

**The Unconstitutionality of Different Standards of Death:**

**Arbitrariness in States' Capital Punishment Laws**

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### Author's Note

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## Introduction

On February 22, 1994, the United States Supreme Court denied Texas death row inmate Bruce Edwin Callins' petition for a writ of certiorari. In sole dissent, Justice Harry Blackmun authored one of the most poignant passages in capital punishment jurisprudence:

Within days, or perhaps hours, the memory of Callins will begin to fade. The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die. We hope, of course, that the defendant whose life is at risk will be represented by competent counsel... we hope that the attorney will investigate all aspects of the case, follow all evidentiary and procedural rules, and appear before a judge who is still committed to the protection of defendants' rights...we hope that the prosecution, in urging the penalty of death... will be humbled, rather than emboldened, by the awesome authority conferred by the State. But even if we can feel confident that these actors will fulfill their roles to the best of their human ability, our collective conscience will remain uneasy. *Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all...and despite the effort of States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake...*from this day forward, I no longer shall tinker with the machinery of death.”<sup>1</sup>

The Supreme Court has been “tinkering” with death since its 1972 landmark decision, *Furman v. Georgia* 408 U.S. 238. The Court held that arbitrary and inconsistent application of the death penalty was unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. The *Furman* decision effectively ground the American death machine, as practiced in the several states, to a halt. Shortly thereafter, in 1976, the Court reopened the gates to capital punishment by approving states' revised death penalty statutes in *Gregg v. Georgia* 428 U.S. 153.

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<sup>1</sup> Justice Harry Blackmun, dissent in the denial of writ of certiorari to the United States Supreme Court, *Callins v. Collins* 114 S.Ct. 1127. (1994). Italics added for emphasis.

Because states were able to demonstrate procedural fairness and rigorous efforts at combating discrimination and arbitrary sentencing, the Court reasoned that the death penalty, on its face, was constitutional, as long as certain safeguards were in place.

No singular, bedrock principle emerged from *Furman*, since the justices' nine separate opinions drew on different doctrinal sources. Robert Weisberg notes, "it [*Furman*] is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias."<sup>2</sup> *Furman* certainly signaled a sentiment against arbitrary and capricious imposition, but it did not specify legal guidance for future cases.

The *Furman* and *Gregg* decisions did, however, plant the doctrinal seed that arbitrariness in capital punishment is unconstitutional. Even though arbitrariness was not clearly defined, the underlying idea in the plurality opinions is that variation is a problem. Despite explicitly permitting states to retain control over certain areas of capital punishment, as the Court began to do in *Gregg*, the Court *does* have a latent concern about states' operation of the death penalty. The core of that concern is an objection to arbitrariness and variation, themes to which the Court continually returns.

However, as Justice Blackmun's comments in 1994 show, even twenty years after *Furman* and *Gregg*, the justice system fails to constitutionally administer the death penalty. Regrettably, *another* twenty years after that stirring dissent, Blackmun's remarks about capital punishment still hold true today. Scholars have

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<sup>2</sup> Weisberg, Robert. "Deregulating Death". *The Supreme Court Review*. Vol. 1983 pp 315

noted that “virtually no one” believes constitutional regulation of the death penalty has succeeded in addressing *Furman’s* concerns.<sup>3</sup> The Supreme Court’s handling of the death penalty has been anything but consistent or coherent. As Stuart Banner writes, “the constitutionalization of capital punishment created an enormously complicated, expensive, and time-consuming apparatus that had no real effect on the outcomes...being executed was still...akin to being struck by lightning; the only difference was now it took a decade and millions of public money for the lightning to strike.”<sup>4</sup> Yet, as Blackmun wisely observed in his *Callins* dissent, “this is not to say that the problems with the death penalty today are identical to those that were present twenty years ago [in *Furman*]. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form.”<sup>5</sup> It seems that, post-*Furman*, arbitrariness in the death penalty has only increased.

This thesis will investigate areas of arbitrariness in the United States’ death penalty at the state level. I argue that differences in individual states’ capital murder definitions and sentencing statutes are unconstitutionally arbitrary. Since arbitrariness was not clearly defined in *Furman* or *Gregg*, I propose a new, hybrid doctrine that can overcome the Court’s mixed messages about state control over capital punishment and will also move jurisprudence away from the traditional

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<sup>3</sup> Steiker, Carol S. and Jordan M. Steiker. “Judicial Developments in Capital Punishment Law”. *America’s Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*. Eds. Acker, James R. et al. 2<sup>nd</sup> Ed. Durham, NC: Carolina Academic Press, 2003. pp 55.

