisonment, usually for murder. In most cases, the convictions had been upheld on appeal but new evidence had come to light later which either established the prisoners' innocence or raised strong doubts about their guilt. In most cases this had led to acquittals, pardons, commutations of sentence or the dismissal of the charges, often years after the original conviction. Twenty-three prisoners, however, were executed.

Many other cases in which it was alleged that miscarriages of justice had occurred were excluded from the study's findings, through lack of adequate data.

Some of the errors described in the study were revealed through the efforts of defence attorneys in later appeals; others were discovered by chance or by investigations conducted by newspaper reporters or others not connected with the cases in a legal capacity. In 32 cases it was found that no crime had been committed, sometimes because the purported murder victim was found alive. In some cases other people had confessed to the crime, alibi evidence was found to be valid or witnesses had lied. The report listed some 50 cases

23. The study was conducted from 1983 to 1985 by Hugo Adam Bedau, Department of Philosophy, Tufts University, Massachussetts, and Michael L. Radelet, Department of Sociology, University of Florida, Gainsville. They compiled the cases from law journals, court records, newspapers, interviews with lawyers and other sources. Their findings are described in "Miscarriages of Justice in Potentially Capital Cases", prepublished draft dated 20 April 1986.

occurring after 1970, including several in which death sentences were imposed under the present death penalty laws.

Cases cited in the study included that of John Ross (black), convicted of raping a white woman in Louisiana in 1975. He was 16 at the time and confessed after being beaten by the police. He was sentenced to death after a trial lasting less than a day. His conviction was upheld on appeal, but because the death sentence had been imposed under a mandatory death penalty statute (which was later ruled unconstitutional by the US Supreme Court) his sentence was reduced to 20 years' imprisonment. After his conviction, Ross asserted his innocence in a letter to the Southern Poverty Law Center, which provides free legal services to poor defendants. It took up his case, paying for a private investigation. John Ross was released in 1981 after investigators discovered that a blood sample, alleged at the trial to be that of the rapist, did not match his blood group.

Another case cited in the study was that of Jerry Banks (black), convicted on two counts of murder and sentenced to death in Georgia in 1975. After having been tried twice and sentenced to death, he was granted a third trial in 1980 because of newly discovered evidence, including that of a witness who testified that the fatal shots could not have come from Jerry Banks' weapon. All charges against him were dismissed and he was released later that year — after five years on death row. When his wife asked for a divorce three months later, he killed her and himself. The Georgia county which had conducted the 1975 murder prosecution subsequently awarded damages to Jerry Banks' three children for its mishandling of the case.

The study also included the case of James Adams, sentenced to death in Florida in 1974 for murder and executed in 1984. According to the study, alleged exculpatory evidence in the case was discovered by an investigator one month before the scheduled execution. However, the Florida Governor declined to grant a stay of execution to enable the evaluation of this new evidence.

Although the legal appeals now available to US capital defendants may have reduced the risk of wholly innocent people being sentenced to death, no system can altogether exclude this possibility. Some evidence on which innocent people may be convicted, such as perjured testimony, may never come to light through the normal appeals process.

Apart from questions of guilt or innocence, there are many other ways in which death sentences may be unfair or wrongly imposed, such as through trial error or insufficient investigation of mitigating circumstances at the sentencing hearing. As is illustrated by several cases in this report, the criminal justice process cannot serve as a definitive safeguard against error, prejudice or injustice.

Public opinion

Governments often justify retention of the death penalty on the grounds of strong public support for it. Amnesty International's mission met several US government officials who expressed personal doubts about the death penalty but justified its retention on this basis.

Although opinion polls are not wholly accurate gauges of public attitudes, the numerous polls undertaken in the USA on this question have shown broad consistency in indicating general trends on the death penalty. They show that support for the death penalty declined after the 1930s to reach an all-time low in the mid-1960s, when 42 to 45 per cent of the population was found to favour the death penalty, while a small majority (42 to 47 per cent) opposed it. About 11 per cent of the population was uncertain.

Later polls indicate that public support for the death penalty has risen steadily since the 1960s, with a smaller percentage of those polled professing uncertainty as to their views. National polls conducted in 1984 and 1985 indicated that 75 to 84 per cent of the population supported the death penalty, the highest proportion recorded since 1936.

Public support for the death penalty has increased with, and apparently in response to, a rise in violent crime. Although the reasons for supporting the death penalty varied, the ones most commonly given by those polled were: that it was the deserved punishment for certain crimes; that it acted as a deterrent to violent crime, and that it protected society by the permanent incapacitation of the offender.

However, surveys have indicated that support for the death penalty is not unqualified. A Gallup poll published in January 1985 showed that while 72 per cent of the population supported the death penalty in general, this dropped to 56 per cent when those questioned were given the choice between executing murderers and sentencing them to life without parole. This finding was similar to a Harris poll taken in 1983, which showed a drop in support from more than 70 per cent to 52 per cent if it could be shown that long prison terms were as effective a deterrent as the death penalty. The January 1985 Gallup survey also indicated that a decline among supporters — from 71 per cent to 51 per cent — would occur if new evidence were to show conclusively that the death penalty was not a deterrent.

A recent poll carried out in Florida on behalf of the US Section of Amnesty International showed that, while 84 per cent of those polled in the state favoured the death penalty (62 per cent of this group "strongly favouring" and 22 per cent "somewhat favouring" it), 54 per cent said they would be less likely to support it if dangerous

murderers were sentenced to life imprisonment without parole. Seventy per cent of those polled also said they would support an alternative to the death penalty that would sentence convicted murderers to life in prison with their earnings going directly to the victims' families or to a victims' relief fund. Only 37 per cent said they would still support the death penalty if it was shown that it had no deterrent effect (30 per cent said they would not support the death penalty in such circumstances and 33 per cent said they did not know).[24]

The Florida survey also revealed that there were certain types of cases where the death penalty had been imposed in which a large proportion of those polled said that they would oppose it. A majority said that they did not favour the imposition of death sentences on people who were mentally retarded, or who were mentally unbalanced at the time of the murder and had a history of mental illness.[25]

Respondents in the Florida survey also expressed opposition to the death penalty in four actual cases of prisoners who had been executed. An outright majority (57 per cent) said that they opposed the death penalty in two of the cases: those of James Terry Roach, a minor who also had a history of a debilitating disease (see Chapter 5), and Timothy Baldwin, a prisoner executed in Louisiana who, the respondents were informed, was inadequately represented at his trial and in whose case there was evidence suggesting possible doubt about his guilt. A third case was that of James Dupree Henry, a Florida prisoner who was sentenced to death and executed for an accidental killing during a robbery; in this case 47 per cent of those polled opposed the death penalty, while 40 per cent favoured it. In a fourth case, that of John Spenkelink, who was executed in Florida, 42 per cent of those polled said they opposed the death penalty.[26]

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24. The poll was conducted for Amnesty International USA by Cambridge Survey Research. The first survey, of 500 registered voters, was conducted in February 1986 and a follow-up survey of 400 voters was conducted in April 1986. A series of detailed questions were put to those polled in telephone interviews.

25. In response to different hypothetical questions on how they would vote if they were jurors, 71 per cent of those polled said they would oppose the imposition of the death penalty if the convicted person was mentally retarded; 54 per cent said they would do so if the convicted offender was mentally unbalanced at the time of the crime and had a history of mental illness. In response to a different question, 85 per cent of those polled said that they would oppose the imposition of a death sentence on a mentally retarded offender who was an accomplice to a criminal homicide, where the actual killer received a life sentence in return for testifying for the state.

26. Without a complete record of the cases, those polled could not judge how they would have voted if they had been actual jurors at the trials. However, the

In an opinion poll conducted in Tennessee and Georgia in December 1985, more than two to one of those polled expressed opposition to the execution of offenders aged under 18 at the time of the crime.[27]

Opinion polls are not always reliable and results have differed according to how the questions were phrased. However, they indicate that public support for the death penalty is divided and is not unqualified.

Moreover, support for the death penalty is not always based on accurate information as regards its effectiveness or how it is applied in practice.

The generally high level of support for the death penalty is not shared by all sectors of the community. The churches, in particular, have expressed strong opposition. The General Board of the National Council of Churches of Christ adopted a statement on 13 September 1968, declaring its opposition to the death penalty. Its reasons for taking this position included "The belief in the worth of human life and the dignity of human personality as Gifts of God"; "The conviction that institutionalized disregard for the sanctity of human life contributes to the brutalization of society"; the possibility of error; doubts about its deterrent effect and the belief that "the protection of society is served as well by measures of restraint and rehabilitation, and that society may actually benefit from the contribution of the rehabilitated offender".

Since 1972, the leading bodies of at least 20 major religious denominations in the USA have passed resolutions expressing opposition to the death penalty on religious, moral, humanitarian and social grounds.[28]

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respondents were given a summary of the crimes, who the victims were and other information relating to the circumstances of the cases: this information accorded with accounts of the cases given in court records and elsewhere.

27. The poll was commissioned by the Southern Coalition on Jails and Prisons and conducted by Information Associates of Washington, DC. Four hundred registered voters in each of the towns of Nashville (Tennessee), and Macon (Georgia) were polled.

28. Some of these statements and resolutions are published in the booklet "Capital Punishment: what the religious community says", published by the National Interreligious Task Force on Criminal Justice, New York. Churches whose statements against the death penalty are published in this booklet are: American Baptist Church in the USA, American Ethical Union, American Jewish Committee, American Lutheran Church, Christian Church (Disciples of Christ), Christian Reformed Church, Church of the Brethren, The Episcopal Church, American Friends Service Committee, Lutheran Church in America, The Mennonite Church, National Council of Churches of Christ in the USA, Presbyterian Church in the US, Reformed Church in America, Unitarian Universalist Association, United Church of Christ, United Methodist Church, United Presbyterian Church in the USA, United States Catholic Conference.

Some state governors have also successfully maintained their opposition to the death penalty, despite the majority of their constituents apparently favouring the death penalty. In November 1982 the majority of voters in Massachusetts voted in a referendum for the reintroduction of the death penalty. In the same month a state governor, Michael Dukakis, was elected who was an outspoken abolitionist and whose opponent was strongly in favour of the death penalty. In New York State in the 1970s, Governor Hugh Carey was elected for two successive terms, despite having used his power of veto to prevent legislation to reinstate the death penalty (passed by the state legislature) from becoming law. His successor, Mario Cuomo, was also elected despite being an outspoken abolitionist.

Amnesty International believes that public policy should lead public opinion in matters of human rights and criminological practice. In other countries the death penalty has been abolished even though a majority of the public appeared to favour its retention. Were the public to be fully informed about how the death penalty applies in practice, of its limited capacity, its high cost and lack of deterrent effect, and of alternative measures available to protect society, support for the death penalty in the USA would be likely to diminish.

F.Y.I.

A Bulletin for ALEC Leaders
About State, Federal and Local Issues

February 24, 1989

STATE ISSUES

Service Taxes on Advertising Again an Issue: The extension of state taxes to business services including advertising, an issue thought dead since Florida's bitter experience last year, is again becoming a major subject of debate in state legislatures, including active legislation in Iowa (SF 7), Missouri (HB 642), New Jersey SB 3201), North Carolina (HB 56), Oregon, and South Dakota (HB 1417).

The Oregon legislation is potentially the most far reaching. Under this proposal, the state's 6.5% gross receipts tax would be extended to the advertising revenues of television networks based on a ratio determined by Oregon's percentage of the network's national viewing audience. Many observers fear that the Oregon proposal is a stalking horse for efforts to enact advertising taxes in other states. Indeed, Alan Friedman, General Counsel of the Multistate Tax Commission, an organization of state tax administrators, gleefully calls the Oregon legislation "an evolving model" for other states. Mr. Friedman says that the Oregon proposal "breathes new life" into the service sales tax movement.

Last year, after one of the most divisive and bitter legislative battles in the state's history, Florida was forced to repeal its service sales tax imposed in 1987.

For additional information, contact ALEC State Chairman, Senator Bill Kennemer, at (503) 378-8076, or Duane Parde, Director of ALEC's Task Force on Fiscal Responsibility and Tax Policy.

Civic Literacy Legislation Proposed in Rhode Island: In conjunction with ALEC's National Project on Civic Literacy, Representative Paul Suttell, ALEC Rhode Island State Chairman, has introduced legislation to require all Rhode Island high schools to teach the major principles of the United States Constitution, the Declaration of Independence, and the Federalist Papers. The legislation, HB 6822, is based on model legislation contained in the 1989-90 edition of The Source Book of American State Legislation.

A recent survey by the Center for Civic Education (CCE) found that 70% of American high school and college students did not know that our government derived its authority from the consent of the governed and that two-thirds could not distinguish between democratic and dictatorial forms of government. Even more frighteningly, a 1987 study

by the Hearst corporation found that half of all Americans thought that the Marxist dictum "From each according to his ability, to each according to his need" was part of the U.S. Constitution.

ALEC's National Project on Civic Literacy is designed to inform state legislators of the need for and benefits of promoting a greater societal understanding of America's Founding Documents. As a result of this program, in addition to Rhode Island, civic literacy legislation has been introduced in Colorado, North Dakota, and Texas.

For additional information, contact Representative Suttellat (401) 277-2259, or Duane Parde, Director of ALEC's Task Force on Education, at (202) 547-4646.

National Coalition Endorses ALEC Model Hepatitis B Legislation: The National Foundation for Infectious Diseases' State Legislative Task Group on Hepatitus B has endorsed ALEC model legislation designed to protect health care workers from infection with Hepatitus B. The model "Hepatitus B Inoculation Act" is contained in the 1989-90 edition of The Source Book of American State Legislation.

This bill would mandate that hospitals and nursing homes which receive state funding provide inoculations to protect their employees from the potentially lethal occupational risk of Hepatitus B virus. It is estimated that in 1987, 18,000 health care workers became infected with the Hepatitus B virus and over 300 died as a result of Hepatitus B complications.

William Small, Executive Director of the National Foundation for Infectious Diseases (NFID), warned that the United States is facing "a major epidemic" of Hepatitus B and called for "active support for introduction and passage of this bill."

In addition to representatives from the NFID, the State Legislative Task Group on Hepatitus B includes representatives from the Centers for Disease Control, American Liver Foundation, American Public Health Association, American College of Preventive Medicine, American College of Obstetricians and Gynecologists, American College Health Association, Smith Kline & French Laboratories, the Intergovernmental Health Policy Project, ALEC and the National Conference of State Legislatures.

For additional information, contact Michael Tanner, Director of ALEC's Task Force on Health and Welfare, at (202) 547-4646.

New York Senate Passes Death Penalty: By an overwhelming 39-17 margin, the New York Senate has passed legislation, S 600, that would reinstate capital punishment. The measure was cosponsored by ALEC National Director, Senator Owen Johnson.

