Case Basegound on Capital Punishment
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In Trop, the majority refused to consider "the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital 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. 50 But a coalition of civil rights and civil liberties organizations mounted a campaign against the death penalty in the 1960s, and the Court eventually confronted the issues involved. The answers were not, it is fair to say, consistent one with another.

A series of cases testing the means by which the death penalty was imposed 51 culminated in what appeared to be a decisive rejec tion of the attack in McGautha v. California. 52 Nonetheless, the Court then agreed to hear a series of cases directly raising the question of the validity of capital punishment under the cruel and unusual punishments clause, and, to considerable surprise, the Court held in Furman v. Georgia 53 that the death penalty, at least as administered, did violate the Eighth Amendment. There was no unifying opinion of the Court in Furman; the five Justices in the majority each approached the matter from a different angle in a separate concurring opinion. Two Justices concluded that the death penalty per se was "cruel and unusual" because the imposition of capital punishment "does not comport with human dignity" 54 or because it is "morally unacceptable" and "excessive." 55 One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment. 56 Two Justices concluded that capital punishment was both "cruel" and "unusual" because it was applied in an arbitrary, "wanton," and "freakish" manner 57 and so infrequently that it served no justifying end. 58

Inasmuch as only two of the Furman Justices thought the death penalty to be invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would correct the faults identified in the other three majority opin ions. 59 Enactment of death penalty statutes by 35 States following Furman led to renewed litigation, but not to the elucidation one might expect from a series of opinions. 60 Instead, while the Court seemed firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life, 61 it chose several different paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court determined that the penalty of death for deliberate murder is not per se cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be

established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in Furman. 62 Divisions among the Justices, however, made it difficult to ascertain the form which permissible statutory schemes may take. 63

Inasmuch as the three Justices in the majority in Furman who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition, 64 legislatures turned to enactment of statutes that purported to do away with these difficulties by, on the one hand, providing for automatic imposition of the death penalty upon conviction for certain forms of murder, or, more commonly, providing specified aggravating and mitigating factors that the sentencing authority should consider in imposing sentence, and establishing special procedures to follow in capital cases. In five cases in 1976, the Court rejected automatic sentencing but approved other statutes specifying factors for jury consideration. 65

First, the Court concluded that the death penalty as a punishment for murder does not itself constitute cruel and unusual punishment. While there were differences of degree among the seven Justices in the majority on this point, they all seemed to concur in the position that reenactment of capital punishment statutes by 35 States precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people; rather, they concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, for it to decide that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute their own judgments for the people and their elected representatives. A death penalty statute, just as all other statutes, comes before the courts bearing a presumption of validity which can only be overcome upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence, the judgments of the state legislatures are that it does, and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Neither is the punishment of death disproportionate to the crime being punished, murder. 66

Second, a different majority, however, concluded that statutes mandating the imposition of death for crimes classified as first-degree murder violate the Eighth Amendment. In order to make its determination, the plurality looked to history and traditional usage, to

legislative enactment, and to jury determinations. Because death is a unique punishment, the sentencing process must provide an opportunity for individual consideration of the character and record of each convicted defendant and his crime along with mitigating and aggravating circumstances. 67

Third, while the imposition of death is constitutional per se, the procedure by which sentence is passed must be so structured as to reduce arbitrariness and capriciousness as much as possible. 68 What emerged from the prevailing plurality opinion in these cases are requirements (1) that the sentencing authority, jury or judge, 69 be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused; 70 (2) that to prevent jury prejudice on the issue of guilt there be a separate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, will be presented; 71 (3) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was in fact fairly imposed both on the facts of the individual case and by comparison with the penalties imposed in similar cases. 72 The Court later ruled, however, that proportionality review is not constitutionally required. 73 Gregg, Proffitt, and Jurek did not require such comparative proportionality review, the Court noted, but merely suggested that proportionality review is one means by which a state may "safeguard against arbitrarily imposed death sentences." 74

Most states responded to the requirement that the sentencing authority be given standards narrowing discretion to impose the death penalty by enacting statutes spelling out "aggravating" circumstances at least one of which must be found to be present before the death penalty may be imposed. The standards must be rel atively precise and instructive in providing guidance that minimizes the risk of arbitrary and capricious action by the sentencer, the desired result being a principled way to distinguish cases in which the death penalty is imposed from other cases in which it is not. Thus, the Court invalidated a capital sentence based upon a jury finding that the murder was "outrageously or wantonly vile, horrible, and inhuman," reasoning that "a person of ordinary sensibility could fairly [so] characterize almost every murder." 75 Similarly, an "especially heinous, atrocious or cruel" aggravating circumstance was held to be unconstitutionally vague. 76 The "especially heinous, cruel or depraved" standard is cured, however, by a narrowing interpretation requiring a finding of infliction of mental anguish or physical abuse before the victim's death. 77

The proscription against a mandatory death penalty has also received elaboration. The Court invalidated statutes making death the mandatory sentence for persons convicted of

first-degree murder of a police officer, 78 and for prison inmates convicted of murder while serving a life sentence without possibility of parole. 79 On the other hand, if actual sentencing authority is conferred on the trial judge, it is not unconstitutional for a statute to require a jury to return a death "sentence" upon convicting for specified crimes. 80 Flaws related to those attributed to mandatory sentencing statutes were found in a state's structuring of its capital system to deny the jury the option of convicting on a lesser included offense, when that would be justified by the evidence. 81 Because the jury had to choose between conviction or acquittal, the statute created the risk that the jury would convict because it felt the defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when at that stage the jury should concentrate on determining whether the prosecution had proved defendant's guilt beyond a reasonable doubt. 82