<sup>4</sup> Banner, Stuart. *The Death Penalty: An American History*. Cambridge, MA: Harvard University Press, 2002. pp 295. Here, Banner paraphrases Justice Potter Stewart’s famous assertion that, “these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual”, *Furman v. Georgia* 408 U.S. 238, Stewart, J. concurring at 309.

<sup>5</sup> Justice Blackmun, dissent in *Callins v. Collins* 114 S.Ct. 1127. (1994) at 1143-44.

reliance on *Furman*. My hybrid doctrine takes the “evolving standards of decency” framework, which was recently revived in the cases of *Atkins v. Virginia* and *Roper v. Simmons*, and uses it to expose arbitrariness. The “evolving standards” doctrine reveals unusual practices employed by “outlier states” and also exposes how different standards of death across the nation permit defendants to be “struck by lightning”, as Justice Potter Stewart once described.

To illustrate how the evolving standards framework can identify the problem of inter-state variation, this thesis examines four states’ death penalty laws. I use the practices of judicial override and the use of vague aggravating circumstances in these four states to show how state differences violate the Equal Protection Clause of the Fourteenth Amendment and the evolving standards doctrine, because these practices produce arbitrariness and inconsistency at the sentencing level of capital trials. Revised death penalty laws instituted after *Gregg v. Georgia (1976)* might have corrected for *intrastate* arbitrariness, but not *interstate* arbitrariness, and these differences do not comport with modern standards of decency. Evolving standards and equal protection should define the jurisprudence going forward, rather than a reliance on *Furman*, because such a doctrine will reclaim the essence of the Eighth and Fourteenth Amendments.

The thesis will be structured as follows: First, the remainder of this introduction will begin by explaining and rejecting the traditional argument given in favor of state control over capital punishment: federalism. I reject federalism by citing the “death is different” principle, which the Court and the legal community has repeatedly emphasized and accepted. The introduction will also provide basic



statistics on the current death penalty and will briefly review leading research in the field of arbitrariness.

The heart of the thesis will be composed of six chapters, divided into three sections. Section I will provide necessary background information. For example, Chapter I will analyze *Furman v. Georgia* and explain the development of the “arbitrariness” principle. Chapter II examines *Gregg v. Georgia*, the case that reinstated the death penalty and instituted new procedures in the wake of *Furman*. Both of these chapters will be accomplished through an overview of the facts of each case, the Court’s decision, noteworthy opinions, and explanation of doctrinal significance. Next, Chapter III will review the Supreme Court’s jurisprudence on state statutes, focusing specifically on cases dealing with judicial override and aggravating circumstances. This chapter will analyze cases upholding *or* invalidating state laws, and will conclude by critiquing the Court’s confusing approach and its retraction from the concerns in *Furman*.

Section II examines the specifics of four states’ statutes. Chapter IV will provide a brief overview of the capital murder definitions, trial procedures, and sentencing procedures in Alabama, Florida, Missouri, and Pennsylvania. This section will simply summarize the laws in each state. Chapter V will then explain the interstate variations between Florida and Alabama on the practice of judicial override; between Alabama, Florida, and Pennsylvania on the use of the “grave risk” aggravating circumstance; and between Alabama, Florida, and Missouri on the “especially heinous, atrocious, and cruel” aggravating circumstance.

Section III will explain how interstate variation, as seen in the comparisons of Chapter V, violates the “evolving standards of decency” doctrine and the Equal Protection Clause of the Fourteenth Amendment. Chapter VI will describe how two of the Supreme Court’s recent cases, *Atkins v. Virginia* and *Roper v. Simmons*, have paved the way for comparison, criticism, and ultimately, constitutional challenge, to these differences in states’ death laws.

The concluding chapter will discuss recent developments in state capital punishment laws. It will also reflect on the future direction of scholarship and, given the Supreme Court’s shortcomings, reiterate how my research can offer a new doctrine as a stepping-stone to address the problem of arbitrariness.