Under the provisions of Senator Johnson's legislation, the death penalty could be imposed on individuals convicted of first degree murder if certain specific aggravating circumstances were present:

* The victim was a police officer performing his official duties at the time of the killing; or

* The victim was employed by a state or local correctional facility at the time of the killing; or

* The murderer was serving a previous life sentence or had escaped from a state correctional institution at the time of the crime; or

* The victim was a witness to a crime and the murder was committed to prevent the rendering of testimony in any criminal action or proceeding; or

* The victim was killed during the commission of any of the following felonies, or in the course of immediate flight following such a felony: robbery, burglary, rape, kidnapping, arson, first degree sodomy, first degree sexual abuse, or first or second degree escape; or

* The murderer intended to cause the victim intense suffering, above and beyond that which was a natural consequence of the crime itself; or

* The murderer had previously been convicted of murder.

The Assembly is expected to follow the Senate's lead and give approval to the bill. However, Governor Mario Cuomo has vowed to veto any death penalty bill that passes the legislature. The margin of victory in the Senate was great enough to override such a veto. Senator Johnson is optimistic that the bill will draw similarly strong support in the Assembly.

For additional information, contact Senator Johnson at (516) 669-9200, or Rick Gowdy, Director of ALEC's Task Force on Law and Justice, at (202) 547-4646.

Massachusetts Key Battleground for Toxic Reduction Initiatives: The controversy initiated by the 1986 passage of California's revolutionary Proposition 65 has been taken one step further with the introduction of Massachusett's Toxic Use Reduction Act. The legislation, HB 1929, would grant the state government unprecedented authority to phase-out or restrict the use of chemicals state-wide and enable the state government to order businesses to use less, none, or alternative chemicals in the manufacturing process.

While proponents of the bill claim that industry is not responding to existing market incentives for toxic source reduction, the Associated Industries of Massachusetts (AIM) argues that "existing government programs, or lack thereof, have caused the alleged market failure, not business . . . employers, especially smaller businesses which comprise the majority of Massachusetts manufacturers, are overwhelmed with paperwork requirements and rules that have no obvious direct environmental or safety benefit, discouraging companies and distracting them from focusing on (toxic) source reduction opportunities."

Opponents of the bill point out that requiring state bureaucrats to second guess the manufacturing process of over 10,000 Massachusetts industries would set the stage for uninformed decision making that would cripple a company's ability to do business in the state. Given Massachusetts' current fiscal nightmare, legislators are dubious that the state could afford a massive expansion of the bureaucracy or the engineering expertise necessary to credibly review the potential hazards and benefits of legal chemical usage.

Although AIM has offered a comprimise alternative, the Hazardous Waste Minimization and Management Act, S 1129, Mass. PIRG has vowed to take HB 1929 to a public referendum if necessary, and both sides are preparing for the expected voter initiative.

For additional information, contact G. Montgomery Lovejoy, Vice President for Energy and Environmental Policy for the Associated Industries of Massachusetts, at (617) 262-1180, or Roop Mohunlall, Director of ALEC's Task Force on Energy, Environment, and Natural Resources, at (202) 547-4646.

"Taxpayers' Bill of Rights" Advances in Kansas: The Kansas House Committee on Taxation, with the support of the state Department of Revenue, has introduced legislation, HB 2033, which would codify the procedures that the state would be required to follow in tax collection.

The "Taxpayers' Bill of Rights" would:

1) Require the Director of Taxation to inform all taxpayers, against whom an assessment has been filed, of their right to appeal;

2) Prohibit the Director of Taxation from using the amount or number of assessments levied as a criteria in evaluating Department of Revenue employees;

3) Waive interest payments in cases where Revenue Department negligence has resulted in undue delay in assessing or notifying a taxpayer;

4) Require that leans against property be removed within 30 days of payment;

5) Require that the Department of revenue pay a taxpayer's attorney fees and related expenses if an assessment or other claim is found to be without a reasonable basis; and

6) Require that the Department of Revenue be bound by any written advice that it gives to a taxpayer.

The legislation is currently before the Senate Committee on Assessment and Taxation.

For additional information, contact ALEC State Chairman, Representative Vern Williams, at (913) 296-0111, or Duane Parde, Director of ALEC's Task Force on Fiscal Responsibility and Tax Policy.

Minnesota Considering Comparable Worth Mandate: Senator Ember Reichgott, Chairman of the Senate Judiciary Civil Law Committee, has introduced legislation, SF 130, which would amend the state's Human Rights Act to provide that failure on the part of any business to implement a comparable worth plan would be considered an unfair discriminatory act and a violation of state civil rights laws.

For additional information, contact ALEC State Chairman, Representative Gary Schafer, at (612) 296-6013, or Duane Parde, Director of ALEC's Task Force on Labor, at (202) 547-4646.

New England State Establish Truck Permit Pact: In a major boost to the interstate trucking industry, five New England states (Maine, New Hampshire, Vermont, Massachusetts and Rhode Island) have joined together to establish a multistate permit system for oversized and overweight trucks. The new system, which took effect February 21, significantly streamlines the truck permit system.

According to Maine Transportation Commissioner Dana F. Connors, "This first-in-the-nation agreement makes it easier for the trucker to get permits for multistate travel and cuts down on the administrative workload for individual states." Until now, truck drivers were required to obtain permits from each individual state. Under the new system, trucks meeting certain criteria may obtain a permit good for traveling in all participating states. The state issuing the permit collects the fees and distributes a proportion to the other participating states.

For additional information, contact Roop Mohunlall, Director of ALEC's Task Force on Transportation, Communications and Public Works, at (202) 547-4646.

ALEC NEWS

ALEC Releases New Study on the Privatization of Mass Transit: ALEC has released a new report that concludes that competitive contracting and greater privatization of urban mass transportation services could save states and localities millions of dollars while improving service.

Entitled "Moving America Competitively: A State Legislators' Guide to the Privatization of Public Transportation," the study concludes that "among all public services, perhaps none is more ripe for privatization than public transit." In recent years public transit operating costs have escalated well ahead of the inflation rate and well ahead of the costs of other public services. At the same time, productivity plunged by one-third between 1970 and 1980. At a time of increasingly tight budget constraints, states and localities can no longer afford an increasingly inefficient and costly public transportation system, when privatization will lead to "substantial savings, increased services, reduced fares, and lower taxes."

The report which was authored by Wendell Cox, an internationally recognized expert in public transportation organizational analysis, contains model competitive contracting legislation based on a highly successful Colorado bill. This model legislation has already been introduced in Arizona, Pennsylvania, Utah, and Washington.

For additional information, contact Roop Mohunlall, Director of ALEC's Task Force on Transportation, Communications and Public Works, at (202) 547-4646.

ALEC Legislators Meet With President Bush: At the special request of the White House, five ALEC legislators were selected as an escort for President Bush on his recent visit to South Carolina. They were ALEC State Chairman, Senator Joe Wilson, Senator John Coursen, Senator Rick Lee, Representative Jarvis Klapman, and Representative David Wilkins.

New Info-Pac Available: ALEC now has available an Info-Pac on Surrogate Parenting. To order, contact Michael Tanner, Director of ALEC's Task Force on Health and Welfare, at (202) 547-4646.

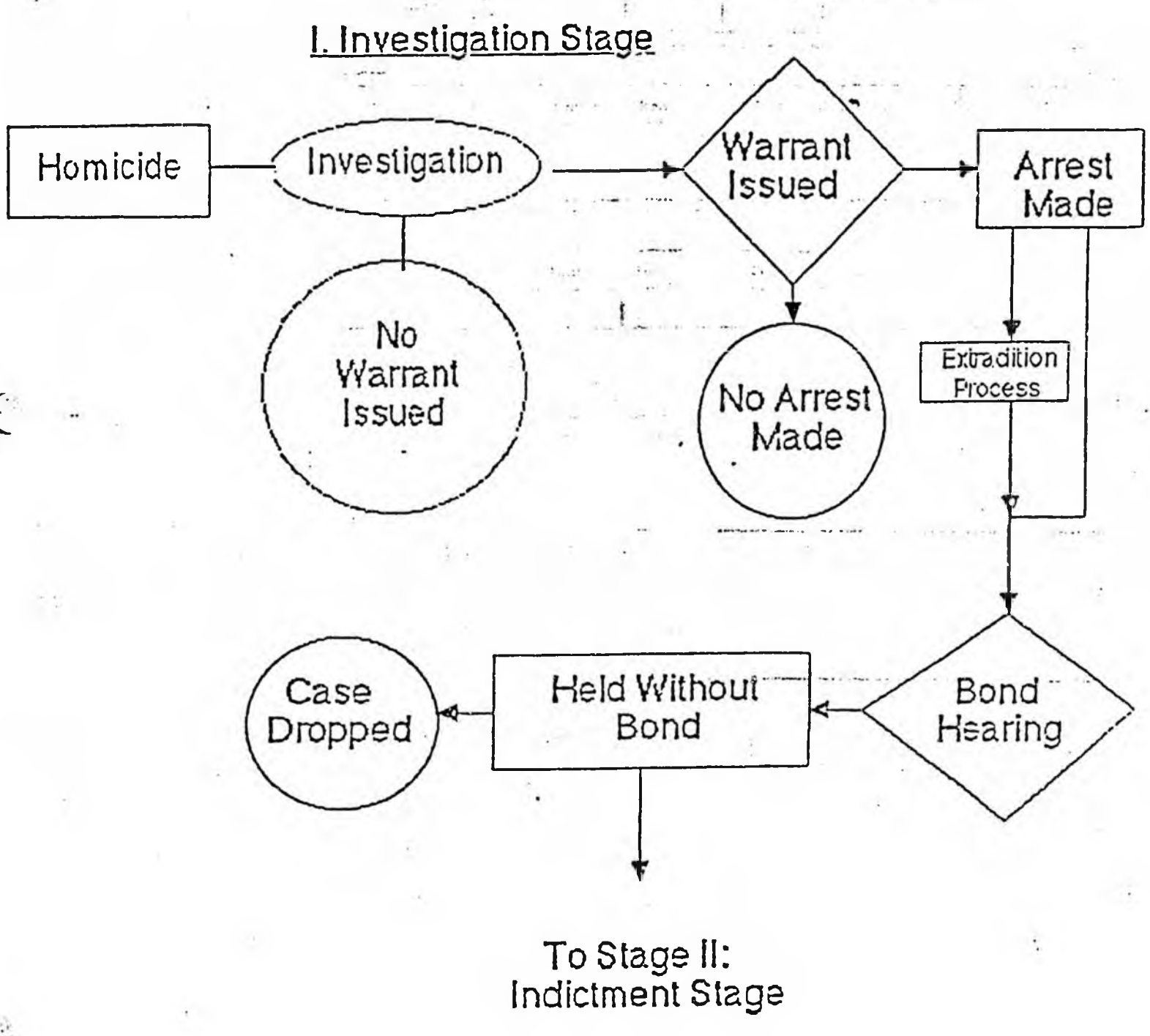
EDITOR

Michael Tanner

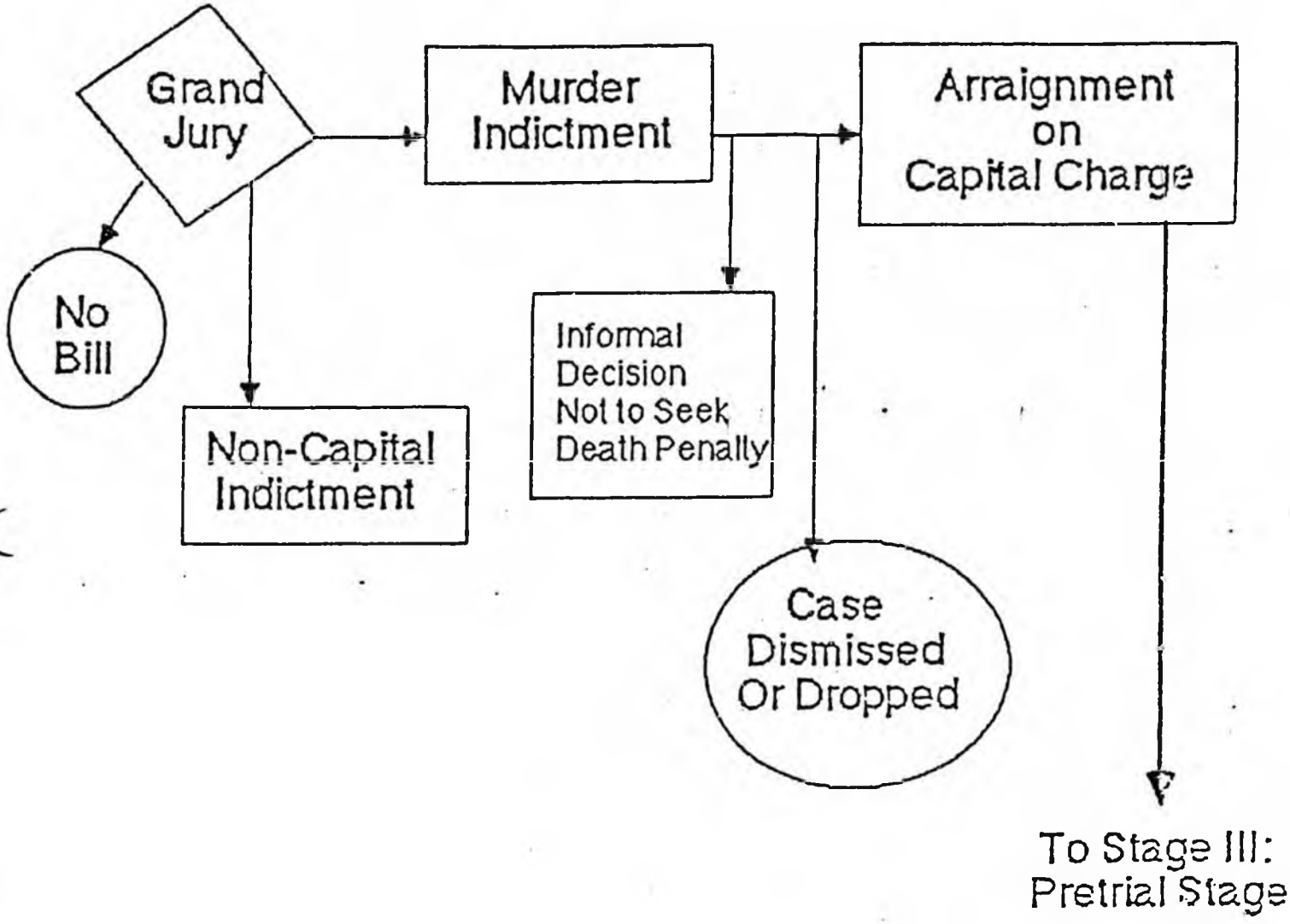
COME TO WHERE THE ACTION IS! ALEC's 1989 Annual Meeting: July 16-20, Monterey, California. For additional information, contact Michael Fletcher, ALEC Director of Conferences, at (202) 547-4646.