The overarching principle of Furman and of the Gregg series of cases was that the jury should not be "without guidance or direction" in deciding whether a convicted defendant should live or die. The jury's attention was statutorily "directed to the specific circumstances of the crime . . . and on the characteristics of the person who committed the crime." 83 Discretion was channeled and rationalized. But in Lockett v. Ohio, 84 a Court plurality determined that a state law was invalid because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law. In other words, the jury's discretion was curbed too much. "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 85 Similarly, the reason that a three-justice plurality viewed North Carolina's mandatory death sentence for persons convicted of first degree murder as invalid was that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant." 86 Lockett and Woodson have since been endorsed by a Court majority. 87 Thus, a great measure of discretion was again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors. 88

The Court has explained this apparent contradiction as constituting recognition "that 'individual culpability is not always measured by the category of crime committed,'" 89 and as the product of an attempt to pursue the "twin objectives" of "measured, consistent application" of the death penalty and "fairness to the accused." 90 The requirement that aggravating circumstances be spelled out by statute serves a narrowing purpose that helps consistency of application; absence of restriction on mitigating evidence helps promote fairness to the accused through an "individualized" consideration of his circumstances. In the Court's words, statutory aggravating circumstances "play a constitutionally necessary function at the stage of legislative definition [by] circumscrib[ing] the class of persons eligible for the death penalty," 91 while consideration of all mitigating evidence requires

focus on "'the character and record of the individual offender and the circumstances of the particular offense'" consistent with "'the fundamental respect for humanity underlying the Eighth Amendment.'" 92 As long as the defendant's crime falls within the statutorily narrowed class, the jury may then conduct "an individualized determination on the basis of the character of the individual and the circumstances of the crime." 93

So far, the Justices who favor abandonment of the Lockett and Woodson approach have not prevailed. The Court has, however, given states greater leeway in fashioning procedural rules that have the effect of controlling how juries may use mitigating evidence that must be admitted and considered. Supp.93.1 States may also cure some constitutional errors on appeal through operation of "harmless error" rules and reweighing of evidence by the appellate court. Supp.93.2 Also, the Court has constrained the use of federal habeas corpus to review state court judgments. As a result of these trends, the Court recognizes a significant degree of state autonomy in capital sentencing in spite of its rulings on substantive Eighth Amendment law.

While holding fast to the Lockett requirement that sentencers be allowed to consider all mitigating evidence, 94 the Court has upheld state statutes that control the relative weight that the sentencer may accord to aggravating and mitigating evidence. 95 "The requirement of individualized sentencing is satisfied by allowing the jury to consider all relevant mitigating evidence"; there is no additional requirement that the jury be allowed to weigh the severity of an aggravating circumstance in the absence of any mitigating factor. 96 So too, the legislature may specify the consequences of the jury's finding an aggravating circumstance; it may mandate that a death sentence be imposed if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, 97 or if the jury finds that aggravating circumstances outweigh mitigating circumstances. 98 And a court may instruct that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," since in essence the instruction merely cautions the jury not to base its decision "on factors not presented at the trial." 99 However, a jury instruction that can be interpreted as requiring jury unanimity on the existence of each mitigating factor before that factor may be weighed against aggravating factors is invalid as in effect allowing one juror to veto consideration of any and all mitigating factors. Instead, each juror must be allowed to give effect to what he or she believes to be established mitigating evidence. 100

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid, 101 or on a trial judge's consideration of improper aggravating circumstances. 102 In each case the sentencing authority had found other aggravating circumstances justifying imposition of capital punishment, and in Zant evidence relating to the invalid factor was nonetheless admissible on another basis. 103 Even in states that require the jury to weigh statutory

aggravating and mitigating circumstances (and even in the absence of written findings by the jury), the appellate court may preserve a death penalty through harmless error review or through a reweighing of the aggravating and mitigating evi dence. 104 By contrast, where there is a possibility that the jury's reliance on a "totally irrelevant" factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand in spite of the presence of other aggravating factors. 105

Focus on the character and culpability of the defendant led the Court initially to hold that introduction of evidence about the character of the victim or the amount of emotional distress caused to the victim's family or community was inappropriate because it "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." 106 New membership on the Court resulted in overruling of these decisions, however, and a holding that "victim impact statements" are not barred from evidence by the Eighth Amendment. 107 "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." 108 In the view of the Court majority, admissibility of victim impact evidence was necessary in order to restore balance to capital sentencing. Exclusion of such evidence had "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the rel evant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide." 109

The Court's rulings limiting federal habeas corpus review of state convictions may be expected to reduce significantly the amount of federal court litigation over state imposition of capital punishment. The Court held in Penry v. Lynaugh 110 that its Teague v. Lane 111 rule of nonretroactivity applies to capital sentencing challenges. Under Teague, "new rules" of constitutional interpretation announced after a defendant's conviction has become final will not be applied in habeas cases unless one of two exceptions applies. The exceptions will rarely apply. One exception is for decisions placing certain conduct or defendants beyond the reach of the criminal law, and the other is for decisions recognizing a fundamental procedural right "without which the likelihood of an accurate conviction is seriously diminished." 112 Further restricting the availability of federal habeas review is the Court's definition of "new rule." Interpretations that are a logical outgrowth or application of an earlier rule are nonetheless "new rules" unless the result was "dictated" by that precedent. 113 While in Penry itself the Court determined that the requested rule (requiring an instruction that the jury consider mitigating evidence of the defendant's mental retardation and abused childhood) was not a "new rule" because it was dictated by Eddings and Lockett, in subsequent habeas capital sentencing cases the Court has found substantive review barred by the "new rule" limitation. 114 A second

restriction on federal habeas review also has ramifications for capital sentencing review. Claims that state convictions are unsupported by the evidence are weighed by a "rational factfinder" inquiry: "viewing the evidence in the light most favorable to the prosecution, [could] any rational trier of fact have found the essential elements of the crime beyond a reasonable doubt." 115 This same standard for reviewing alleged errors of state law, the Court determined, should be used by a federal habeas court to weigh a claim that a generally valid aggravating factor is unconstitutional as applied to the defendant. 116 In addition, the Court has held that, absent an independent constitutional violation, habeas corpus relief for prisoners who assert innocence based on newly discovered evidence should generally be denied. Supp.2 A third rule was devised to prevent successive "abusive" or defaulted habeas petitions. Federal courts are barred from hearing such claims unless the defendant can show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty under applicable state law. 117 The Court has also ruled that a death row inmate has no constitutional right to an attorney to help prepare a petition for state collateral review. 118