### **Federalism and “Death is Different Jurisprudence”**

Federalism has been, perhaps, the strongest and most popular argument against uniformity in capital punishment. Historically, decisions about capital punishment have fallen under states’ police powers, unless the offense was a federal crime, in which case federal law superseded state law and the defendant could be sentenced to death even if capital punishment were outlawed in that state.<sup>6</sup> Beyond historical acceptance of states’ roles in death penalty administration, some scholars have also looked to the Sixth Amendment’s right to a jury trial in the state in which the crime was committed. These scholars believe that emphasis on local community thought, as evidenced in jury behavior, is a clear constitutional statement that states may employ capital punishment if and how they wish. Thus, the Sixth Amendment’s

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<sup>6</sup> Indeed, this is one area that has received much criticism. See: Mannheimer, Michael J. Zydney. “When the Federal Death Penalty is ‘Cruel and Unusual’”. *University of Cincinnati Law Review*. Vol. 74, 2005-2006.

guarantee of a state-specific jury trial supersedes any equal protection claims. These scholars deem geographic uniformity to be undesirable, and even unconstitutional.

For example, Columbia Law School professor Michael C. Dorf contends:

the Constitution anticipates that jurors in different states may differ in their views, and finds nothing wrong with that...under our Constitution, federal criminal jury trials are meant to differ state by state to some extent. The impulse to insist on a nationally uniform capital charging policy may spring from a laudable concern for equal justice. But the constitutional right to jury trial in the state where the crime is committed should act as a strong counterweight to that impulse.<sup>7</sup>

Claims such as these are not without merit. State discretion, whether through legislation or jury behavior, can be read as statement of the will of the people. The Court has repeatedly emphasized that the majority of the American public has consistently supported capital punishment, and the Court has accepted this as evidence of the punishment's constitutional legitimacy. Federalism permits public support, or disapproval, for capital punishment to win the day.

Yet, relying on federalism too easily embraces stagnant norms and readily dismisses the fact that arbitrariness infiltrates the capital punishment system. Using federalism to support the constitutionality of inter-state variation undermines the very principles that the Court used to return execution power to the states after 1976—regularity, the absence of discrimination, channeled discretion, and the narrowing of a class of defendants. If we simply excuse obvious arbitrariness across the states because states have the right to employ the death penalty, then we directly discount the progress since *Furman* and *Gregg*. Though the Court does pay

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<sup>7</sup> Dorf, Michael C. *The Misguided Quest for Geographic Uniformity in Capital Punishment: Why It Conflicts With Constitutional Jury Trial Rights*. FindLaw Column: 19 Feb. 2003.

lip service to federalism in *Atkins v. Virginia*<sup>8</sup>, it still appears bothered by state variation.<sup>9</sup> In fact, the most compelling argument against the cry of federalism is one that the Court has explicitly embraced, and one that capital punishment advocates and abolitionists can both acknowledge: that death is different.

Numerous Court opinions have cited this principle. Even before *Furman*, in cases like *Witherspoon v. Illinois* 391 U.S. 510 (1968), the Court emphasized that special circumstances for jury selection were required in capital cases that were not required in other criminal trials. In *Furman* itself, Justice Brennan described death as a “unique punishment” that “is in a class by itself”<sup>10</sup>, while Justice Stewart stated, “the penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”<sup>11</sup> In *Gregg*, the majority reiterated these statements,<sup>12</sup> and since 1976 the Court has frequently referenced the “death is different” principle. A few notable examples include Justice Brennan’s description of “death as different” as a “previously unquestioned principle” requiring “unique safeguards” because the death penalty is “qualitatively different,” as well as his observation that it, “hardly

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<sup>8</sup> *Atkins v. Virginia* 536 U.S. 304 (2002). Stevens, J., majority opinion at 317, quoting *Ford v. Wainwright* 477 U.S. 399 (1986) at 405, 416-417, “we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” *Atkins* ruled that the execution of the mentally handicapped was unconstitutional, but did not call for uniform, national standards for defining “mentally retarded” (the term the Court used).

<sup>9</sup> Despite the explicit statement that states have legislative prerogative to define standards for mental deficiencies, the *Atkins* opinion does reflect a concern for state variation, as will be discussed in Section III Chapter VI of this thesis.

<sup>10</sup> *Furman* Brennan, J. concurring at 286-89

<sup>11</sup> *Furman*, Stewart J. concurring at 306.