B. The Flow Chart System (From ABA Ad Hoc Committee)

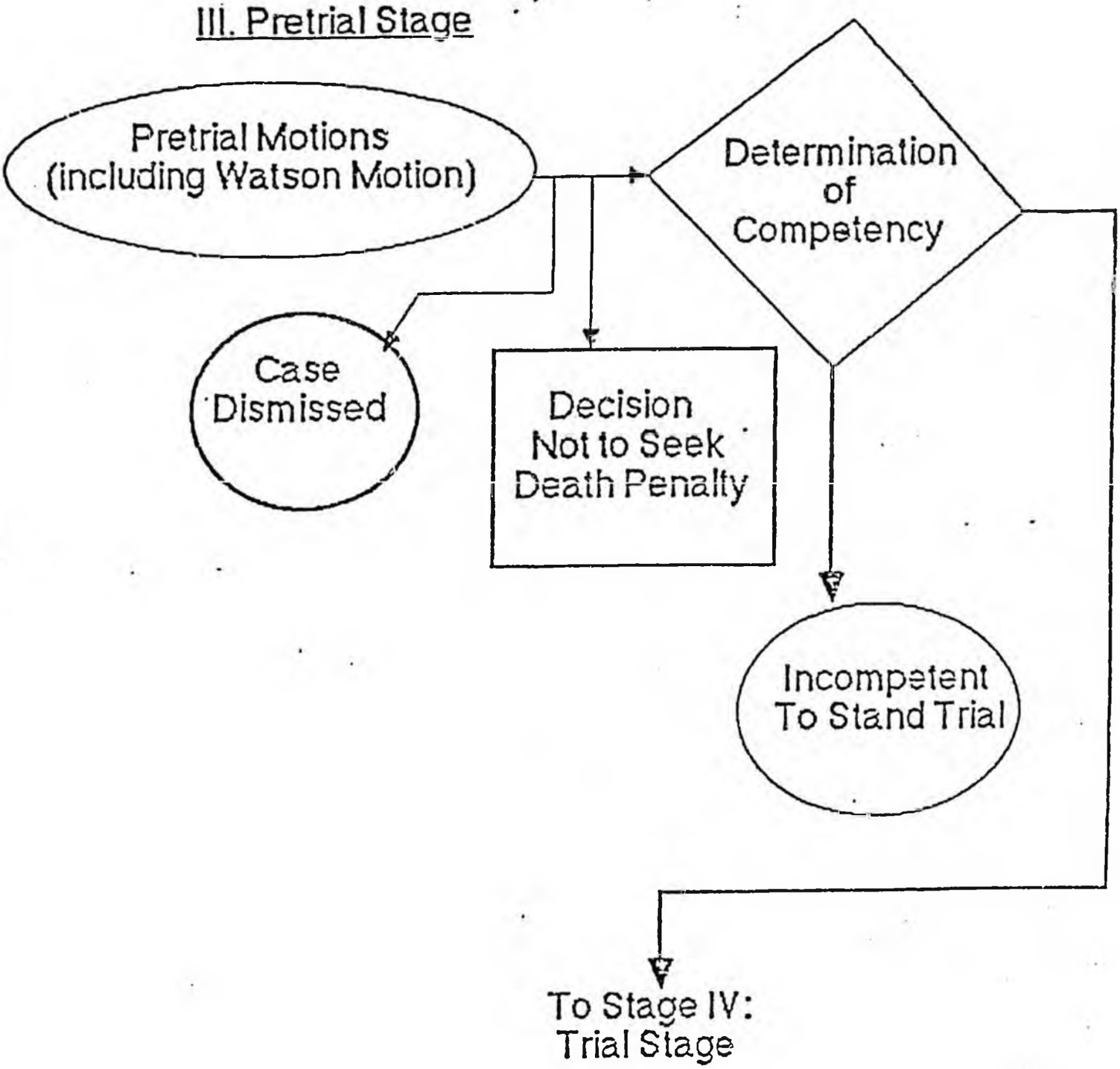
FIGURE 1



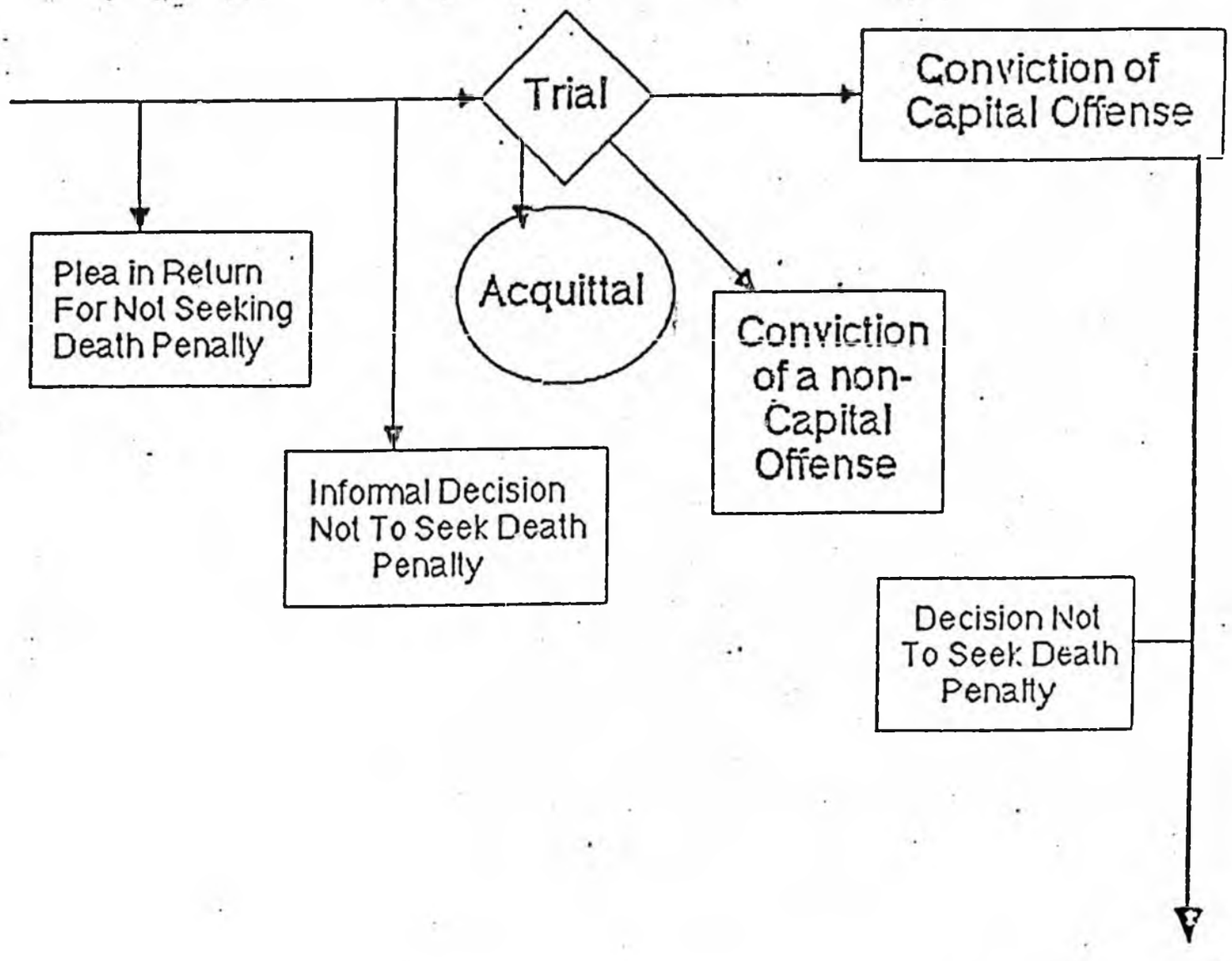
II. Indictment Stage



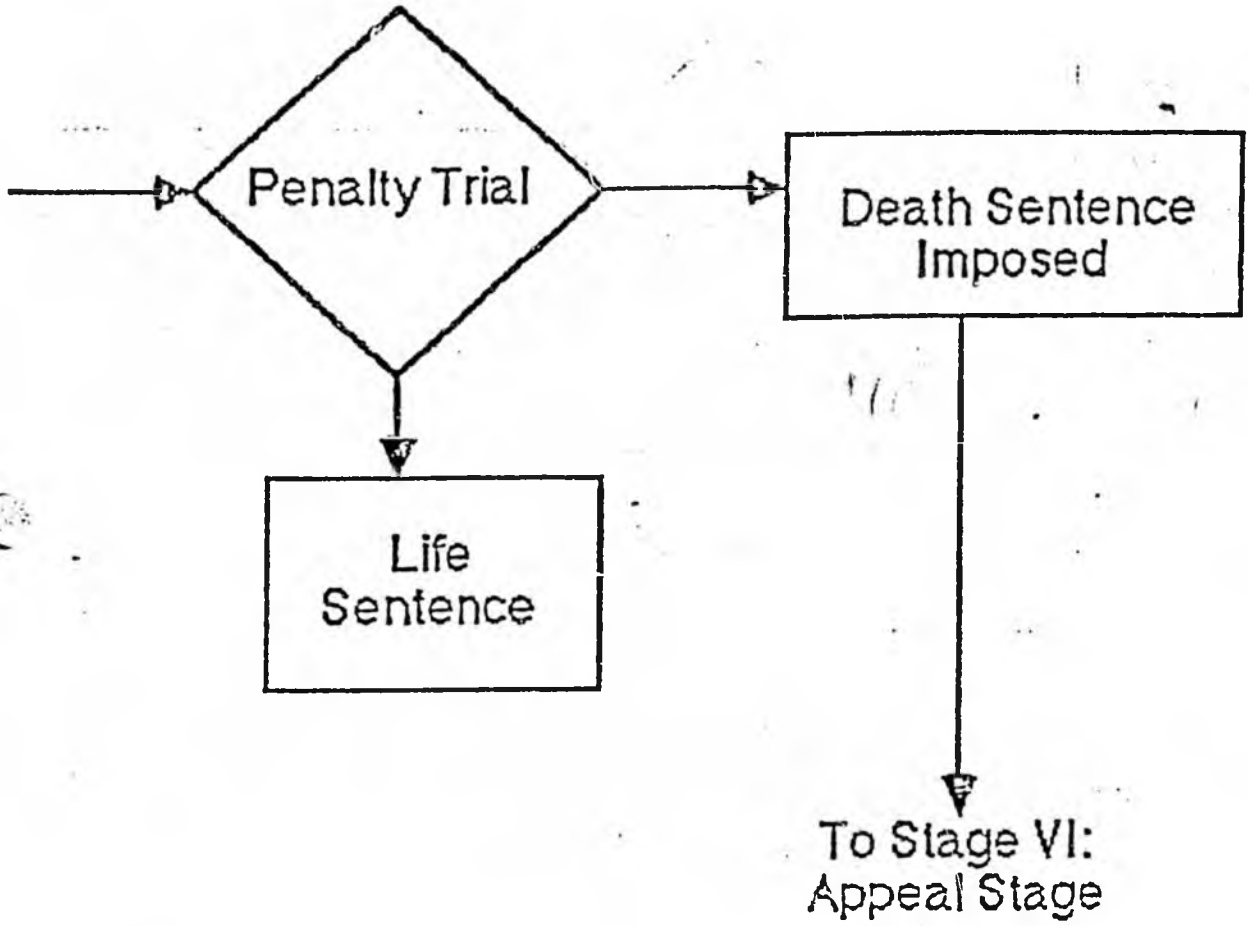
III. Pretrial Stage

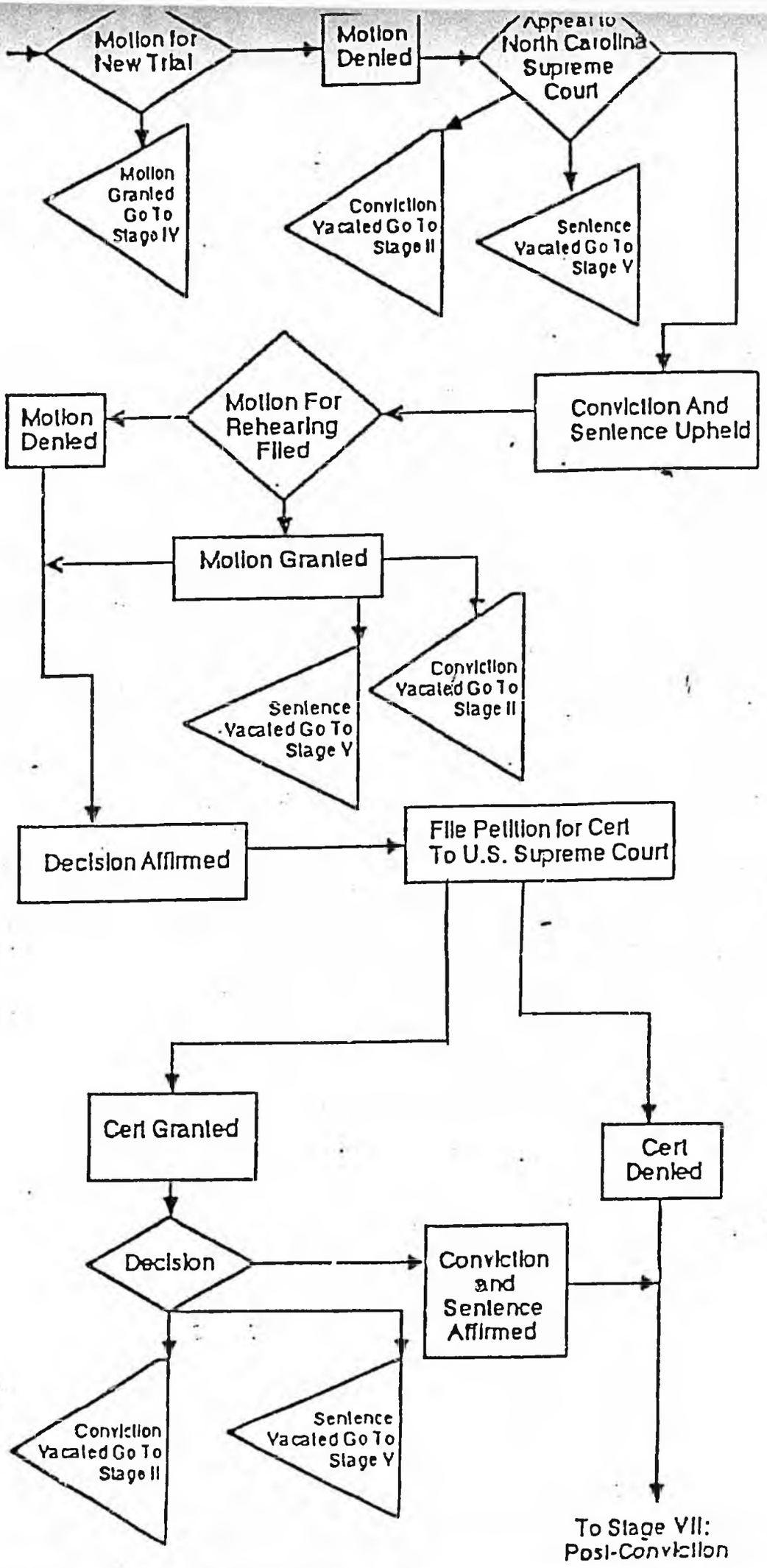


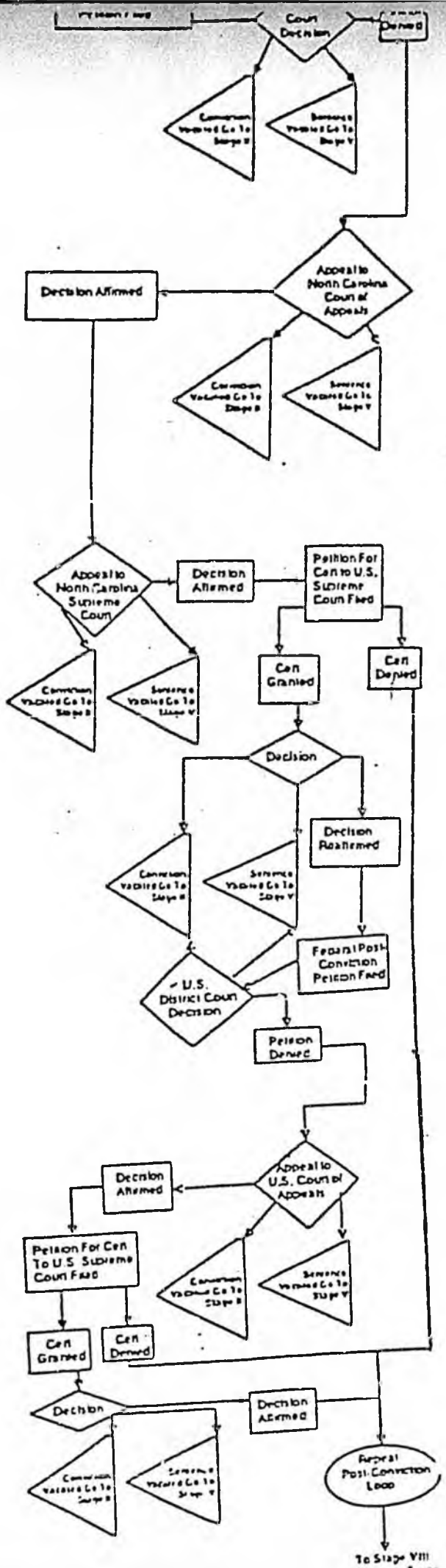
IV. Trial Stage



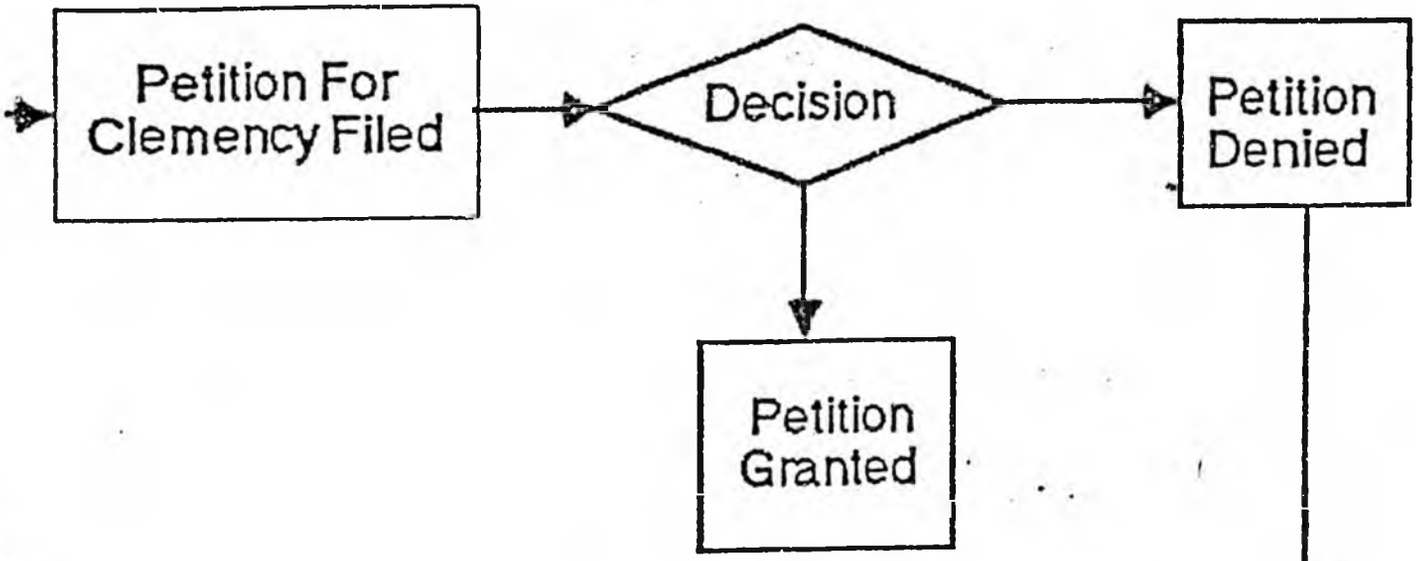
V. Sentencing Stage



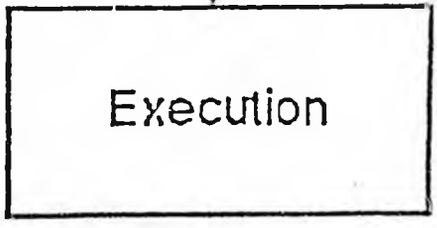

Motion for New Trial
Motion Denied
Appeal to North Carolina Supreme Court
Motion Granted Go To Stage IV
Conviction Vacated Go To Stage II
Sentence Vacated Go To Stage V
Motion Denied
Motion For Rehearing Filed
Conviction And Sentence Upheld
Motion Granted
Sentence Vacated Go To Stage V
Conviction Vacated Go To Stage II
Decision Affirmed
File Petition for Cert To U.S. Supreme Court
Cert Granted
Cert Denied
Decision
Conviction and Sentence Affirmed
Conviction Vacated Go To Stage II
Sentence Vacated Go To Stage V
To Stage VII: Post-Conviction


Court Decision
Denied
Decision Affirmed
Appeal to North Carolina Court of Appeals
Appeal to North Carolina Supreme Court
Decision Affirmed
Petition For Cert to U.S. Supreme Court Filed
Cert Granted
Cert Denied
Decision
Decision Reaffirmed
Federal Post-Conviction Petition Filed
U.S. District Court Decision
Petition Denied
Appeal to U.S. Court of Appeals
Decision Affirmed
Petition For Cert To U.S. Supreme Court Filed
Cert Granted
Cert Denied
Decision
Decision Affirmed
Federal Post-Conviction Loop
To Stage VIII

VIII. Clemency Stage



IX. Execution Stage



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Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*

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I. Introduction

Since the publication of Isaac Ehrlich's controversial articles [6; 9] on murder and capital punishment, there has been extensive criticism of his findings. Using regression analysis with U.S. time-series data, Ehrlich found that increases in the relative frequency of arrest, the relative frequency of conviction given arrest and the relative frequency of execution given conviction, reduce the number of homicides per capita and that the magnitudes of these effects are consistent with sharp predictions—the "elasticity conditions"—derived from the hypothesis that potential murderers act as if they were maximizing expected utility.[1]

Among the criticisms of Ehrlich's time-series work on homicide, the most important are: (1) The FBI data used by Ehrlich to measure homicides and the probabilities of punishment is highly suspect, especially during the 1930s [3]. (2) Ehrlich's results are sensitive to the inclusion of additional explanatory variables and the choice of functional form [3; 19; 26]. (3) Ehrlich's regressions are unstable over the 1960s [26]. (4) The negative correlations between the homicide rate and the probabilities of punishment found by Ehrlich may be explained by the effect of the homicide rate on the probabilities of punishment not vice versa [17].

Ehrlich has responded to these criticisms in some detail [7; 8; 9; 11]; perhaps his strongest rebuttal is his cross-sectional study of homicide [9] which replicated the deterrence findings reported in his 1975 time-series article. Recently, however, Ehrlich's cross-sectional results have also come under fire. McManus [25] and Leamer [22; 23] have argued that Ehrlich's cross-sectional finding that capital punishment is a deterrent to homicide is sensitive to one's prior beliefs concerning the variables to be included in the homicide regression.

The purpose of this paper is not to debate the merits of Ehrlich's research but to move the debate forward by presenting new updated time-series estimates of the U.S. homicide function. Within the context of the new estimates presented in this paper, the criticisms of

*The author thanks Gary Becker, Isaac Ehrlich, Terry Seaks and George Stigler for helpful suggestions.

1. Let E_{PA} = the elasticity of homicide with respect to the probability of arrest, E_{PC} = the elasticity of homicide with respect to the conditional probability of conviction and E_{PE} = the elasticity of homicide with respect to the conditional probability of execution. For a group of expected utility maximizing individuals it can be shown that $-E_{PA} > -E_{PC} > -E_{PE}$. See Ehrlich [6, 401].

Ehrlich's results are considered. In section II of the paper Hoenack and Weiler's [17] results are critically examined. In the third section of the paper several improvements are made in the estimation of the U.S. homicide function: the time-series sample is updated to 1977, numerous alternative sets of explanatory variables are considered and most importantly, the homicide rate is measured using Vital Statistics data rather than FBI data. The results in this section confirm Ehrlich's findings. The *t*-statistics of the estimated coefficients on the probabilities of punishment are, in general, highly significant and much larger than the *t*-statistics reported by Ehrlich. Also, the magnitudes of the coefficients on the probabilities of punishment are consistent with the "elasticity conditions" derived by Ehrlich.

In section four the stability and proper functional form of the homicide function are analyzed. The homicide function is shown to be reasonably stable over time. The choice of the proper functional form is carefully analyzed using the Box-Cox analysis; the hypothesis that the homicide function is log-linear cannot be rejected whereas the hypotheses that the homicide function has a semi-logarithmic or a linear functional form are decisively rejected. Also, the optimal functional form resulting from the Box-Cox analysis is highly consistent with the deterrence theory.