In Coker v. Georgia, 119 the Court held that the state may not impose a death sentence upon a rapist who does not take a human life. 120 The Court announced that the standard under the Eighth Amendment was that punishments are barred when they are "excessive" in relation to the crime committed. A "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." 121 In order that judgment not be or appear to be the subjective conclusion of individual Justices, attention must be given to objective factors, predominantly "to the public attitudes concerning a particular sentence--history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions. . . ." 122 While the Court thought that the death penalty for rape passed the first test, it felt it failed the second. Georgia was the sole State providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of injury to the person and the public." 123

Applying the Coker analysis, the Court ruled in Enmund v. Florida 124 that death is an unconstitutional penalty for felony murder if the defendant did not himself kill, or attempt to take life, or intend that anyone be killed. While a few more States imposed capital punishment in felony murder cases than had imposed it for rape, nonetheless the weight was heavily against the practice, and the evidence of jury decisions and other indicia of a modern consensus similarly opposed the death penalty in such circumstances. Moreover, the Court determined that death was a disproportionate sentence for one who neither took

life nor intended to do so. Because the death penalty is a likely deterrent only when murder is the result of premeditation and deliberation, and because the jus tification of retribution depends upon the degree of the defendant's culpability, the imposition of death upon one who participates in a crime in which a victim is murdered by one of his confederates and not as a result of his own intention serves neither of the purposes underlying the penalty. 125 In Tison v. Arizona, however, the Court eased the "intent to kill" requirement, holding that, in keeping with an "apparent consensus" among the states, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." 126 A few years earlier, Enmund had also been weakened by the Court's holding that the factual finding of requisite intent to kill need not be made by the guilt/innocence factfinder, whether judge or jury, but may be made by a state appellate court. 127

A measure of protection against jury bias was added by the Court's holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." 128 A year later, however, the Court ruled in McCleskey v. Kemp 129 that a strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation. Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but "at most show only a likelihood that a particular factor entered into some decisions." 130 Just as important to the outcome, however, was the Court's application of the two overarching principles of prior capital punishment cases: that a state's system must narrow a sentencer's discretion to impose the death penalty (e.g., by carefully defining "aggravating" circumstances), but must not constrain a sentencer's discretion to consider mitigating factors relating to the character of the defendant. While the dissenters saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty, 131 the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a prima facie case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors "focus their collective judgment on the unique characteristics of a particular criminal defendant"--a focus that can result in "final and unreviewable" leniency. 132

The Court has recently grappled with several cases involving application of the death penalty to persons of diminished capacity. The first such case involved a defendant whose competency at the time of his offense, at trial, and at sentencing had not been questioned, but who subsequently developed a mental disorder. The Court held in Ford v. Wainwright 133 that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of execution-time sanity must be determined in a proceeding satisfying the minimum requirements of due process. 134 The Court noted that execution of the insane had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and

continues to be so viewed today. And, while no states purport to permit the execution of the insane, a number, including Florida, leave the determination to the governor. Florida's procedures, the Court held, fell short of due process because the decision was vested in the governor, and because the defendant was given no opportunity to be heard, the governor's decision being based on reports of three state- appointed psychiatrists. 135

By contrast the Court in 1989 found "insufficient evidence of a national consensus against executing mentally retarded people." While the Court conceded that "it may indeed be 'cruel and unusual' punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions," retarded persons who have been found competent to stand trial, and who have failed to establish an insanity defense, fall into a different category. Consequently, the Court was unwilling to conclude that execution of a mentally retarded person is "categorically prohibited by the Eighth Amendment." 136 What is required in this as in other contexts, however, is individualized consideration of culpability: a retarded defendant must be offered the benefit of an instruction that the jury may consider and give mitigating effect to evidence of retardation or abused background. 137

There is also no categorical prohibition on execution of juveniles. A closely divided Court has invalidated one statutory scheme which permitted capital punishment to be imposed for crimes committed before age 16, but has upheld other statutes authorizing capital punishment for crimes committed by 16 and 17 year olds. Important to resolution of the first case was the fact that Oklahoma set no minimum age for capital punishment, but by separate provision allowed juveniles to be treated as adults for some purposes. 138 While four Justices favored a flat ruling that execution of anyone younger than 16 at the time of his offense is barred by the Eighth Amendment, concurring Justice O'Connor found Oklahoma's scheme defective as not having necessarily resulted from the special care and deliberation that must attend decisions to impose the death penalty. 139 The following year Justice O'Connor again provided the decisive vote when the Court in Stanford v. Kentucky 140 held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17. Like Oklahoma, neither Kentucky nor Missouri 141 directly specified a minimum age for the death penalty. To Justice O'Connor, however, the critical difference was that there clearly was no national consensus forbidding imposition of capital punishment on 16 or 17-year-old murderers, whereas there was such a consensus against execution of 15 year olds. 142

The Stanford Court was split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia's plurality would focus almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 143 The Stanford dissenters would broaden this inquiry with proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 144 Justice O'Connor, while recognizing the Court's "constitutional obligation to conduct proportionality analysis," does not believe that such analysis can resolve the underlying issue of the constitutionally required minimum age. 145