<sup>12</sup> *Gregg v. Georgia* 428 U.S. 152 (1976), joint opinion of Justices Stewart, Powell, and Stevens at 188. On the same day, in *Woodson v. North Carolina* 428 U.S. 280 at 305, this same trio of justices declared that the, “penalty of death is qualitatively different from a sentence of imprisonment, however long.”

needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death.”<sup>13</sup>

There are two features of the death penalty that the Court has identified as making it different in kind and deserving of special scrutiny: finality and severity. The finality of capital punishment makes its consequences irreversible. As for the severity, the Court has used phrases such as, “ultimate sanction”, “extreme severity” and “truly awesome punishment” to emphasize that death completely denies the defendant his personal humanity and his chance to exist in human society. The irrevocability and gravity of the punishment thus invokes a higher standard for procedural safeguards at the penalty phase. As Justice Stewart expressed in *Furman*: “it [the death penalty] is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.”<sup>14</sup> “Death is different” jurisprudence has become an enduring principle that the Court consistently returns to in order to explain why it has so painstakingly regulated and refined state laws.

The “death is different” concept thus overpowers the federalism argument. It is constitutionally necessary that capital defendants be protected from arbitrariness, caprice, and discrimination. These protections supersede the right of states to employ their own unique standards. Death is qualitatively different from all other punishments, and it is the highest expression of state power over its citizens. If

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<sup>13</sup> *McClesky v. Kemp* 481 U.S. 279, Brennan, J., dissenting at 340. Other cases in which this principle is cited include *Lockett v. Ohio* 438 U.S. 586(1978) ; *Spanziano v. Florida* 468 U.S. 447 (1984); *Atkins v. Virginia* 536 U.S. 304 (2000); and *Ring v. Arizona* 536 U.S. 584 (2002).

<sup>14</sup> *Furman* Stewart, J. concurrence at 306

states are to employ the ultimate punishment, which is unique in its finality and its severity, then they must abide by constitutional mandates. While states generally meet the basic outlines of the model penal code and the “ideal” capital punishment scheme (such as a bifurcated trial, the existence of mitigating factors to counter aggravating factors, and automatic appellate court review), it becomes noticeable that states do not protect against discrimination and arbitrariness in many areas.

This thesis embraces “death is different” jurisprudence, without claiming that differing standards in other areas of criminal law need be addressed, because death is accepted as a punishment that is qualitatively different from all others. The remainder of this introduction will provide basic information about capital punishment in the United States, and will briefly review the literature surrounding the arbitrariness debate.

### **The Current Status of Capital Punishment in the United States**

Thirty-three states in the United States, plus the federal government, have the death penalty, while seventeen states and the District of Columbia do not.<sup>15</sup> For the purposes of this thesis, only the laws of the individual 50 states will be considered. As of October 1, 2012, there are 3,146 inmates on death row.<sup>16</sup> 3,083 are male, and 63 are female.<sup>17</sup> 1,358 are White; 1,319 Black; 390 Latino/Latina; 44 Asian; 34 Native American; and 1 unknown.<sup>18</sup>

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<sup>15</sup> *Death Penalty Information Center*. <http://www.deathpenaltyinfo.org/>

<sup>16</sup> Fins, Deborah. “Death Row U.S.A.: Fall 2012”. The Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc. pp 1.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

60 of these 3,146 prisoners are on federal death row, meaning that an overwhelming majority (3,086) of *all* death row inmates were sentenced to death by one of thirty-three states.<sup>19</sup> In descending order, the top five states with the most prisoners on death row are: California (724); Florida (411); Texas (304); Pennsylvania (204); and Alabama (202).<sup>20</sup> Thus, just five states, out of thirty-three, comprise 59% of the total death row population at the state level.

As of October 1, 2012, there have been 1,307 executions in the United States since the reinstatement of capital punishment in 1976.<sup>21</sup> In descending order, the five states that have held the most executions are: Texas (486, or 37.18% of the total); Virginia (109, 8.34%); Oklahoma (100, 7.65%); Florida (73, 5.59%); and Missouri (68, 5.20%).<sup>22</sup> In total, these five states have executed 836 of the 1,307 executions, or 64%. The remaining 27 states that allow capital punishment each comprise *less than 5%* of the total number of executions since 1976.<sup>23</sup> Last year, in 2012, 43 people were executed in nine different states, but just four states (Texas, Oklahoma, Mississippi, and Arizona) were responsible for over 75% of those executions.<sup>24</sup>

Death sentences, like executions, are largely clustered in only a few states. Last year, in 2012, 77 people were sentenced to death in 17 states.<sup>25</sup> Thus, in 2012 about *half* of the states that permit capital punishment, 17 out of 33, actually sentenced defendants to death; however, more than half of the 77 sentences—46—

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<sup>19</sup> Ibid 32-33

<sup>20</sup> Ibid

<sup>21</sup> Ibid 4

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> "The Death Penalty Year End Report". *Death Penalty Information Center*. December 2012. pp 2

<sup>25</sup> Ibid 1

occurred in the South.<sup>26</sup> It is clear that the practice of the death penalty is quite concentrated among a small number of states that frequently sentence and execute defendants.