II. Hoenack and Weiler's Results Reconsidered

The crucial idea underlying Hoenack and Weiler's [16; 17] (hereafter H&W) argument that Ehrlich's results are spurious is that an increase (decrease) in homicides increases (decreases) the work-loads of the police and courts causing the arrest, conviction, and execution rates to decline (rise), at least in the short run. If the increase (decrease) in homicides is found to be permanent, the amount of resources devoted to enforcing the law against homicide may be increased (decreased), but this occurs only after a time lag. According to this theory, even if potential murderers are unaware of, or unaffected by, changes in the relative frequencies of punishment, one would still expect to observe negative short run correlations between the homicide rate and the relative frequencies of punishment.

After specifying a complete structural model of homicide depicting the response of the law enforcement system to changes in homicides and the response of homicides to changes in deterrence variables H&W estimate 4 different homicide functions using 2SLS. In their first two regressions which contain the same variables used by Ehrlich, H&W report results that are similar to Ehrlich's. However, after including another age distribution variable not used by Ehrlich, or after replacing Ehrlich's single age distribution variable with two different age distribution variables, H&W get dramatically different results.

In the latter two regressions, the coefficients on the relative frequencies of conviction and execution are both positive. Using tests of overidentifying restrictions and FBI data on the age distribution of arrests, H&W argue that their homicide regressions containing two age distribution variables are superior to Ehrlich's homicide regression containing only one age distribution variable. H&W conclude their paper by arguing that Ehrlich's findings supporting the deterrence theory are spurious and reflect the response of the relative frequencies of punishment to changes in the homicide rate, not the response of the homicide rate to changes in the relative frequencies of punishment. H&W's criticism of Ehrlich's results is too ambitious. At best, they have shown that their 2SLS estimates of the para-

Table I. Definition of Variables in the Regression Analysis

ln q^*	= Natural logarithim of non-negligent homicides per 1000 civilian population based on FBI data.
ln q	= Natural logarithim of non-negligent homicides per 1000 civilian population based on Vital Statistics data.
ln PA	= Natural logarithim of probability of arrest.
ln PC	= Natural logarithim of conditional probability of conviction given arrest.
ln PE	= Natural logarithim of conditional probability of execution given conviction.
ln LFP	= Natural logarithim of proportion of the population in the labor force.
ln U	= Natural logarithim of percent of labor force unemployed.
ln Y	= Natural logarithim of Friedman's estimate of real permanent income per capita.
ln NW	= Natural logarithim of the proportion of the population which is nonwhite.
ln REL	= Natural logarithim of the proportion of the population which belongs to a religion.
ln HWF	= Natural logarithim of the proportion of families that have both husband and wife present.
TT	= Time trend: 1933 = 1, 1934 = 2, . . . , 1977 = 45.
ln $A1424$	= Natural logarithim of the proportion of the population within the 14–24 age group.
ln $A2124$	= Natural logarithim of the proportion of the population within the 21–24 age group.
ln $A2529$	= Natural logarithim of the proportion of the population within the 25–29 age group.
ln $A2129$	= Natural logarithim of the proportion of the population within the 21–29 age group.

Note: Except for the variable q, the data used in this paper is identical to the data used by Hoenack and Weiler for 1933–1969. For a listing of the instrumental variables used in the 2SLS regressions, see Hoenack and Weiler [17, 329]. A detailed listing of the data sources and data used in this paper is available from the author on request.

meters of the homicide function are sensitive to the inclusion of additional explanatory variables.

In Table II, H&W's 2SLS estimates of the U.S. homicide function are replicated[2] in equations (1) and (2). Table I defines the variables used in the regression analysis. There is a serious flaw in H&W's estimates replicated in equations (1) and (2). They fail to correct for statistically significant first-order autocorrelation. Possibly they were misled by the reasonable looking Durbin-Watson statistics. The Durbin-Watson statistic, however, is not valid for 2SLS estimation.

Equations (3) and (4) report the 2SLS estimates with a correction for first-order autocorrelation.[3] The estimates of the first-order autocorrelation, $\hat{\rho}$, in equations (3) and (4), .572 and .535, respectively, are large and statistically significant. Contrary to H&W's estimates in equations (1) and (2), the coefficients on the probabilities of conviction and execu-

2. See Hoenack and Weiler [17, 334], table 2, equations 10 and 11. The author wishes to thank Hoenack and Weiler for providing me with their data.

3. Beach and MacKinnon's [1] method which retains the first observation has been used to correct for autocorrelation in the residuals. The instrumental variables include the lagged value of the dependent variable and the lagged values of the explanatory variables except for the time trend [12; 14].