While the Court continues to tinker with the law of capital punishment, it has taken a number of steps in the 1980s and early 1990s to attempt to reduce the many procedural and substantive opportunities for delay and defeat of the carrying out of death sentences, and to give the states more leeway in administering capital sentencing. The early post-Furman stage involving creation of procedural protections for capital defendants, and premised on a "death is different" rationale, 146 gave way to increasing impatience with the delays made possible through procedural protections, especially those associated with federal habeas corpus review. 147 Having consistently held that capital punishment is not inherently unconstitutional, the Court seems bent on clarifying and even streamlining constitutionally required procedures so that those states that choose to impose capital punishment may do so without inordinate delays. Changed membership on the Court is having its effect; gone from the Court are Justices Brennan and Marshall, whose belief that all capital punishment constitutes cruel and unusual punishment meant two automatic votes against any challenged death sentence. Strong differences remain over such issues as the appropriate framework for consideration of aggravating and mitigating circumstances and the appropriate scope of federal review, but as of 1992 a Court majority seems committed to reducing obstacles created by federal review of death sentences pursuant to state laws that have been upheld as constitutional.

Footnotes

[Footnote 50] Id. at 99. In Rudolph v. Alabama, 375 U.S. 889 (1963), Justices Goldberg, Douglas, and Brennan, dissenting from a denial of certiorari, argued that the Court should have heard the case to consider whether the Constitution permitted the imposition of death "on a convicted rapist who has neither taken nor endangered human life," and presented a line of argument questioning the general validity of the death penalty under the Eighth Amendment.

[Footnote 51] E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968) (exclusion of death-scrupled jurors). See also Davis v. Georgia, 429 U.S. 122 (1976), and Adams v. Texas, 448 U.S. 38 (1980) (explicating Witherspoon). The Eighth Amendment was the basis for

grant of review in Boykin v. Alabama, 395 U.S. 238 (1969) and Maxwell v. Bishop, 398 U.S. 262 (1970), but membership changes on the Court resulted in decisions on other grounds.

[Footnote 52] 402 U.S. 183 (1971). McGautha was decided in the same opinion with Crampton v. Ohio. McGautha raised the question whether provision for imposition of the death penalty without legislative guidance to the sentencing authority in the form of standards violated the due process clause; Crampton raised the question whether due process was violated when both the issue of guilt or innocence and the issue of whether to impose the death penalty were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity which defendant should live and which die; while bifurcated proceedings might be desirable, they were not required by due process.

[Footnote 53] 408 U.S. 238 (1972). The change in the Court's approach was occasioned by the shift of Justices Stewart and White, who had voted with the majority in McGautha.

[Footnote 54] Id. at 257 (Justice Brennan).

[Footnote 55] Id. at 314 (Justice Marshall).

[Footnote 56] Id. at 240 (Justice Douglas).

[Footnote 57] Id. at 306 (Justice Stewart).

[Footnote 58] Id. at 310 (Justice White). The four dissenters, in four separate opinions, argued with different emphases that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not "cruel and unusual" when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered "cruel and unusual." Id. at 375 (Chief Justice Burger), 405 (Justice Blackmun), 414 (Justice Powell), 465 (Justice Rehnquist). Each of the dissenters joined each of the opinions of the others.

[Footnote 59] Collectors of judicial "put downs" of colleagues should note Justice Rehnquist's characterization of the many expressions of faults in the system and their correction as "glossolalial." Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (dissenting).

[Footnote 60] Justice Frankfurter once wrote of the development of the law through "the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. See, e.g., Chief Justice Burger, Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not . . . always been easy to decipher"); Justice White, id. at 622 ("The Court has now completed

its about-face since Furman") (concurring in result); and Justice Rehnquist, id. at 629 (dissenting) ("the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed"), and id. at 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years").

[Footnote 61] On crimes not involving the taking of life or the actual commission of the killing by a defendant, see Coker v. Georgia, 433 U.S. 584 (1977) (rape); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder committed by confederate). Those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception to the Court's narrowing of the crimes for which capital punishment may be imposed. The federal hijacking law, 49 U.S.C. Sec. 1472, imposes death only when death occurs during commission of the hijacking. But the treason statute does not require a death to occur and represents a situation in which great and fatal danger might be presented. 18 U.S.C. Sec. 2381.

[Footnote 62] Justices Brennan and Marshall adhered to the view that the death penalty is per se unconstitutional. E.g., Coker v. Georgia, 433 U.S. 584, 600 (1977); Lockett v. Ohio, 438 U.S. 586, 619 (1978); Enmund v. Florida, 458 U.S. 782, 801 (1982).

[Footnote 63] A comprehensive evaluation of the multiple approaches followed in Furman-era cases may be found in Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U. Pa. L. Rev. 989 (1978).

[Footnote 64] Thus, Justice Douglas thought the penalty had been applied discriminatorily, Furman v. Georgia, 408 U.S. 238 (1972), Justice Stewart thought it had been applied in an arbitrary, "wanton," and "freakish" manner id. at 310, and Justice White thought it had been applied so infrequently that it served no justifying end. Id. at 313.

[Footnote 65] The principal opinion was in Gregg v. Georgia, 428 U.S. 153 (1976) (upholding statute providing for a bifurcated proceeding separating the guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court). Statutes of two other States were similarly sustained, Proffitt v. Florida, 428 U.S. 242 (1976) (statute generally similar to Georgia's, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggravating factors against statutory mitigating factors), and Jurek v. Texas, 428 U.S. 262 (1976) (statute construed as narrowing death-eligible class, and lumping mitigating factors into consideration of future dangerousness), while those of two other States were invalidated, Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating death penalty for first-degree murder).