Interestingly, the last decade has witnessed a significant increase in both state moratoriums and state abolition of capital punishment. Since 2007, five states<sup>27</sup> have abolished the death penalty. On November 22, 2012, Governor John Kitzhaber of Oregon announced that all executions in the state would be halted during his tenure as governor, although it is unclear what future executives and legislators will do. Recently, on March 15, 2013, both chambers of the Maryland legislature passed a bill outlawing capital punishment, which the governor has pledged to sign.<sup>28</sup> This will make Maryland the eighteenth state to abolish the death penalty in the nation's history, and the sixth to do so in six years.

### **A Brief Overview of Arbitrariness Scholarship**

Ever since the *Furman* decision, arbitrariness in capital punishment has received much scholarly and legal attention. Leading arbitrariness research has focused considerably on three areas: the composition and decision making of the capital jury, the effects of the quality of the defense attorney, and the issue of racial bias.

Since the capital jury is ultimately responsible for sentencing a defendant to death, the Supreme Court<sup>29</sup> has attempted to guide and narrow that responsibility,

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<sup>26</sup> Ibid

<sup>27</sup> In chronological order: New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), and Connecticut (2012).

<sup>28</sup> Wagner, John. "Maryland Assembly votes to repeal death penalty". *The Washington Post*. 15 March 2013.

<sup>29</sup> A table of these cases is provided in the Appendix, Table 1



most notably in two areas: selecting jurors based on their views about the death penalty, and the jury's consideration of evidence. Before *Furman*, in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court ruled that a jury composed only of jurors who would choose the death penalty violates the Sixth Amendment because it is not an impartial jury made up of a cross-section of the community.<sup>30</sup> The process of determining “*Witherspoon*-excludables”, meaning those who could be removed from the jury because of their views on the penalty, became known as “death qualification”. In *Lockhart v. McCree* 476 U.S. 162 (1986) the Court ruled that jurors who are unwilling under any circumstances to impose the death penalty could be excluded.<sup>31</sup> Similarly, jurors who would automatically impose death can be excluded.<sup>32</sup>

The Court's jurisprudence on juries and evidence evaluation began in 1978 with *Lockett v. Ohio* 438 U.S. 586. The foundations for *Lockett* came from the Court's ruling two years earlier in *Woodson v. North Carolina* 428 U.S. 280 (1976), which held that mandatory death penalty sentences for certain crimes were unconstitutional because cases must be examined on an individual basis. The result was that death penalty cases, “virtually required the consideration of mitigating evidence.”<sup>33</sup> “Mitigating evidence” is defined as any information about the defendant's character or record, or any circumstances of the offense, that are given as a reason for why the sentence should be less than death. In *Lockett*, the Court

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<sup>30</sup> *Witherspoon v. Illinois*, 391 U.S. 510 (1968)

<sup>31</sup> *Lockhart v. McCree* 476 U.S. 162 (1986)

<sup>32</sup> *Morgan v. Illinois* 504 U.S. 719 (1992)

<sup>33</sup> Latzer, Barry. *Death Penalty Cases: Leading US Supreme Court Cases on Capital Punishment*. 2002. 2<sup>nd</sup> Ed. Burlington, MA: Elsevier Science, 2002. pp 105

found that sentencers must be allowed to consider a range of mitigating factors, not just those specified in the statute, before imposing the death penalty.<sup>34</sup> Later, in *Eddings v. Oklahoma* 455 U.S. 104 (1982), the Court ruled that a trial judge could not *refuse* to include a mitigating factor presented by the defense, such as the defendant's history of childhood abuse.