Table II. H&W's Results Reconsidered

Equation	(1)	(2)	(3)	(4)	(5)	(6)
Dependent Variable	q^*	q^*	q^*	q^*	q^*	q^*
ln *PA*	−.186	−.213	−.075	−.097	−.074	−.079
	(2.81)	(2.70)	(2.20)	(2.55)	(2.60)	(2.69)
ln *PC*	.0046	.010	−.0079	−.0030	−.0080	−.0057
	(.39)	(.72)	(1.33)	(.45)	(1.55)	(1.03)
ln *PE*	.00016	.00021	−.00098	−.0019	−.0011	−.0016
	(.05)	(.05)	(.63)	(1.15)	(.94)	(1.31)
ln *U*	−.0024	−.0030	−.0027	−.0028	−.0026	−.0027
	(.78)	(.82)	(1.35)	(1.27)	(1.36)	(1.30)
ln *Y*	−.0048	−.023	.0159	−.0036	.016	.0021
	(.13)	(.50)	(.64)	(.14)	(.67)	(.08)
ln *LFP*	.046	.068	−.053	−.036	−.055	−.053
	(.57)	(.62)	(.88)	(.51)	(.94)	(.80)
TT	.00042	.00093	−.00041	−.000047	−.00045	−.00016
	(.24)	(.44)	(.46)	(.05)	(.54)	(.18)
ln *A1424*	.022		.036		.035	
	(1.59)		(2.65)		(2.68)	
ln *A2124*		.016		.021		.022
		(1.07)		(1.50)		(1.48)
ln *A2529*	.039	.035	.031	.021	.030	.020
	(1.74)	(1.43)	(2.27)	(1.13)	(2.38)	(.96)
C	1.08	1.30	.445	.636	.438	.516
	(2.08)	(2.01)	(1.81)	(2.41)	(2.09)	(2.40)
$\hat{\rho}$			.572	.535	.568	.679
			(3.46)	(3.08)	(3.42)	(4.53)
DW	1.75	1.75	1.70	1.80	1.71	1.71
Period	1935–69	1935–69	1935–69	1935–69	1935–69	1935–69

Note: Equations (1)–(4) are estimated with 2SLS. Equations (1) and (2) replicate H&W's [17, 334] results. Equations (3) and (4) are estimated with a correction for first order autocorrelation. Equations (5) and (6) are estimated assuming *PA*, *PC* and *PE* are exogenous variables again with a correction for first order autocorrelation. The absolute value of *t*-statistics are given in parentheses.

tion in equations (3) and (4) are negative. Also, the ranking of the coefficients on ln*PA*, ln*PC* and ln*PE* in equations (3) and (4) is consistent with the "elasticity conditions."

The correct estimation of H&W's specification of the homicide function yields results consistent with the deterrence theory. The coefficients on the conviction and execution variables, however, remain insignificant in the correctly estimated regressions reported in equations (3) and (4). The weakness of H&W's argument will be demonstrated more convincingly in section III where the OLS regression estimates with lagged relative frequencies of punishment are reported. While both H&W and Ehrlich have used 2SLS estimation

Table III. Results of Hausman's Test

Regression Specification	Coefficients (Absolute Value of *t*-statistics in parentheses)		
	ln $\hat{P}A$	ln $\hat{P}C$	ln $\hat{P}E$
A1424 and *A2529*	.006	−.0022	−.0016
	(.09)	(.16)	(.67)
A2124 and *A2529*	.027	.012	−.0024
	(.35)	(.81)	(1.06)

based on different theoretical models,[4] the econometric justification for 2SLS estimation of the U.S. homicide function is weak.[5] It is possible to test whether the homicide function estimated with OLS methods is misspecified. Using a test developed by Hausman [15], which tests for correlation between the error term in an equation and the possibly endogenous variables, one cannot reject the hypothesis that the probabilities of punishment are exogenous variables. This result is of some importance because in cases where the explanatory variables are orthongonal to the error term, the use of 2SLS estimation yields inefficient estimates, whereas ordinary least squares methods yield efficient estimates.

The test is performed by estimating the regression

$$\mathbf{q}^* = \mathbf{X}_1\beta_1 + \mathbf{X}_2\beta_2 + \hat{\mathbf{X}}_1\alpha + \mathbf{u}, \tag{7}$$

where $\mathbf{q}^*$ is the $T \times 1$ vector of observations on homicides per capita, $\mathbf{X}_1$ is the $T \times 3$ matrix of observations on the relative frequencies of punishment, $\mathbf{X}_2$ is a $T \times 7$ matrix of exogenous variables in the homicide function and $\hat{\mathbf{X}}_1$ is a $T \times 3$ matrix of instruments for the relative frequencies of punishment. β_1, β_2, and α are coefficient vectors and $\mathbf{u}$ is a vector of error terms subject to first-order autocorrelation. The matrix of instruments, $\hat{\mathbf{X}}_1$, is found by regressing each of the relative frequencies of punishment on a set of instrumental variables which include the dependent variable lagged one year and the right-hand-side variables in the homicide function lagged one year as well as all the predetermined variables in H&W's [17, 329] model. A test of $H_0: \alpha = 0$ is a test for correlation between the error terms and the probabilities of punishment. If $H_0: \alpha = 0$ is rejected, this indicates that the OLS regression is misspecified and that the homicide function should be estimated with 2SLS. Estimation of equation (7) for the two specifications of the homicide function with different age distribution variables yields the estimates of α reported below in Table III.

The coefficients on the instruments for the probabilities of punishment in Table III are, with only one exception, less than their standard errors. The *F*-value for the test of the hypothesis $H_0: \alpha = 0$ is .67, well below the critical value of *F* for this test.[6] Clearly one cannot reject the hypothesis that the probabilities of punishment are exogenous. Because there is no evidence that the probabilities of punishment are endogenous and because

4. Ehrlich's decision to estimate the homicide function with 2SLS was based on an optimal law enforcement model. Ehrlich hypothesized that exogenous increases in the homicide rate would lead to increases in the probabilities of arrest, conviction, and execution. H&W's disequilibrium model of law enforcement predicts exogenous increases in the homicide rate will cause the probabilities of arrest, conviction and execution to fall.

5. The author [20; 21] did use 2SLS to estimate the Canadian homicide function. Unlike the U.S., Canada has a uniform crime code and law enforcement authority. Because of this difference it is more plausible to believe that law enforcement behavior is endogenous in Canada. The use of 2SLS estimation for the Canadian homicide function was supported by the use of Hausman's test.

6. The 5% critical value of *F* for 3 and 22 degrees of freedom is 3.05.

2SLS is less efficient than OLS when the explanatory variables are exogenous, the remaining regressions are estimated with OLS methods. Equations (5) and (6) in Table II report the results of estimating the homicide function assuming that *PA*, *PC* and *PE* are exogenous variables. As expected, the coefficients on the deterrence variables in (5) and (6) have smaller standard errors than the coefficients on the deterrence variables in equations (3) and (4) but the difference is not dramatic. The coefficients on the probabilities of conviction and execution in equations (5) and (6) are still less than twice their standard errors.

III. Updating the Homicide Regression and the Choice of Explanatory Variables

In this section the homicide function is estimated using the Vital Statistics data to measure homicides per capita. Bowers and Pierce [3, 187-89] argue persuasively that the FBI measure of homicides during the 1930s is suspect. In the 1930s when the FBI reporting system was just beginning the number of reporting agencies was relatively small. As Bowers and Pierce note, the FBI measure of homicides during the 1930s is 15% below the Vital Statistics measure of homicides. However, after 1939 the two series are in much closer agreement.

Despite Bowers and Pierce's criticism of Ehrlich for using the FBI measure of homicides, they do not present alternative regression estimates utilizing the Vital Statistics measure of homicides. Had Bowers and Pierce shown that the probabilities of punishment have insignificant coefficients in the regression with the Vital Statistics measure of homicides, their claim that Ehrlich's results are an illusion would have been strengthened considerably. H&W [17, 339] are aware of Bowers and Pierce's criticism of the FBI measure of homicides yet they too report only estimates of the homicide function using the FBI measure of homicides. Had Bowers and Pierce or H&W estimated the homicide function with the Vital Statistics measure of homicide they would have found that the resulting regression estimates support the deterrence theory more strongly than the regression estimates with the FBI measure of homicides.[7]

Measuring the Execution Risk

Before the homicide regression can be updated, some provision must be made for measuring the subjective probability of execution from 1968-76 when the relative frequency of execution was zero. Despite the fact that there were no executions in the U.S. from 1968-76, it is doubtful that potential murderers believed there was no possibility of being executed in these years. Another problem with assuming the subjective probability of execution is zero is that it makes the use of the log-linear functional form impossible because the logarithim of zero is undefined.

One solution to this problem is to use an alternative functional form that does not

7. For example reestimating equation (2), Table II with the Vital Statistics measure of homicides yields the following:

Variable	ln*PA*	ln*PC*	ln*PE*
Coefficient	−.136	−.029	−.0058
t-statistic	−1.86	−2.66	−1.64

measure the probability of execution in logarithims.[8] This approach will be discussed later in section IV. Ehrlich [6, 409] dealt with the problem of zero relative frequencies of execution in the last two years of his sample, 1968 and 1969, by assuming for measurement purposes that 1 execution occurred in each of the years 1968 and 1969. In this section two methods of measuring the probability of execution are used. First Ehrlich's approach is followed by arbitrarily assuming 1 execution per year from 1968 to 1976. Secondly, a Bayesian approach is used which allows potential criminals to annually revise their subjective probabilities in light of new information. The latter method is explained below.

Assume that potential murderers' uncertainty about the relative frequency of execution in 1968 can be described by a beta prior density function

$$f(Pe(t_0)|\alpha,\beta) = [\Gamma(\alpha+\beta)Pe(t_0)^{\alpha-1}(1-Pe(t_0))^{\beta-1}]/[\Gamma(\alpha)\Gamma(\beta)], \tag{8}$$

where $0<Pe<1$, $t_0 = 1968$ and Γ is the gamma function defined by

$$\Gamma(\alpha) = \int_0^\infty u^{\alpha-1}e^{-u}du \qquad \alpha>0. \tag{9}$$

The expected value of the relative frequency of execution in 1968 is

$$E[Pe(t_0)] = \alpha/(\alpha+\beta). \tag{10}$$

Given $c(t_0)$ independent convictions in 1968, $e(t_0)$ of which result in executions, the posterior distribution of $Pe(t_0)$ is also a beta distribution with a density function[9] $f(Pe(t_0+1)|\alpha+e(t_0), \alpha+\beta+c(t_0)-e(t_0))$. The expected vlaue of Pe in 1969 is given by

$$E[Pe(t_0+1)] = [\alpha+e(t_0)]/[\alpha+\beta+c(t_0)-e(t_0)]. \tag{11}$$

The annual revision of the beta distribution in light of new sample information gives the expected value of $Pe(t)$ in year t_0+j of

$$E[Pe(t_0+j)] = [\alpha+\sum_{i=0}^{j-1}e(t_0+i)]/[\alpha+\beta+\sum_{i=0}^{j-1}c(t_0+i)-e(t_0+i)], \tag{12}$$

where $j = 1, \ldots 8$. Because $e(t) = 0$ from 1968 to 1976 equation (17) simplifies to

$$E[Pe(t_0+j)] = \alpha/[\alpha+\beta+\sum_{i=0}^{j-1}c(t_0+i)]. \tag{13}$$

The values of α and β are chosen in the following manner. After the class action suits filed by Anthony Amsterdam [17, 331] in 1965 there were only 3 executions in the U.S. in 1966 and 1967. From 1968 to 1976 there were no executions. The estimated sum of homicide convictions in 1966 and 1967 is 9436.[10] Based on the sample information in 1966 and 1967, it is assumed that $\alpha = 3$ and $\alpha+\beta = 9436$, yielding an expected value of Pe in 1968 in percentage points of .032. The implied values of the subjective probabilities of execution for 1969-76 are .0207, .0156, .0124, .0099, .0083, .0071, .0061, and .0052.[11]

8. Ehrlich [9] argues on both theoretical and empirical grounds that the probabilities of punishment should be measured in logarithims.

9. See DeGroot [4, 40, 60].

10. The number of convictions in 1966 and 1967 are calculated using the formula $PA_t \cdot PC_t \cdot Q_t$ where Q_t is the number of homicides and t is a subscript referring to the year.

11. The value of PE from 1933-67 and 1977 is measured by the number of executions divided by the estimated number of homicide convictions lagged one year. The estimates of homicide convictions are calculated as explained in footnote 10.

The Updated Regressions

The log-linear functional form is used in this section rather than the semilogarithmic form used by H&W. Ehrlich [9] found the cross-sectional evidence to be consistent with the log-linear functional form. Statistical justification for the log-linear functional form is presented in the next section. In the equations in Table IV, a single age distribution variable *A2129*, the proportion of the population between 21 and 29 years of age, is used rather than two separate age distribution variables.[12] Finally, three new explanatory variables are added to the regressions in Table IV. *NW*, the proportion of the population that is nonwhite, *REL*, the proportion of the population that belongs to a religion and *HWF*, the proportion of families with both husband and wife present.

Equations (14) and (15) in Table IV present the updated estimates of H&W's homicide regression treating the probabilities of punishment as exogenous variables. In equation (14) the probability of execution is measured using the Bayesian approach discussed previously. In equation (15) the probability of execution is measured by assuming 1 execution per year in the years when there were no executions, 1968-1976. The alternative measures of the probability of execution used in equations (14) and (15) yield similar estimates of the elasticity of homicide with respect to the conditional probability of execution, respectively, −.076 and −.068. These estimates are comparable to the estimates reported by Ehrlich [6, 410].

The probability of arrest, the conditional probability of conviction and the conditional probability of execution all have negative and statistically significant coefficients in equations (14) and (15). Furthermore, the magnitudes of the coefficients on the probabilities of punishment are consistent with the "elasticity conditions." The coefficients on the probability of arrest in equations (14) and (15) are larger at the 5% significance level than the coefficients on the conditional probability of conviction which are in turn larger at the 5% significance level than the coefficients on the conditional probability of execution.

As expected, the age distribution variable *A2129* has positive and statistically significant coefficients in equations (14) and (15). The unemployment rate and the labor force participation rate are included in the regressions as measures of the opportunity costs of committing homicide. The unemployment rate is expected to have a positive effect on the homicide rate and the labor force participation rate is expected to have a negative effect. Although the coefficients on the unemployment and labor force participation rates have the expected signs in equations (14) and (15), none of these coefficients are significant. The coefficient on permanent income has a positive but insignificant coefficient in equations (14) and (15) and the coefficients on the time trend are negative and insignificant. Finally, neither equation exhibits much autocorrelation in the residuals.

In the next four equations in Table IV potential murderers' subjective probabilities of punishment are measured by averaging the current values of *PA*, *PC* and *PE* with the two previous years' values. Thus $PA3 = (PA + PA_{-1} + PA_{-2})/3$, $PC3 = (PC + PC_{-1} + PC_{-2})/3$ and $PE3 = (PE + PE_{-1} + PE_{-2})/3$ are used rather than the current values of *PA*, *PC*, and *PE*. This averaging process produces a smoother, less erratic series for these variables which probably corresponds more closely to potential murderers' subjective probabilities than the current relative frequencies.