[Footnote 66] Gregg v. Georgia, 428 U.S. 153, 168 -87 (1976) (Justices Stewart, Powell, and Stevens); Roberts v. Louisiana, 428 U.S. 325, 350 - 56 (1976) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger). The views summarized in the text are those in the Stewart opinion in Gregg. Justice White's opinion basically agrees with this opinion in concluding that contemporary community sentiment accepts capital punishment, but did not endorse the proportionality analysis. Justice White's Furman dissent and those of Chief Justice Burger and Justice Blackmun show a rejection of proportionality analysis. Justices Brennan and Marshall dissented, reiterating their Furman views. Gregg, supra, at 227, 231.

[Footnote 67] Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Justices Stewart, Powell, and Stevens composed the plurality, and Justices Brennan and Marshall concurred on the basis of their own views of the death penalty. 428 U.S. at 305 , 306, 336.

[Footnote 68] Here adopted is the constitutional analysis of the Stewart plurality of three. "[T]he holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds," Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976), a comment directed to the Furman opinions but equally applicable to these cases and to Lockett. See Marks v. United States, 430 U.S. 188, 192 -94 (1977).

[Footnote 69] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important societal function in maintaining a link between contemporary community values and the penal system, but agreed that sentencing may constitutionally be vested in the trial judge. Gregg v. Georgia, 428 U.S. 153, 190 (1976). A definitive ruling came in Spaziano v. Florida, 468 U.S. 447 (1984), upholding a provision under which the judge can override a jury's advisory life imprisonment sentence and impose the death sentence. "[T]he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." Id. at 462-63. Consequently, a judge may be given significant discretion to override a jury sentencing recommendation, as long as the court's decision is adequately channeled to prevent arbitrary results. Harris v. Alabama, 115 S. Ct. 1031 (1995) (Eighth Amendment not violated where judge is only required to "consider" a capital jury's sentencing recommendation).

[Footnote 70] Gregg v. Georgia, 428 U.S. 153, 188 -95 (1976). Justice White seemed close to the plurality on the question of standards, id. at 207 (concurring), but while Chief Justice Burger and Justice Rehnquist joined the White opinion "agreeing" that the system under review "comports" with Furman, Justice Rehnquist denied the constitutional requirement of standards in any event. Woodson v. North Carolina, 428 U.S. 280, 319 - 21 (1976) (dissenting). In McGautha v. California, 402 U.S. 183, 207 -08 (1971), the Court had rejected the argument that the absence of standards violated the due process clause. On the vitiation of McGautha, see Gregg, supra, at 195 n.47, and Lockett v. Ohio, 438 U.S. 586, 598 -99 (1978). In assessing the character and record of the defendant, the jury may be required to make a judgment about the possibility of future dangerousness of the defendant, from psychiatric and other evidence. Jurek v. Texas, 428 U.S. 262, 275 -76

(1976). Moreover, testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. Barefoot v. Estelle, 463 U.S. 880 (1983). But cf. Estelle v. Smith, 451 U.S. 454 (1981) (holding self-incrimination and counsel clauses applicable to psychiatric examination, at least when doctor testifies about his conclusions with respect to future dangerousness).

[Footnote 71] Gregg v. Georgia, 428 U.S. 153, 163 , 190-92, 195 (1976) (plurality opinion). McGautha v. California, 402 U.S. 183 (1971), had rejected a due process requirement of bifurcated trials, and the Gregg plurality did not expressly require it under the Eighth Amendment. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters in Roberts v. Louisiana, 428 U.S. 325, 358 (1976), rejected bifurcation and viewed the plurality as requiring it. All states with post-Furman capital sentencing statutes took the cue by adopting bifurcated capital sentencing procedures, and the Court has not been faced with the issue again. See Raymond J. Pascucci, et al., Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency, 69 Cornell L. Rev. 1129, 1224-25 (1984).

[Footnote 72] Gregg v. Georgia, 428 U.S. 153, 195 , 198 (1976) (plurality); Proffitt v. Florida, 428 U.S. 242, 250 -51, 253 (1976) (plurality); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality).

[Footnote 73] Pulley v. Harris, 465 U.S. 37 (1984).

[Footnote 74] Id. at 50.

[Footnote 75] Godfrey v. Georgia, 446 U.S. 420, 428 -29 (1980) (plurality opinion).

[Footnote 76] Maynard v. Cartwright, 486 U.S. 356 (1988). But see Tuilaepa v. California, 114 S. Ct. 2630 (1994) (holding that permitting capital juries to consider the circumstances of the crime, the defendant's prior criminal activity, and the age of the defendant, without further guidance, is not unconstitutionally vague).

[Footnote 77] Walton v. Arizona, 497 U.S. 639 (1990). Accord, Lewis v. Jeffers, 497 U.S. 764 (1990). See also Gregg v. Georgia, 428 U.S. 153, 201 (1976) (upholding full statutory circumstance of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); Proffitt v. Florida, 428 U.S. 242, 255 (1976) (upholding "especially heinous, atrocious or cruel" aggravating circumstance as interpreted to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim"); Sochor v. Florida, 112 S. Ct. 2114 (1992) (impermissible vagueness of "heinousness" factor cured by narrowing interpretation including strangulation of a conscious victim); Arave v. Creech, 507 U.S. 463 (1993) (consistent application of narrowing construction of phrase "exhibited utter disregard for human life" to require that the defendant be a "cold-blooded, pitiless slayer" cures vagueness).

[Footnote 78] Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam) (involving a different defendant than the first Roberts v. Louisiana case, supra n.67).

[Footnote 79] Sumner v. Shuman, 483 U.S. 66 (1987).

[Footnote 80] Baldwin v. Alabama, 472 U.S. 372 (1985) (mandatory jury death sentence saved by requirement that trial judge independently weigh aggravating and mitigating factors and determine sentence).