Yet, despite these guidelines for narrowing the potential arbitrariness of a juror's decision, capital juries *do* remain at odds with constitutional requirements. Indeed, despite the score of Court decisions surrounding the issue, persistent problems with capital juries have led some to conclude that the Court's efforts have, "had the effect of 'deregulating death' to the point where capital juries function much as they had before *Furman*."<sup>35</sup> As William J. Bowers et al. have claimed, based on interviews and data collected by The Capital Jury Project, capital juries fail to meet constitutional requirements in at least seven ways. For example, jurors often fail to understand sentencing requirements, erroneously believe the law requires the death penalty, evade responsibility for the punishment, and often prematurely decide on a punishment sentence.<sup>36</sup>

In 1997, the American Bar Association called for a nationwide moratorium on capital punishment "unless and until" serious flaws were identified and corrected, and in 2007, the organization began an examination of eight states'<sup>37</sup> death penalty

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<sup>34</sup> *Lockett v. Ohio* 438 U.S. 586 (1978). Burger, J. majority opinion at 604-605

<sup>35</sup> Bowers, William J., Thomas W. Brewer and Charles S. Lanier. "The Capital Jury Experiment of the Supreme Court." Lanier, Charles S., William J. Bowers, and James R. Acker. *The Future of America's Death Penalty: An Agenda For the Next Generation of Capital Punishment Research*. Durham, NC: Carolina Academic Press, 2009. pp 199-221, quoting Robert Weisberg, 204

<sup>36</sup> Bowers et al from Lanier et al, quoting Robert Weisberg, pp 200

<sup>37</sup> Arizona, Alabama, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee

systems.<sup>38</sup> One of the ABA's key findings from the initial assessments was that jurors have trouble understanding their roles and responsibilities, because many states do not provide written instructions.<sup>39</sup> More significantly, as Bowers et al. note, even though the Court has held that the jury must be informed of the defendant's parole ineligibility when future dangerousness is at issue, and the only sentencing alternative is life imprisonment without possibility of parole,<sup>40</sup> many jurors still underestimate the alternatives to the death penalty.<sup>41</sup>

As for the second main area of arbitrariness research, on the quality of the defense counsel, Deborah Fleischaker writes, "defense counsel competency is perhaps the most critical factor in determining whether a capital offender/defendant receives the death penalty"<sup>42</sup>. Yet, "nation-wide, there are no minimum standards of experience or competence for counsel in death cases."<sup>43</sup> The influence that the quality of the defendant's counsel has on a case's outcome continuously receives scrutiny. Accordingly, the Court has attempted to deal with this issue in several cases.<sup>44</sup>

The Court's jurisprudence on capital defense attorneys began in *Strickland v. Washington* 466 U.S. 668 (1984), in which the Court established a two-part test for making a claim of ineffective assistance of counsel. First, a defendant must

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<sup>38</sup> Fleischaker, Deborah. "The ABA Death Penalty Moratorium Implementation Project: Setting the Stage for Future Research". Lanier, Bowers, and Acker. pp 69-88. pp 69

<sup>39</sup> Fleischaker 73

<sup>40</sup> *Simmons v. South Carolina* 512 U.S. 154

<sup>41</sup> Bowers et al, from Lanier et al, pp 204.

<sup>42</sup> Fleischaker, from Lanier, Bowers, and Acker, p 76.

<sup>43</sup> Hutton, Chris. "Flaws in Capital Sentencing: Skewing the Reasoned Moral Response". Martinez, J. Michael et al. eds. *The Leviathan's Choice: Capital Punishment in the Twenty-First Century*. New York, NY: Rowman & Littlefield Publishers, Inc. 2002. pp 281

<sup>44</sup> A table of these cases is provided in the Appendix, Table 2

demonstrate that counsel's performance fell below an objective standard of reasonableness, such that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."<sup>45</sup>

Second, the defendant must show that the attorney's deficient performance deprived the defendant of a fair trial, because there was a reasonable probability that if counsel had performed adequately, the result would have been different.