12. The use of a single age distribution variable instead of two separate age distribution variables makes little difference in the regressions results.

Table IV. Updated OLS Estimates of the U.S. Homicide Function

Equation	(14)	(15)		(16)	(17)	(18)	(19)
Dependent Variable	ln q	ln q		ln q	ln q	ln q	ln q
ln *PA*	−2.24	−2.31	[ln *PA3*]	−1.57	−1.34	−1.21	−1.37
	(5.91)	(5.47)		(4.57)	(4.81)	(3.95)	(4.00)
ln *PC*	−.315	−.307	[ln *PC3*]	−.436	−.544	−.547	−.548
	(4.79)	(4.12)		(11.8)	(11.6)	(9.78)	(10.45)
ln *PE*	−.076		[ln *PE3*]	−.103	−.098	−.102	−.103
	(5.21)			(12.0)	(13.0)	(13.2)	(13.51)
ln *PE**		−.068					
		(3.99)					
TT	−.013	−.011		−.023	−.005	−.013	−.008
	(1.35)	(1.02)		(3.33)	(1.32)	(1.51)	(2.06)
ln *A2129*	.462	.533		.392	.200	.159	.103
	(3.15)	(3.36)		(4.44)	(2.89)	(1.33)	(2.08)
ln *U*	.010	.015		−.025	−.027		
	(.31)	(.40)		(1.51)	(1.86)		
ln *LFP*	−1.03	−.842		−2.33	−2.18	−2.04	−1.95
	(1.50)	(1.03)		(7.48)	(8.11)	(7.35)	(6.35)
ln *Y*	.244	.256		.297	.244	.422	.340
	(.87)	(.80)		(1.98)	(2.28)	(5.42)	(2.94)
ln *NW*				1.10		.333	
				(1.91)		(.50)	
ln *REL*					−1.11	−1.17	−1.29
					(3.47)	(2.44)	(3.97)
ln *HWF*							.378
							(.67)
C	7.33	7.74		6.22	2.21	1.20	1.60
	(4.84)	(4.56)		(7.08)	(1.50)	(.67)	(.80)
$\hat{\rho}$	.004	.153		−.272	−.403	−.360	−.364
	(.024)	(.87)		(1.60)	(2.48)	(2.13)	(2.17)
R^2	.973	.957		.996	.998	.997	.997
Period	1936–77	1936–77		1936–77	1936–77	1936–77	1936–77

Note: Absolute value of *t*-statistics in parentheses.

Another advantage of averaging the current values of *PA*, *PC*, and *PE* with their lagged values is that it further justifies treating the probabilities of punishment as exogenous variables. Changes in the current homicide rate may affect current and future relative frequencies of punishment in the manner suggested by H&W, but the current homicide rate should have no effect on past values of *PA*, *PC* and *PE*.

As mentioned earlier, some new variables have been added to the regressions in Table IV. Because a disproportionate number of homicide victims and persons arrested for

homicide are nonwhite, *NW* is expected to have a positive effect on the homicide rate. Ehrlich [5; 9] found in his cross-sectional studies that the proportion of state population that is nonwhite is positively associated with homicide and other felony crime rates. The religion variable, *REL*, is included in the regressions as a measure of the quality of the environment, moral inhibitions of committing homicide, or possibly as a measure of fears of other worldly punishment for committing homicide.

In equations (16)-(19) in Table IV, the coefficients on *PA3*, *PC3* and *PE3* are all negative and highly significant. Comparing equations (14) and (15) with equations (16)-(19), the averaging process reduces the magnitude of the coefficients on the arrest variable but increases the magnitude of the coefficients on the conviction and execution variables. In the latter 4 equations in Table IV, the coefficients on the conviction and execution variables have much larger *t*-statistics than in equations (14) or (15). The *t*-statistics on *PC3* in equations (16)-(19) range from −9.78 to −11.8; the *t*-statistics on *PE3* in equations (16)-(19) range from −12 to −13.5. The much larger *t*-statistics on the conviction and execution variables in the last 4 regressions in Table IV are consistent with the belief that averaging the relative frequencies of punishment over a number of years produces a better measure of criminals' subjective probabilities of punishment than the use of the current relative frequencies of punishment.

Averaging the relative frequencies of punishment has some important effects on the other estimated coefficients too. In contrast to the positive coefficients on the unemployment rate, *U*, in equations (14) and (15), the coefficients on the unemployment rate are negative in equations (16) and (17). In equation (18) and subsequent equations the unemployment rate is dropped from the regression. The coefficients on the labor force participation, *LFP*, in equations (16)-(19) are negative, as expected, and highly significant. The *t*-statistics on the permanent income variable, *Y*, are also much larger in equations (16)-(19) than in equations (14) and (15).

The coefficient on ln*NW* in equation (16) is positive as expected but not quite significant at the 5% level. The coefficient on ln*REL* in equation (17), −1.11, is an estimate of elasticity of homicide with respect to the proportion of the population that belongs to an organized religion. According to this estimate a 10% increase in *REL* would reduce the homicide rate by approximately 11%. The coefficient on the religion variable in equation (17) is significant at the 1% level.

Equation (18) shows the results of including both the nonwhite and religion variables in the regression. The religion variable remains significant at the 5% level but the *t*-statistics on the nonwhite variable drops sharply. The age distribution variable also becomes insignificant in equation (18). The coefficients on the nonwhite and age distribution variables in Table IV illustrate what Leamer [22; 23; 24] and other econometricians have been emphasizing recently, that the significance and even the sign of regression coefficients often depend on the set of explanatory variables chosen by the researcher.

Fragility of the Regression Results

To examine the fragility of the regression results in Table IV in a systematic way, the homicide function is estimated with a large number of alternative specifications. Each specification consists of a different subset of explanatory variables taken from a set of variables that includes all the variables listed in Table IV plus the following variables: the

Table V. Specification Search

Variable	*N*	Negative Coefficient	Negative and Significant	Positive Coefficient	Positive and Significant
ln *PA3*	210	209 (.995)	134 (.638)	1 (.005)	0 (.0)
ln *PC3*	210	210 (1.0)	210 (1.0)	0 (.0)	0 (.0)
ln *PE3*	210	210 (1.0)	210 (1.0)	0 (.0)	0 (.0)
TT	210	173 (.824)	111 (.529)	37 (.176)	2 (.01)
ln *A2129*	210	7 (.033)	0 (.0)	203 (.962)	87 (.414)
ln *LFP*	84	84 (1.0)	84 (1.0)	0 (.0)	0 (.0)
ln *Y*	84	10 (.119)	0 (.0)	74 (.881)	25 (.298)
ln *REL*	84	84 (1.0)	72 (.857)	0 (.0)	0 (.0)
ln *HWF*	84	0 (.0)	0 (.0)	84 (1.0)	26 (.310)
ln *U*	84	63 (.750)	29 (.345)	21 (.250)	0 (.0)
ln *NW*	84	13 (.155)	0 (.0)	71 (.845)	12 (.143)
ln *MALE*	84	84 (1.0)	18 (.214)	0 (.0)	0 (.0)
ln *WELF*	84	49 (.583)	10 (.119)	35 (.417)	3 (.036)
ln *SCH*	84	27 (.321)	7 (.083)	57 (.690)	28 (.357)
INF	84	6 (.071)	0 (.0)	78 (.929)	4 (.048)

Note: N = number of specifications in which variable appeared. Percentages expressed as a proportion of N are given in parentheses.

proportion of the population that is male (*MALE*), real welfare payments (*WELF*), median years of schooling (*SCH*), inflation (*INF*) and the proportion of families that have both husband and wife present (*HWF*).

Each specification consists of 9 explanatory variables: *PA3*, *PC3*, *PE3*, *TT*, *A2129*, plus 4 other variables taken from the 10 remaining variables described above.[13] The total number of specifications is given by $10^{C}4 = 210$. Table V summarizes the results by the sign and significance of the estimated coefficients. A coefficient is considered "significant" in Table V if its *t*-statistic is greater than 2 in absolute value.

In every regression but one, *PA3* has a negative coefficient and the arrest variable is negative and significant in 134 of the 210 specifications. The conviction and execution variables are negative and significant in every one of the 210 specifications. Clearly the conviction and execution variables are robust with respect to the choice of explanatory variables. A further examination of the regressions shows that in 183 of the 210 specifications the magnitude of the coefficients on ln*PA3*, ln*PC3* and ln*PE3* are in accordance with the "elasticity conditions."

Concerning the non-deterrence variables, the labor force participation rate has negative and significant coefficients in each of the 84 specifications in which this variable was used. The religion variable also has negative coefficients in each of the 84 regressions in

13. To provide a valid test of the deterrence theory one must include all 3 of the conditional probabilities of punishment.

which it was used.[14] In 72 of the 84 specifications the coefficient on the religion variable is significant. Two other variables that have coefficients with the same sign in each specification are: (1) the proportion of families with husband and wife present and (2) the proportion of the population that is male. Ironically, both of these variables have coefficients with unexpected signs.

In each of the 84 specifications the proportion of families with both husband and wife present has positive coefficients. It was thought that the proportion of families with both husband and wife present would measure the quality of the social environment and hence would be negatively related to the homicide rate. However, an alternative explanation for the effect of HWF consistent with the positive coefficients on this variable is that separation of antagonistic spouses reduces the number of homicides by spouses. The coefficients on HWF are significant in 26 of the 84 specifications. Because a disproportionate number of the persons arrested for homicide are males, it was thought that the proportion of the population that is male might have a positive effect on the homicide rate. However, in each case the coefficient on this variable is negative, although the coefficients are significant in only 18 of the 84 specifications.

The age distribution variable *A2129*, has positive coefficients in 203 of the 210 specifications in which this variable appears. In 87 of these specificatons the coefficients on the age distribution variable are positive and significant. The time trend has negative coefficients in 173 of the 210 specifications in which it appears and in 111 specifications the coefficients are negative and significant. The permanent income variable, Y, has positive coefficients in 74 of the 84 specifications in which it appears and has positive and significant coefficients in 25 of the specifications.

Interestingly, the inflation rate has positive coefficients in 78 of the 84 specifications in which this variable appears. However, this variable is only significant in 4 of the 84 specifications in which it appears. The proportion of the population that is nonwhite has positive coefficients in 71 of the 84 specifications in which it appears but has positive and significant coefficients in only 12 cases. The effects of the remaining 3 variables — unemployment, real federal welfare payments, and schooling — are inconsistent and in most specifications insignificant.

Based on the specification search described in Table V and other considerations equation (19) in Table IV represents the specification of the homicide function that is used for subsequent analysis in this paper. Aside from the deterrence variables, *PA3*, *PC3* and *PE3*, the explanatory variables included are the time trend, age distribution, labor force participation, permanent income per capita, the proportion of the population that is a member of a religious group and the proportion of families with both husband and wife present. The coefficient on $\ln HWF$ in equation (19), .378, is positive but insignificant. The inclusion of the new variable in the homicide function has little effect on the other estimated coefficients as can be seen by comparing equations (16)-(18) to equation (19).

Tradeoff of Executions for Murders

The *ceteris paribus* tradeoff of executions for homicides evaluated at the mean number of homicides $\bar{Q}$ and the mean number of executions $\bar{E}$ is given by

14. However, if the probabilities of punishment are measured by their current values *PA*, *PC*, and *PE*, rather than their averaged values *PA3*, *PC3*, and *PE3*, the coefficient on the religion variable is sometimes positive.

$$\Delta Q/\Delta E = \hat{\alpha}(\bar{Q}/\bar{E}). \tag{20}$$

where $\hat{\alpha}$ is the estimate of the elasticity of homicide with respect to the probability of execution. Letting $\hat{\alpha} = -.1$ based on the estimates reported in equations (16)-(19) of Table IV, the tradeoff of executions for murders is approximately −18.5.

This tradeoff is considerably larger than the estimate tradeoffs of −7 to −8 reported by Ehrlich [6, 414]. There are two reasons for the higher tradeoff reported in this paper. First from equation 20 the tradeoff increases proportionally with $\bar{Q}/\bar{E}$. In the updated sample used in this paper the value of $\bar{Q}/\bar{E}$ is larger than in Ehrlich's sample.[15] Secondly the value of $\hat{\alpha}(-.10)$ used in computing the tradeoff in this paper is larger than the $\hat{\alpha}$ values used by Ehrlich [6, 410], −.06 and −.065.

A number of qualifications should be considered in interpreting the estimated tradeoff of executions for homicides. First the standard errors of the point estimates of α should be considered. From equations (19) in Table IV, the 99% confidence interval for α is (−.082, −.124). The confidence intervals for α based on equations (16)-(18) yield similar ranges. Evaluating the tradeoff at the lower and higher range of the confidence interval yields tradeoffs of −15.2 and −23, respectively. More importantly the estimated value of α varies considerably depending on the choice of explanatory variables used. From the specification search discussed earlier, 210 different regressions were considered. The values of α in these regressions ranged from a low of −.046 to a high of −.152. The corresponding tradeoff of executions for homicides ranges from −8.5 to −28. It is interesting to note that even at the lower range of α the tradeoff is still substantial.

Finally the estimated tradeoffs reported in this paper are calculated under the *ceteris paribus* assumption. Under certain conditions this may give misleading estimate of the true tradeoff. For example, if juries react to an increased relative frequency of execution by demanding greater proof of guilt before convicting, an increase in the probability of execution may reduce the probability of conviction, wholly or partially offsetting the deterrent effect of the increase in the probability of execution.[16] The author investigated this possibility by regressing the probability of conviction on the probability of execution and other explanatory variables. These regressions provide no evidence in favor of the hypothesis that the probability of execution has a negative effect on the probability of conviction.

IV. The Choice of Functional Form and the Stability of the Homicide Function over Time.

As mentioned in the introduction, Bowers and Pierce [3], Passell and Taylor [26] and Klein, Forst and Filatov [19] have criticized Ehrlich's time-series results as being sensitive to the choice of time period and functional form. To check the stability of the homicide regression over time, equations (21)-(24) in Table VI report the results of estimating the homicide regression over alternative subperiods of the full sample. Equation (21) presents the full sample (1963-77) regression. Equation (22) is estimated over the 1936-69 period to check how sensitive the regression results are to omitting the 1970s data from the sample.

15. For the updated sample used in this paper $\bar{Q} = 10696$ and $\bar{E} = 58$. For Ehrlich's [6, 414] sample $\bar{Q} = 8965$ and $\bar{E} = 75$.

16. The author [20, 68] found some evidence of a negative relationship between *PC* and *PE* in his study of homicide in Canada.