[Footnote 81] Beck v. Alabama, 447 U.S. 625 (1980). The statute made the guilt determination "depend . . . on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue." Id. at 640. Cf. Hopper v. Evans, 456 U.S. 605 (1982). No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses is due to the defendant's refusal to waive the statute of limitations for those lesser offenses. Spaziano v. Florida, 468 U.S. 447 (1984). See also Schad v. Arizona, 501 U.S. 624 (1991) (first-degree murder defendant, who received instruction on lesser included offense of second-degree murder, was not entitled to a jury instruction on the lesser included offense of robbery). In Schad the Court also upheld Arizona's characterization of first-degree murder as a single crime encompassing two alternatives, premeditated murder and felony-murder, and not requiring jury agreement on which alternative had occurred.

[Footnote 82] Also impermissible as distorting a jury's role are prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. Compare Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) with California v. Ramos, 463 U.S. 992 (1983) (jury responsibility not undermined by instruction that governor has power to reduce sentence of life imprisonment without parole). See also Lowenfield v. Phelps, 484 U.S. 231 (1988) (poll of jury and supplemental jury instruction on obligation to consult and attempt to reach a verdict was not unduly coercive on death sentence issue, even though consequence of failing to reach a verdict was automatic imposition of life sentence without parole). Romano v. Oklahoma, 114 S. Ct. 2004 (1994) (imposition of death penalty after introduction of evidence that defendant had been sentenced to death previously did not diminish the jury's sense of responsibility so as to violate the Eighth Amendment).

[Footnote 83] Gregg v. Georgia, 428 U.S. 153, 197 -98 (1976) (plurality).

[Footnote 84] 438 U.S. 586 (1978). The plurality opinion by Chief Justice Burger was joined by Justices Stewart, Powell, and Stevens. Justices Blackmun, Marshall, and White concurred in the result on separate and conflicting grounds. Id. at 613, 619, 621. Justice Rehnquist dissented. Id. at 628.

[Footnote 85] 438 U.S. at 604 (plurality).

[Footnote 86] Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Justice Stewart, joined by Justices Powell and Stevens). Accord, Roberts v. Louisiana, 428 U.S. 325 (1976) (statute mandating death penalty for five categories of homicide constituting first-degree murder).

[Footnote 87] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (adopting Lockett); Sumner v. Shuman, 483 U.S. 66 (1987) (adopting Woodson). The majority in Eddings was composed of Justices Powell, Brennan, Marshall, Stevens, and O'Connor; Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. The Shuman majority was composed of Justices Blackmun, Brennan, Marshall, Powell, Stevens, and O'Connor; dissenting were Justices White and Scalia and Chief Justice Rehnquist. Woodson and the first Roberts v. Louisiana had earlier been followed in the second Roberts v. Louisiana, 431 U.S. 633 (1977), a per curiam opinion from which Chief Justice Burger, and Justices Blackmun, White, and Rehnquist dissented.

[Footnote 88] Justice White, dissenting in Lockett from the Court's holding on consideration of mitigating factors, wrote that he "greatly fear[ed] that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time Furman was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that 'its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" 438 U.S. at 623 . More recently, Justice Scalia voiced similar misgivings. "Shortly after introducing our doctrine requiring constraints on the sentencer's discretion to 'impose' the death penalty, the Court began developing a doctrine forbidding constraints on the sentencer's discretion to 'decline to impose' it. This second doctrine--counterdoctrine would be a better word--has completely exploded whatever coherence the notion of 'guided discretion' once had. . . . In short, the practice which in Furman had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in Woodson and Lockett renamed the discretion not to sentence to death and pronounced constitutionally required." Walton v. Arizona, 497 U.S. 639, 661 -62 (1990) (concurring in the judgment). For a critique of these criticisms of Lockett, see Scott E. Sundby, The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing, 38 UCLA L. Rev. 1147 (1991).

[Footnote 89] Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion of Justices Stewart, Powell, and Stevens) (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Chief Justice Burger dissenting)).

[Footnote 90] Eddings v. Oklahoma, 455 U.S. 104, 110 -11 (1982).

[Footnote 91] Zant v. Stephens, 462 U.S. 862, 878 (1983). This narrowing function may be served at the sentencing phase or at the guilt phase; the fact that an aggravating circumstance justifying capital punishment duplicates an element of the offense of first-degree murder does not render the procedure invalid. Lowenfield v. Phelps, 484 U.S. 231

(1988).

[Footnote 92] Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

[Footnote 93] Zant v. Stephens, 462 U.S. 862, 879 (1983).

[Footnote 93.1 (1996 Supplement)] See, e.g., Johnson v. Texas, 509 U.S. 350 (1993) (consideration of youth as a mitigating factor may be limited to jury estimation of probability that defendant would commit future acts of violence).

[Footnote 93.2 (1996 Supplement)] Richmond v. Lewis, 506 U.S. 40 (1992) (no cure of trial court's use of invalid aggravating factor where appellate court fails to reweigh mitigating and aggravating factors).

[Footnote 94] See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987) (instruction limiting jury to consideration of mitigating factors specifically enumerated in statute is invalid); Penry v. Lynaugh, 492 U.S. 302 (1989) (jury must be permitted to give effect to defendant's evidence of mental retardation and abused background); Skipper v. South Carolina, 476 U.S. 1 (1986) (exclusion of evidence of defendant's good conduct in jail denied defendant his Lockett right to introduce all mitigating evidence). But cf. Franklin v. Lynaugh, 487 U.S. 164 (1988) (consideration of defendant's character as revealed by jail behavior may be limited to context of assessment of future dangerousness).

[Footnote 95] "Neither [Lockett nor Eddings] establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all." Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Justice Stevens concurring in judgment).