Despite the Court's efforts, proving ineffective counsel is a daunting task for a defendant. Professor Chris Hutton writes, "there is a huge gap between what is ineffective and what is good; only the worst representation is found ineffective...in capital cases, then, defense counsel may make serious mistakes, but not enough to have been ineffective."<sup>46</sup> As early as 1983, scholars cautioned about the qualifications and experience of capital defense attorneys:

a disproportionate number of them are court-appointed, rather than privately retained attorneys, who work with severely limited resources for conducting investigations, hiring expert witnesses, and in general preparing an effective capital defense...the system assigns to the least experienced, resourceful, and independent members of the bar these especially difficult cases where the defendant's life is at stake and extralegal influences are strongly felt.<sup>47</sup>

A 2000 study by Columbia Law professor James S. Liebman, et al., found that of the two most common errors "prompting a majority of reversals at the state post-conviction stage", one of them was "egregiously incompetent defense lawyers who didn't even look for—and *demonstrably missed*—important evidence that the

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<sup>45</sup> *Strickland v. Washington* 466 U.S. 668 (1984)

<sup>46</sup> Hutton, from Martinez et al, pp 280-81

<sup>47</sup> Bowers, William J. "The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes". *Journal of Criminal Law & Criminology*, Vol 74. No 3 (Fall 1983), pp 1069

defendant was innocent or did not deserve to die."<sup>48</sup> Additionally, in its 2007 state assessments, the ABA found that many states did not provide two lawyers at all stages of the capital trial and did not have a statewide indigent defendant representation system, instead providing services on a county-by-county basis.<sup>49</sup>

Strikingly, members of the Supreme Court have even brought the issue to the forefront. Associate Justice Ruth Bader Ginsburg stated, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial."<sup>50</sup> Former Associate Justice Sandra Day O'Connor has suggested, "perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."<sup>51</sup>

The third, and perhaps most studied, issue in arbitrariness is racial bias. Racial bias in capital punishment has not been eliminated, and some might say not even adequately addressed, post-*Furman*. Indeed, the Court has historically not been as sympathetic to constitutional challenges in this area as it has been in other aspects of capital punishment.<sup>52</sup>

Initially, the Court's rulings on race and capital punishment looked promising for defendants. Shortly after *Furman*, in *Batson v. Kentucky* 476 U.S. 79 (1977), the Court ruled that a prosecutor's use of peremptory challenge—the dismissal of jurors

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<sup>48</sup>Liebman, James S., Jeffrey Fagan and Valerie West. "A Broken System: Error Rates in Capital Cases 1973-1995." Columbia University Law School. 12 June 2000. pp ii. (Italics original). The second factor was police or prosecutors who did discover this type of evidence but suppressed it from the jury.

<sup>49</sup> Fleischaker, from Lanier, Bowers, and Acker, pp 73

<sup>50</sup> Ginsburg, Ruth Bader. "In Pursuit of the Public Good: Lawyers Who Care". University of the District of Columbia. David A. Clarke School of Law, Washington, D.C. 9 April 2001. Joseph F. Raul Lecture.

<sup>51</sup> O'Connor, Sandra Day. Remarks at the Meeting of the Minnesota Women Lawyers Association. 2 July 2001.

<sup>52</sup> A table of these cases is provided in the Appendix, Table 3

without stating a valid cause for doing so—may not be used to exclude jurors based solely on their race.<sup>53</sup> Though not a death penalty case, *Batson* set the stage for two later cases: *Miller-El v. Dretke* 545 U.S. 231 (2005) and *Synder v. Louisiana* 552 U.S. 472 (2008), both of which upheld *Batson*'s holding that a prosecutor's peremptory challenges could not be used for purposes of racially constructing a jury.

However, in the infamous case of *McCleskey v. Kemp* 481 U.S. 279 (1987), the Court ruled that statistical evidence showing that African-Americans are more likely to receive the death penalty does not necessarily show *purposeful* discrimination in any given trial, and thus there was no constitutional violation<sup>54</sup>. McCleskey's attorneys presented the results of a thorough study of capital sentencing in Georgia by Professor David Baldus, et al.<sup>55</sup> The seminal Baldus study concluded that defendants, and especially black defendants, who had murdered white victims were significantly more likely to receive the death penalty than similarly situated defendants convicted of murdering blacks. Yet, Justice Powell, writing for the majority in *McCleskey*, claimed that while the study was statistically valid, it did not demonstrate "a constitutionally significant risk of race bias affecting the Georgia capital-sentencing process,"<sup>56</sup> nor did it indicate that racial considerations actually

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<sup>53</sup> *Batson v. Kentucky* 476 U.S. 79(1977), Powell, J. majority opinion at 88-89.