Table VI. OLS Estimates of the Homicide Function Over Alternative Time Periods

Equation	(21)	(22)	(23)	(24)
Dependent Variable	ln q	ln q	ln q	ln q
ln *PA3*	−1.37	−1.20	−2.02	−1.62
	(4.00)	(3.66)	(3.57)	(3.78)
ln *PC3*	−.548	−.543	.382	−.576
	(10.4)	(11.4)	(0.34)	(7.34)
ln *PE3*	−.103	−.130	−.073	−.119
	(13.5)	(9.11)	(1.52)	(9.26)
TT	−.0083	−.017	−.016	−.0075
	(2.06)	(3.34)	(1.64)	(1.69)
ln *A2129*	.103	−.0087	−.226	.130
	(2.08)	(.13)	(1.73)	(2.00)
ln *LFP*	−1.95	−2.86	−3.28	−1.93
	(6.35)	(6.39)	(6.02)	(5.63)
ln *Y*	.340	.319	−.225	−.063
	(2.94)	(1.79)	(.64)	(.20)
ln *REL*	−1.29	−.886	.173	−.685
	(3.97)	(2.44)	(.21)	(1.24)
ln *HWF*	.378	1.14	4.47	.063
	(.67)	(.96)	(2.03)	(.10)
C	1.60	.731	7.93	6.02
	(.80)	(.29)	(1.69)	(1.57)
$\hat{\rho}$	−.364	−.465	−.605	−.439
	(2.17)	(2.66)	(2.64)	(2.25)
R^2	.997	.998	.999	.998
Period	1936–77	1936–69	1936–57	1944–77

Note. Absolute value of *t*-statistics are given in parentheses.

Equation (23) reports the regression estimated over the even shorter 1936-57 period. In equation (24) the regression is estimated from 1944-77 to check how sensitive the results are to omitting the first 8 years of the sample. Bowers and Pierce [3] argue that the FBI data on conviction rates is unreliable until the 1940s.

Comparing equations (22) and (24) to the full sample regression, equation (21), one can see that deleting the first 8 observations or the last 8 observations from the sample does not substantially alter the coefficient estimates, or their *t*-statistics. Deleting the last 8 observations from the sample causes the coefficient on the age distribution variable to switch from positive to negative; deleting the first 8 observations causes the coefficient on permanent income per capita to switch from positive to negative. In equation (23), estimated from 1936-57, the *t*-statistic on the coefficient on ln *PE3* falls to −1.52 which is not significantly different from 0 at the 5% level. It is possible, as Passell and Taylor [26] argue, that the sharp decline in the execution rate in the late 1950s and 1960s is a proxy for some

Table VII. Stability of the Homicide Function Over Time

Period	SSR × 100	SE × 100	F	$F_{.95}$	F'
1936–55	.405078	2.01265	.82	2.30	1.75
1936–56	.503054	2.13851	1.65	2.30	1.44
1936–57	.539733	2.12080	1.54	2.30	1.30
1936–58	.694215	2.31087	1.08	2.30	.823
1936–59	.699655	2.23552	1.39	2.30	1.22
1936–60	.725234	2.19884	1.60	2.30	1.14
1936–61	.725258	2.12905	1.84	2.30	1.26
1936–62	.737985	2.08353	2.64	2.30	1.59
1936–63	.763841	2.05999	3.06	2.30	1.70
1936–64	.848132	2.11273	2.55	2.30	1.15
1936–65	.852513	2.06[illegible]	2.52	2.30	1.31
1936–66	.894152	2.06346	2.01	2.28	1.35
1936–67	.978733	2.10921	1.92	2.30	1.22
1936–68	.979003	2.06314	2.23	2.32	1.46
1936–69	.999335	2.04056	2.51	2.36	1.66
1936–70	1.00338	2.00338	2.96	2.41	2.04
1936–71	1.11938	2.07492	2.77	2.47	1.70
1936–72	1.18212	2.09242	2.98	2.57	1.76
1936–73	1.31173	2.16443	2.79	2.71	1.08
1936–74	1.41293	2.20730	2.89	2.93	.0002
1936–75	1.41294	2.17020	4.48	3.32	—
1936–76	1.76421	2.38558	1.24	4.15	—
1936–77	1.83472	2.39447	—	—	—

unknown omitted variables that are really responsible for the rising homicide rate during this period. Another explanation for the insignificant coefficient on ln*PE3* (and ln*PA3*) in equation (23) is the small number of degrees of freedom — 13 — combined with the multicollinearity among the explanatory variables.[17]

To examine the stability of the homicide regression more systematically, Table VII reports the sum of squared residuals (SSR) and the standard error of the homicide regression (SE) over different time periods beginning with 1936-55 and ending with 1936-77. From column 3 in Table VII one can see that the standard error of the regression is reasonably stable over time, exhibiting no systematic trend. Inspection of column 2 in the table shows a very large increase in the SSR from 1975 to 1976. The large jump in the SSR from 1975 to 1976 is associated with a sharp decline in the homicide rate in 1976. The homicide rate reached its minimum sample value in 1957 and except for a very slight

17. Examples of first-order correlations between variables for the 1936-57 period are: *TT* and ln*Y*(.976), *TT* and ln*REL*(.973), *TT* and ln*PE3*(−.954), ln*PE3* and ln*Y*(−.936), ln*PE3* and ln*REL*(−.906), ln*PE3* and ln*PA3*(−.899).

decline in 1961 the homicide rate increased steadily from 1957 to 1974. From 1962 to 1974 the average annual rate of increase in the homicide rate was 6%. In 1975 the homicide rate fell by a small amount and then fell very sharply by more than 9% in 1976. The large increase in the SSR from 1975 to 1976 in column 2 reflects the fact that the regression equation does not predict the sharp decline in the homicide rate in 1976.

Column 4 reports the F-values for the Chow tests of the equality of the coefficients for the subperiod in column 1 and the subperiod consisting of the remaining years in the full sample. For example, the first F-value in column 4 is for the test of the hypothesis that the regression coefficients are equal over the 1936-55 and 1956-77 subperiods. Beginning with the 1936-66 and 1967-77 subperiods the F-values are calculated using the Chow test for the case of insufficient degrees of freedom. The 5% critical values of F are reported in column 5.

If the full sample is divided between 1962 and 1965 or between 1969 and 1973 the hypothesis that the coefficients are equal over the two subperiods is rejected at the 5% level. However, if one divides the sample between 1955 and 1961 or between 1966 and 1968, the hypothesis that the regression coefficients are equal over the two subperiods is not rejected. One might argue that dividing the sample at 1957 provides the most plausible division. The trend of the homicide rate was negative from the early 1930s to 1957. In 1957 the homicide rate reached its minimum sample value; thereafter the trend of the homicide rate was increasing until 1974. The F-statistic for the hypothesis that the coefficients are equal from 1936-57 and 1958-77 is 1.54 which is well below the 5% critical value of F.

Even if one were to believe that the division of the sample between 1962 and 1965 or between 1969 and 1973 is more appropriate than some other division, the increased efficiency from using the full sample regression estimates may outweight the bias in the coefficient estimates resulting from the restriction that the coefficient estimates be equal in the two subperiods. Wallace [28] has shown that if the goal is to minimize the weighted average of the mean square errors of the coefficient estimates, the resulting critical values of F are higher than the conventional F-values for Chow tests. Using Goodnight and Wallace's [13] tables for the weak MSE test for restrictions in regressions, the critical 5% F-value is, 4.29. From column 3 of Table VII the 5% critical value of F for the weak MSE test is never exceeded.

Column 6 presents the F-values for the hypothesis of equal coefficients over the subperiod indicated in column 1 and the remaining years in the full sample except for the last two years, 1976 and 1977. The largest F-value in column 6 is 2.04 which is below the 5% critical of F for the conventional Chow test. Even the weak evidence of instability in the homicide function depends critically on the last two years of the sample. By deleting the last two years from the sample there is no partition of the sample that yields an F-value which exceeds the 5% critical value of F for the Chow test. In summary, the homicide function appears to be reasonably stable over time. The evidence for instability of the homicide is weak and critically dependent on the last two years of the sample.

To test for the optimal functional form for the time-series data, suppose the model to be estimated with the time-series data is

$$q_t^{(A1)} = c + B_1 PA3_t^{(A2)} + B_2 PC3_t^{(A2)} + B_3 PE3_t^{(A2)} + B_4 Y_t^{(A2)} + B_5 LFP_t^{(A2)} + B_6 TT + B_7 A2129_t^{(A2)} + B_8 REL^{(A2)} + B_9 HWF^{(A2)}. \quad (25)$$

$$u_t = \rho u_{t-1} + \epsilon_t.$$

where $|\rho| < 1$ and ϵ_t is $NID(0,\sigma^2)$. The Box-Cox [2] transformation of the dependent variable is defined by

$$q_t^{(\lambda 1)} = (q_t^{\lambda 1} - 1)/\lambda 1 \quad \text{for } \lambda 1 \neq 0, \tag{26}$$

and

$$q_t^{(\lambda 1)} = \ln q_t \text{ for } \lambda 1 = 0.$$

The transformation of the right-hand-side variables are similarly defined. The log-linear functional form is represented by $(\lambda 1, \lambda 2) = (0, 0)$ and the linear functional form is represented by $(\lambda 1, \lambda 2) = (1, 1)$.

Letting $\mathbf{q}^{(\lambda 1)}$ be the vector of transformed observations on the homicide rate, $\mathbf{X}^{(\lambda 2)}$ the matrix of transformed observations on the right-hand-side variables, and $\mathbf{B}$ the vector of coefficients, the log likelihood function for the sample of observations on the homicide rate is

$$L = -T/2[\ln(2\pi\sigma^2)] + 1/2\ln(1-\rho^2) - 1/2(\sigma^2)[\mathbf{q}^{(\lambda 1)} - \mathbf{X}^{(\lambda 2)}\mathbf{B}]' \mathbf{V}^{-1}[\mathbf{q}^{(\lambda 1)} - \mathbf{X}^{(\lambda 2)}\mathbf{B}] + (\lambda 1 - 1) \sum_{t=1}^{T} \ln q_t, \tag{27}$$

where $\mathbf{V}^{-1}$ is the matrix

$$\begin{bmatrix} 1 & -\rho & 0 & \cdot & \cdot & \cdot & 0 & 0 \\ -\rho & 1+\rho^2 & -\rho & 0 & \cdot & \cdot & 0 & 0 \\ 0 & -\rho & 1+\rho^2 & & & & \cdot & \cdot \\ \cdot & 0 & & & & & \cdot & \cdot \\ \cdot & \cdot & & & & & \cdot & \cdot \\ \cdot & \cdot & & & & & \cdot & \cdot \\ & \cdot & & & & & 1+\rho^2 & -\rho \\ 0 & 0 & & & & & -\rho & 1 \end{bmatrix}$$

Letting the first three terms in equation (27) be denoted by L_1, equation (27) simplifies to

$$L = L_1 + (\lambda 1 - 1) \sum_{t=1}^{T} \ln q_t. \tag{28}$$

For given values of $\lambda 1$ and $\lambda 2$, maximizing L_1 with respect to $\mathbf{B}$, σ^2, and ρ is the same as maximizing the log-likelihood function for a linear regression with autocorrelated errors. Beach and MacKinnon's [1] maximum-likelihood technique is used to estimate L_1 for given values of $\lambda 1$ and $\lambda 2$ and then it is a simple matter to add L_1 and $(\lambda 1 - 1)\Sigma \ln q_t$ to find L.[18]

In Table VIII, the values of the estimated log likelihood function for the 1936-77 data

18. See Seaks and Layson [27] for a more detailed discussion of this procedure.

Table VIII. Test for Functional Form

$\lambda 2$	$\lambda 1^*$	L	$\lambda 2$	$\lambda 1^*$	L
−2.0	.0	197.4	.1	−.4	222.0
−1.9	.0	197.5	.2	−.5	220.5
−1.8	.0	197.5	.3	−.5	218.3
−1.7	.0	197.4	.4	−.5	215.6
−1.6	−.1	197.5	.5	−.4	212.6
−1.5	−.1	197.4	.6	−.3	209.6
−1.4	−.1	197.4	.7	−.1	207.0
−1.3	−.1	197.3	.8	.0	204.7
−1.2	−.1	197.2	.9	.1	203.0
−1.1	−.1	197.1	1.0	.2	201.9
−1.0	−.1	197.1	1.1	.2	201.2
−.9	−.1	197.0	1.2	.3	201.0
−.8	−.1	197.0	1.3	.3	201.0
−.7	−.1	197.1	1.4	.3	201.2
−.6	−.1	197.4	1.5	.3	201.6
−.5	.0	198.0	1.6	.4	202.0
−.4	.8	199.8	1.7	.4	202.6
−.3	.6	209.0	1.8	.4	203.2
−.2	.3	216.5	1.9	.4	203.9
−.1	.0	220.8	2.0	.4	204.5
.0	−.3	222.3	2.1	.4	205.1

are computed for different pairs of $(\lambda 1, \lambda 2)$. In constructing Table VIII the value of $\lambda 2$ was allowed to vary between −2 and 2.0 in increments of .1, and then for each value of $\lambda 2$, the value of $\lambda 1$ was allowed to vary between −2 and 2 in increments of .1. Letting $\lambda 1^*$ be the value of $\lambda 1$ that maximizes L for a given value of $\lambda 2$, the values of L for different ordered pairs $(\lambda 1^*, \lambda 2)$ are reported in Table VIII.

The global maximum value of the likelihood function in Table VIII is 222.33 at $(\hat{\lambda}1, \hat{\lambda}2) = (-.3, 0)$. The results of estimating this regression are given by

$$
\begin{aligned}
q^{(-.3)} = {} & 3.04 - \underset{(.70)}{2.82}\ln PA3 - \underset{(3.84)}{1.25}\ln PC3 - \underset{(11.1)}{.246}\ln PE3 \\
& - \underset{(15.2)}{.020}\,TT + \underset{(2.30)}{.207}\ln A2129 - \underset{(1.98)}{5.41}\ln LFP \\
& + \underset{(8.23)}{.839}\ln Y - \underset{(3.32)}{3.27}\ln REL + \underset{(4.71)}{.717}\ln HWF, \qquad \hat{\rho} = -.465. \qquad (29)
\end{aligned}
$$

Table IX. Likelihood Ratio Tests for Alternative Simple Functional Forms

Functional Form	$(\lambda 1, \lambda 2)$	$L(\lambda 1, \lambda 2)$	χ^2
Log-linear	(0, 0)	220.96	2.75
Semi-log	(0, 1)	201.70	41.26
Semi-log	(1, 0)	205.06	34.54
Linear	(1, 1)	198.55	47.56
Optimal	(−.3, 0)	222.33	

In equation (29) the coefficients on the probabilities of punishment are all negative, statistically significant[19] and consistent with the elasticity conditions. It is interesting to note that the transformation of the independent variables, $\hat{\lambda}2 = 0$, is consistent with Ehrlich's [9, 734-44] theoretical arguments for measuring the probabilities of punishment in logarithims.