[Footnote 96] Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

[Footnote 97] Id.

[Footnote 98] Boyde v. California, 494 U.S. 370 (1990).

[Footnote 99] California v. Brown, 479 U.S. 538, 543 (1987).

[Footnote 100] Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990).

[Footnote 101] Zant v. Stephens, 462 U.S. 862 (1983).

[Footnote 102] Barclay v. Florida, 463 U.S. 954 (1983).

[Footnote 103] In Eighth Amendment cases as in other contexts involving harmless constitutional error, the court must find that error was "'harmless beyond a reasonable doubt in that it did not contribute to the [sentence] obtained.'" Sochor v. Florida, 112 S. Ct. 2114, 2123 (1992) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal testimony might have affected how the jury evaluated another aggravating factor. Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. Tuggle v. Netherland, 116 S. Ct. 283 (1995).

[Footnote 104] Clemons v. Mississippi, 494 U.S. 738 (1990). Cf. Parker v. Dugger, 498 U.S. 308 (1991) (affirmance of death sentence invalid because appellate court did not reweigh non-statutory mitigating evidence).

[Footnote 105] Johnson v. Mississippi, 486 U.S. 578 (1988).

[Footnote 106] Booth v. Maryland, 482 U.S. 496, 503 (1987). And culpability, the Court added, "depends not on fortuitous circumstances such as the composition [or articulateness] of [the] victim's family, but on circumstances over which [the defendant] has control." Id. at 504 n.7. The decision was 5-4, with Justice Powell's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, and Stevens, and with Chief Justice Rehnquist and Justices White, O'Connor, and Scalia dissenting. See also South Carolina v. Gathers, 490 U.S. 805 (1989), holding that a prosecutor's extensive comments extolling the personal characteristics of a murder victim can invalidate a death sentence when the victim's character is unrelated to the circumstances of the crime.

[Footnote 107] Payne v. Tennessee, 501 U.S. 808 (1991). "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief," Chief Justice Rehnquist explained for the Court. Id. at 825. Justices White, O'Connor, Scalia, Kennedy, and Souter joined in that opinion. Justices Marshall, Blackmun, and Stevens dissented.

[Footnote 108] Id. at 827. Overruling of Booth may have been unnecessary in Payne, inasmuch as the principal "victim impact" evidence introduced involved trauma to a surviving victim of attempted murder who had been stabbed at the same time his mother and sister had been murdered and who had apparently witnessed those murders; this evidence could have qualified as "admissible because . . . relate[d] directly to the circumstances of the crime." Booth, 482 U.S. at 507 n.10. Gathers was directly at issue in Payne because of the prosecutor's references to effects on family members not present at the crime.

[Footnote 109] Id. at 822 (citation omitted).

[Footnote 110] 492 U.S. 302 (1989).

[Footnote 111] 489 U.S. 288 (1989). The "new rule" limitation was suggested in a plurality opinion in Teague. A Court majority in Penry and later cases has adopted it.

[Footnote 112] 489 U.S. at 313 . The second exception was at issue in Sawyer v. Smith, 497 U.S. 227 (1990); there the Court held the exception inapplicable to the Caldwell v. Mississippi rule that the Eighth Amendment is violated by prosecutorial misstatements characterizing the jury's role in capital sentencing as merely recommendatory. It is "not enough," the Sawyer Court explained, "that a new rule is aimed at improving the accuracy of a trial. . . . A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." Id. at 242.

[Footnote 113] Penry, 492 U.S. at 314 . Put another way, it is not enough that a decision is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision." A decision announces a "new rule" if its result "was susceptible to debate among reasonable minds" or if it would not have been "an illogical or even a grudging application" of the prior decision to hold it inapplicable. Butler v. McKellar, 494 U.S. 407, 415 (1990).

[Footnote 114] See, e.g., Butler v. McKellar, 494 U.S. 407 (1990) (1988 ruling in Arizona v. Roberson, that the Fifth Amendment bars police- initiated interrogation following a suspect's request for counsel in the context of a separate investigation, announced a "new rule" not dictated by the 1981 decision in Edwards v. Arizona that police must refrain from all further questioning of an in-custody accused who invokes his right to counsel); Saffle v. Parks, 494 U.S. 484 (1990) (habeas petitioner's request that capital sentencing be reversed because of an instruction that the jury "avoid any influence of sympathy" is a request for a new rule not "compel[led]" by Eddings and Lockett, which governed what mitigating evidence a jury must be allowed to consider, not how it must consider that evidence); Sawyer v. Smith, 497 U.S. 227 (1990) (1985 ruling in Caldwell v. Mississippi, although a "predictable development in Eighth Amendment law," established a "new rule" that false prosecutorial comment on jurors' responsibility can violate the Eighth Amendment by creating an unreasonable risk of arbitrary imposition of the death penalty, since no case prior to Caldwell had invalidated a prosecutorial comment on Eighth Amendment grounds). But see Stringer v. Black, 112 S. Ct. 1130 (1992) (neither Maynard v. Cartwright, 486 U.S. 356 (1988), nor Clemons v. Mississippi, 494 U.S. 738 (1990), announced a "new rule").

[Footnote 115] Lewis v. Jeffers, 497 U.S. 764, 781 (1990) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[Footnote 116] Lewis v. Jeffers, 497 U.S. 764, 780 -84 (1990). The lower court erred, therefore, in conducting a comparative review to determine whether application in the defendant's case was consistent with other applications.

[Footnote 2 (1996 Supplement)] Herrera v. Collins, 506 U.S. 390 (1993) (holding that a petitioner would have to meet an "extraordinarily high" threshold of proof of innocence to warrant federal habeas relief).