The values of the log likelihood function for 4 alternative simple functional forms and the optimal functional form, $(\hat{\lambda}1, \hat{\lambda}2) = (-.3, 0)$, are presented in Table IX. The likelihood ratio test statistic for the hypothesis $H_0: (\lambda 1, \lambda 2) = (\lambda 1^o, \lambda 2^o)$ is $2[(\hat{\lambda}1, \lambda 2) - L(\lambda 1^o, \lambda 2^o)]$ which has a χ^2 distribution with 2 degrees of freedom. The last column in Table IX reports the values of this test statistic for 4 alternative simple functional forms. The 5% and 1% critical values of χ^2 are, respectively, 5.99 and 9.21. The hypothesis that the homicide function is log-linear cannot be rejected at the 5% significance level. However, both versions of the semi-log functional form and the linear functional form are easily rejected at the 1% significance level. The finding that the time-series estimates of the homicide function are consistent with the log-linear specification corroborates Ehrlich's [9] finding that the optimal functional form for the cross-sectional homicide function is close to the log-linear specification.

Table X reports the coefficient estimates and *t*-statistics of the probabilities of punishment for the 4 simple functional forms. For all 4 functional forms the probabilities of punishment are negative and statistically significant at the 1% level. The deterrence findings are clearly robust with respect to the choice of functional form. However, the *t*-statistics on the probability of execution measured in natural values are considerably lower than the *t*-statistics on probability of execution measured in logarithims.

V. Conclusion

This paper has presented updated estimates of the U.S. homicide function that strongly confirm Ehrlich's [6; 9] deterrence findings. The basic deterrence results reported here are also consistent with the author's [20; 21] studies of Canadian homicide and Wolpin's [29] study of homicide in England and Wales. For the full sample regressions estimated in this paper, the probability of arrest, the conditional probability of conviction given arrest, and the conditional probability of execution given conviction have negative and statistically significant effects on the homicide rate. In addition the ranking of the estimated elasticities of homicide with respect to the probabilities of punishment is consistent with sharp predictions derived from the hypothesis of expected utility maximization.

19. In equation 29 all *t*-statistics are conditional on the assumption that $\lambda 1 = -.3$ and $\lambda 2 = 0$.

Table X. Coefficients on the Probabilities of Punishment for Alternative Functional Forms

Functional Form	Variables		
	ln *PA3*	ln *PC3*	ln *PE3*
Log-linear	−1.37	−.548	−.103
	(4.00)	(10.4)	(13.5)
Semi-log	−.118	−.035	−.0058
	(3.18)	(6.01)	(6.13)
	PA3	*PC3*	*PE3*
Semi-log	−.028	−.021	−.073
	(3.72)	(7.70)	(3.28)
Linear	−.0018	−.0014	−.0044
	(3.71)	(7.89)	(3.08)

Note: Absolute value of *t*-statistics in parentheses.

In this paper the homicide rate is measured using the Vital Statistics measure of homicides rather than the FBI series. Previous researchers have used exclusively the FBI data in their time-series analysis. Bowers and Pierce [3], however, argue forcefully that the Vital Statistics measure of homicides is superior to the FBI measure. It is found in this paper that the Vital Statistics data supports the deterrence theory more strongly than the FBI series.

Two other important differences between previous research in this area and the estimates presented in this paper are: (1) OLS methods are used in this paper rather than 2SLS and (2) the probabilities of punishment are measured by averaging the current relative frequencies of punishment with their lagged values of the two previous years. The use of OLS methods rather than 2SLS is justified by an application of Hausman's test and by the use of lagged relative frequencies of punishment to measure murders subjective probabilities of punishment. The particular lag structure used to measure the probabilities is very simple and somewhat arbitrary. However, the deterrence findings reported in this paper are found to be robust with respect to the lag structure used.

Three other important issues that have arisen in the debate over Ehrlich's homicide work are carefully discussed: (1) the sensitivity of the deterrence results to the choice of explanatory variables, (2) the stability of the homicide function over time and (3) the choice of functional form. The deterrence findings are found to be robust with respect to the choice of explanatory variables and functional form. The use of the log-linear functional form is justified by the Box-Cox analysis. The homicide function estimated in this paper is also shown to be reasonably stable over time.

From the specification search, it was found that the proportion of the population that belongs to a religion has a negative and significant effect on the homicide rate in most specifications. Two variables often used by researchers in estimating homicide functions — the unemployment rate and the proportion of the population that is nonwhite — were found to have inconsistent and generally insignificant effects on the homicide rate depending on the choice of explanatory variables. The labor force participation rate has a negative and significant effect on the homicide rate in most specifications. Permanent income per

capita and the proportion of the population between 21 and 29 years of age have positive effects on the homicide rate in most specifications.

The econometric evidence presented in this paper provides solid support for the deterrence hypothesis. The deterrence findings reported in this paper are not fragile. Different sets of explanatory variables have been used, alternative functional forms for the homicide function have been used and the homicide function has been estimated over different time periods. The regression results consistently support the deterrence hypothesis that increases in the probabilities of arrest, conviction, and execution reduce the homicide rate. Even murderers appear to obey the law of demand.

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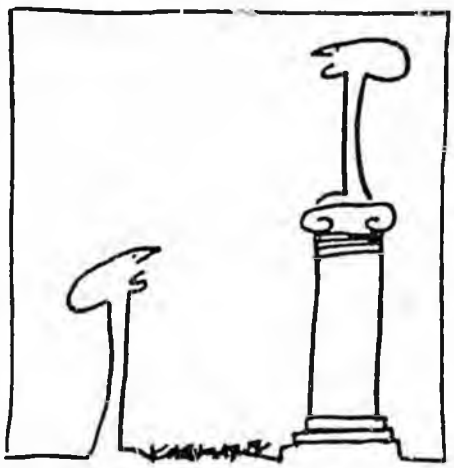
DEATH AND DETERRENCE

Professor Stephen K. Layson, an economist at the University of North Carolina at Greensboro, has published in the *Southern Economic Journal* (July 1985) a statistical study of the effects of executions on the murder rate. He concluded that every execution of a murderer deters, on the average, 18 murders that would have occurred without it.

Layson also inquired into the effects of the arrest and conviction of murderers on the murder rate. His correlations indicate that a 1 per cent increase in the clearance (arrest) rate for murder would lead to 250 fewer murders per year. Currently the clearance rate is 75 per cent. Further, a 1 per cent increase in murder convictions would deter about 105 murders. Currently 38 per cent of all murders result in a conviction; 0.1 per cent of murders result in an execution.

Attempts to correlate murder to punishment rates have been made for a long time. Most had flagrant defects. Some correlated murder rates to the presence or absence of capital-punishment statutes—not to executions, which alone matter. Others failed properly to isolate murder rates from variables other than punishment, even when these variables were known to influence murder rates. For instance, changes in the proportion of young males in the population do influence murder rates regardless of executions, since most murders are committed by young males. The first major statistical analysis that properly handled all variables was published by Isaac Ehrlich in the *American Economic Review* (June 1975). Ehrlich found that from 1933 to 1969 "an additional execution per year . . . may have resulted on the average in seven or eight fewer murders."

Ehrlich's study went against the cherished beliefs of most social scientists (after all, it confirmed what common sense tells us). A whole cottage industry arose to refute him. In turn he refuted the refuters. The verdict is inconclusive. As is often the case in statistical matters, if a different period is analyzed, or some technical assumptions are changed, a different result is produced. Thus the testimony of Professor Thorsten Sellin, given in 1953—long before Ehrlich wrote—to the Royal Commission on Capital Punishment in Great Britain, still stands. Asked whether he could "conclude . . . that capital punishment has no deterrent effect," Sellin, an ardent but honest opponent of capital punishment, replied, "No, there is no such conclusion." Despite considerable advances in methods of analysis I think that, as yet, it has not been proved conclusively that capital punishment deters more than life imprisonment, or that it does not. However, the preponderance of evidence now does tend to show that capital punishment deters more than alternative punishments. Professor Layson's paper will add to that preponderance. But many attempts will be made to refute it, and, in all likelihood, the verdict will still be that the statistics are not conclusive.



"You're way up there, but you're not way, way up there."

What are we to deduce? Obviously people fear death more than life imprisonment. Only death is final. Where there is life there is hope. Actual murderers feel that way: 99.9 per cent prefer life imprisonment to death. So will prospective murderers. What is feared most deters most. Possibly, statistics do not show this clearly, because there are so few executions compared to the number of murders. It is even possible that the uncertain prospect of execution deters so few not already deterred by the prospect of life imprisonment that there is no statistical trace. Yet, if by executing convicted murderers there is any chance, even a mere possibility, of deterring future murderers, I think we should execute them. The life even of a few victims who may be spared seems infinitely precious to me. The life of the convicted murderer has but negative value. His crime has forfeited it.

Opponents of capital punishment usually admit that their opposition has little to do with statistical data. When asked whether they would favor the death penalty if it were shown conclusively that each execution deters, say, one hundred murders, such opponents as Ramsey Clark (former U.S. attorney general) or Henry Schwarzschild (ACLU) resoundingly say no. But neither likes the inference that must be drawn: that he is more interested in keeping murderers alive than in sparing their victims, that he values the life of a convicted murderer more than the life of innocent victims. Those who do not share this bizarre valuation will favor capital punishment.

For beyond deterrence, or possible deterrence, there is justice. The thought that the man who cruelly and deliberately slaughtered your child for fun or profit is entitled peacefully to live out his days at taxpayers' expense, playing

(Continues on page 61)

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Clemens, a/k/a Mark Twain, who was also known as Papa, though in a more familial and private sense of that endearing term. The endearment was especially pronounced, in this case, because it came from Twain's 13-year-old daughter Susy. She was an unusually bright and sensitive child and very much the natural offspring of the beloved "Livy" and our first truly indigenous storyteller of world rank. This is simply an astonishing book, in several ways at once, and one that must become a necessary reference for all Mark Twain enthusiasts and scholars. It gives Susy's biography of her father for the first time in its entirety, usefully set in large-print type in order to distinguish it from the rest of the text, and introduced by Mark Twain along with his predictably amusing and copious comments. Then there is editor Charles Neider's introduction, with its revelations of Susy as someone rather more complex than an adoring daughter in thrall to the father-genius. More than anything else, however, *Papa* is an intensely human document, which appeared in the great celebratory year of 1985: the 150th anniversary of Mark Twain's birth (1835); the 75th of his death (1910); and the centenary of both the American publication of *Huckleberry Finn* (1885) and Susy Clemens's charming biography of her father. She died at age 24 of spinal meningitis. THOMAS P. MCDONNELL

The Glenn Gould Reader, edited by Tim Page (Knopf, 476 pp., $20)

"GLENN GOULD," B. H. Haggin once grumbled, "prefers talking nonsense on anything anywhere to playing the piano marvelously in the concert hall." For the benefit of those who appreciated Gould's particular brand of nonsense more than Mr. Haggin did, Tim Page has put together a lengthy collection of essays, speeches, and interviews called *The Glenn Gould Reader*. Gould's prose was as uneven as his piano playing; some of these pieces (particularly "The Prospects of Recording") are startlingly provocative, some embarrassingly sophomoric, one or two just plain dull. Virtually all are more or less perverse: Gould calls Richard Strauss "the greatest musical figure who has lived in this century" on one page and dismisses the Mozart G Minor Symphony as "a half-hour of banality" on the next. But all are worthy of your closest attention for despite his extreme (and self-conscious) eccentricities of taste and thought, Glenn Gould was the most gifted pianist of his generation, and his best writings on music were as thought-provoking, closely argued, and compelling as his best performances. Avoid the dragged-out spoofs and parodies; savor the liner notes, which are to recorded classical music as Paul Desmond's *triple sec* is to jazz. A wonderful, irritating book. TERRY TEACHOUT

VAN DEN HAAG

(Continued from page 44)

tennis or baseball or enjoying the prison library, is hard to stomach. Wherefore about 75 per cent of Americans favor the death penalty, for the sake of justice, and to save innocent lives. I think they are right.

On occasion I have been presented with a hypothetical. Suppose, I have been asked, that each execution were shown to raise rather than reduce the murder rate. Of course this is quite unlikely (wherefore there is no serious evidence): The more severe and certain the punishment, the less often the crime occurs, all other things being equal. The higher the price of anything, the less is bought. But, if one accepts, *arguendo*, the hypothetical, the answer depends on whether one prefers justice —which demands the execution of the murderer—or saving the lives that, by this hypothesis, could be saved by not executing him. I love justice, but I love innocent lives more. I would prefer to save them.

Fortunately we do not face this dilemma. On the contrary. Capital punishment not only satisfies justice but is also more likely to save innocent lives than life imprisonment. □

BROOKS

(Continued from page 36)

U.S. has been able to concentrate its foreign policy on faraway places like the Middle East and Asia precisely because of the lack of any threat close to home. Disorder in Latin America ties down our forces and makes us less able to fulfill commitments in Europe and elsewhere. Meanwhile, every effort to stabilize Latin America draws a flood of anti-American vitriol from the American Left, our European allies, and the Latin Americans themselves. The Soviets want nothing constructive out of Latin America. They can view the disintegration of Latin America from a distance, hoping the U.S. will get sucked into the mess, while keeping their own hands clean.

In a limited sense, those who say our Latin America problem is not primarily part of the East-West conflict are correct. But neither is the unrest there an indigenous product of poverty and exploitation. Even in Nicaragua, there was no widespread anti-American sentiment before the rise of the Sandinistas. Rather, unrest in Latin America is brought on by a small vanguard of university-educated, upper-middle-class terrorists who have been elevated to guerrilla status by the strategy and support of Fidel Castro. Demographically, these groups are identical to Italy's Red Brigades or the German Baader-Meinhof Gang. The leader of *Sendero Luminoso* is an old philosophy professor who went off into the hills to form a pseudo-Maoist, pseudo-Inca personality cult. Arturo Cruz captured the character of the Sandinistas when he asked derisively, "Do you think a single one of them—the nine comandantes—could get a job and earn a living?"

In 1981, then Secretary of State Alexander Haig argued for going after what he called "the source" of Central America's trouble by applying direct pressure on Cuba. Since Haig's departure, nobody in the Administration or in Congress has echoed that view. Our hesitancy stems from the myth that the Cubans are Soviet puppets, and thus that pressure on the Cubans is the same as pressure on Moscow. The Cubans are not Soviet puppets but Soviet allies. They are dependent allies to be sure, but Moscow neither demands absolute Cuban obedience nor absolutely supports Cuban adventures. We must adopt a defensive posture vis-à-vis the Soviets because we don't have the power to defang them. But there is no reason to be similarly intimidated by Fidel Castro. We should not be satisfied with confronting Castro over his conquests in Grenada and Nicaragua; we should take aim at the factory of Latin revolution. Our Latin America policy would be more realistic if we were to pretend that except as a source of money and guns, the Soviet Union doesn't exist. □