[Footnote 117] Sawyer v. Whitley, 112 S. Ct. 2514 (1992). The focus on eligibility limits inquiry to elements of the crime and to aggravating factors, and thereby prevents presentation of mitigating evidence. Here the court was barred from considering an allegation of ineffective assistance of counsel for failure to introduce the defendant's mental health records as a mitigating factor at sentencing.

[Footnote 118] Murray v. Giarratano, 492 U.S. 1 (1989) ("unit attorneys" assigned to prisons were available for some advice prior to filing a claim).

[Footnote 119] 433 U.S. 584 (1977). Justice White's opinion was joined only by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall concurred on their view that the death penalty is per se invalid, id. at 600, and Justice Powell concurred on a more limited basis than Justice White's opinion. Id. at 601. Chief Justice Burger and Justice Rehnquist dissented. Id. at 604.

[Footnote 120] Although the Court stated the issue in the context of the rape of an adult woman, id. at 592, the opinion at no point sought to distinguish between adults and children. Justice Powell's concurrence expressed the view that death is ordinarily disproportionate for the rape of an adult woman, but that some rapes might be so brutal or heinous as to justify it. Id. at 601.

[Footnote 121] Id. at 592.

[Footnote 122] Id.

[Footnote 123] Id. at 598.

[Footnote 124] 458 U.S. 782 (1982). Justice White wrote the opinion of the Court and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, with Justices Powell and Rehnquist and Chief Justice Burger, dissented. Id. at 801. Accord, Cabana v. Bullock, 474 U.S. 376 (1986) (also holding that the proper remedy in a habeas case is to remand for state court determination as to whether Enmund findings have been made).

[Footnote 125] Justice O'Connor thought the evidence of contemporary standards did not support a finding that capital punishment was not appropriate in felony murder situations. Id. at 816-23. She also objected to finding the penalty disproportionate, first because of the degree of participation of the defendant in the underlying crime, id. at 823-26, but also because the Court appeared to be constitutionalizing a standard of intent required under state law.

[Footnote 126] 481 U.S. 137, 158 (1987). The decision was 5-4. Justice O'Connor's opinion for the Court viewed a "narrow" focus on intent to kill as "a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers," id. at 157, and concluded that "reckless disregard for human life" may be held to be "implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Id.

[Footnote 127] Cabana v. Bullock, 474 U.S. 376 (1986). Moreover, an appellate court's finding of culpability is entitled to a presumption of correctness in federal habeas review, a habeas petitioner bearing a "heavy burden of overcoming the presumption." Id. at 387-88. See also Pulley v. Harris, 465 U.S. 37 (1984) (Eighth Amendment does not invariably require comparative proportionality review by a state appellate court).

[Footnote 128] Turner v. Murray, 476 U.S. 28, 36 -37 (1986).

[Footnote 129] 481 U.S. 279 (1987). The decision was 5-4. Justice Powell's opinion of the Court was joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Scalia. Justices Brennan, Blackmun, Stevens, and Marshall dissented.

[Footnote 130] 481 U.S. at 308 .

[Footnote 131] Id. at 339-40 (Brennan), 345 (Blackmun), 366 (Stevens).

[Footnote 132] Id. at 311. Concern for protecting "the fundamental role of discretion in our criminal justice system" also underlay the Court's rejection of an equal protection challenge in McCleskey. See p.1857, infra.

[Footnote 133] 477 U.S. 399 (1986).

[Footnote 134] There was an opinion of the Court only on the first issue, that the Eighth Amendment creates a right not to be executed while insane. Justice Marshall's opinion to that effect was joined by Justices Brennan, Blackmun, Stevens, and Powell. The Court's opinion did not attempt to define insanity; Justice Powell's concurring opinion would have held the prohibition applicable only for "those who are unaware of the punishment they are about to suffer and why they are to suffer it." Id. at 422.

[Footnote 135] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity . . . calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411 - 12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the

opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[Footnote 136] Penry v. Lynaugh, 492 U.S. 302, 335 (1989).

[Footnote 137] Id. at 328.

[Footnote 138] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[Footnote 139] The plurality opinion by Justice Stevens was joined by Justices Brennan, Marshall, and Blackmun; as indicated in the text, Justice O'Connor concurred in a separate opinion; and Justice Scalia, joined by Chief Justice Rehnquist and by Justice White, dissented. Justice Kennedy did not participate.

[Footnote 140] 492 U.S. 361 (1989). The bulk of Justice Scalia's opinion, representing the opinion of the Court, was joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Kennedy. Justice O'Connor took exceptions to other portions of Justice Scalia's opinion (dealing with proportionality analysis); and Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented.

[Footnote 141] The case of Wilkins v. Missouri was decided along with Stanford.

[Footnote 142] Compare Thompson, 487 U.S. at 849 (O'Connor, J., concurring) (two-thirds of all state legislatures had concluded that no one should be executed for a crime committed at age 15, and no state had "unequivocally endorsed" a lower age limit) with Stanford, 492 U.S. at 370 (15 of 37 states permitting capital punishment decline to impose it on 16-year-old offenders; 12 decline to impose it on 17-year-old- offenders).

[Footnote 143] "A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." 492 U.S. at 377 .

[Footnote 144] Id. at 394-96.

[Footnote 145] Id. at 382.

[Footnote 146] See, e.g., Gardner v. Florida, 430 U.S. 349, 357 -58 (1977): "From the point of view of the defendant, [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

[Footnote 147] See, e.g., Barefoot v. Estelle, 463 U.S. 880, 888 (1983): "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit." See also Gomez v. United States District Court, 112 S. Ct. 1652 (1992) (vacating orders staying an execution, and refusing to consider, because of "abusive delay," a claim that "could have been brought more than a decade ago"--that California's method of execution (cyanide gas) constitutes cruel and unusual punishment).