<sup>54</sup> *McCleskey v. Kemp* 481 U.S. 279 (1987). Powell, J. majority opinion at 306-308 and 312-313

<sup>55</sup> Originally published as: Baldus, David C., George Woodworth, and Charles Pulaski. "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience". *Journal of Criminal Law and Criminology* (Northwestern University) (1983). 74 (3): 661-753. Later published as: Baldus, David C., George Woodworth, and Charles Pulaski. *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*. Boston, MA: Northeastern University Press, 1990. Even before the Baldus study, other scholars noted the relationship between race and death sentences. See: Radelet, Michael. "Racial Characteristics and the Imposition of the Death Penalty." *American Sociological Review*, Vol. 46 (1981) pp 918-27.

<sup>56</sup> *McCleskey* at 313

enter into sentencing decisions in Georgia.<sup>57</sup> At most, the study demonstrated a correlation between race and the death penalty.<sup>58</sup> Interestingly, the same year that the *McCleskey* decision was rendered, Barry Nakell and Kenneth A. Hardy published a comprehensive empirical study of arbitrariness at all stages of the capital trial, and found that, while the race of the victim and the race of the defendant mattered at different stages of the trial, race *did* have a significant effect at all stages.<sup>59</sup>

Post-*McCleskey*, studies have continued to claim that race remains a considerable factor in capital sentencing. A forum held by the American Bar Association in 1997 discussed the issue of racial bias at length, with many scholars stressing the need to rectify this problem.<sup>60</sup> In its initial findings, the ABA's Death Penalty Moratorium Implementation Project reported that each of the eight states had significant racial disparities in capital sentencing, especially with regard to the race of the victim.<sup>61</sup> In 1990, the United States General Accounting Office produced a report evaluating 28 studies performed by 21 sets of researchers, covering homicide cases for different time periods through 1988, in states that have the death penalty and in different geographic regions of the country.<sup>62</sup> The report found,

a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision. In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than

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<sup>57</sup> *McCleskey* at 282-283

<sup>58</sup> *McCleskey* at 312

<sup>59</sup> Nakell, Barry and Kenneth A. Hardy. *The Arbitrariness of the Death Penalty*. Philadelphia, PA: Temple University Press, 1987.

<sup>60</sup> The American Bar Association. *Focus on Law Studies*. Spring 1997, Volume XII, Number 2: The Death Penalty.

<sup>61</sup> Fleischaker, from Lanier, Bowers, and Acker, pp 73

<sup>62</sup> United States General Accounting Office. "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities". GAO/GGD-90-57. Washington, D.C. 26 Feb 1990.

those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.<sup>63</sup>

Specifically, “the race of victim influence was found at all stages of the criminal justice system process, although...the influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendant with a capital offense, decision to proceed to trial rather than plea bargain) than in later stages.”<sup>64</sup> The evidence for the influence of the race of defendant on death penalty outcomes was unclear, for although more than half of the studies found that race of defendant influenced the likelihood of being charged with a capital crime or receiving the death penalty, the relationship between race of defendant and outcome of the case sometimes depended on other factors.<sup>65</sup> Yet, more than three-fourths of the studies that identified a “race of defendant effect” found that black defendants were more likely to receive the death penalty.<sup>66</sup> As one of the most controversial aspects of the debate on capital punishment, the issue of racial bias is not likely to disappear anytime soon.

The preceding summary did not delve into the full extent of the research in the key areas of arbitrariness—the capital jury, the defense, and the influence of race. However, this brief review does create a context for the next section, which provides a comprehensive history of the two Supreme Court cases that ushered in the era of modern capital punishment, and then explains subsequent cases dealing with state statutes.

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<sup>63</sup> Ibid pp 5

<sup>64</sup> Ibid

<sup>65</sup> Ibid 6

<sup>66</sup> Ibid



## Section I

This section explains the development of what “arbitrariness”, a term that eludes crisp definition, actually means in capital punishment jurisprudence. The first chapter begins with an analysis of *Furman v. Georgia*, the case that first acknowledged arbitrariness. The second chapter considers *Gregg v. Georgia*, in which the Court approved states’ revised statutes that (supposedly) corrected for arbitrariness. The third chapter reviews major Court rulings on state statutes, in preparation for the later analysis of differences in current state statutes and why they can be found unconstitutionally arbitrary.

### Chapter I

#### ***Furman v. Georgia (1972) and the Beginnings of Arbitrariness***

*Furman v. Georgia* 408 U.S. 238 (1972) is the case that began the modern death penalty era. The Supreme Court did not reject the constitutionality of the death penalty entirely, but it did rule that parts of states’ death penalty schemes were unconstitutional. Thus, after the decision was handed down, it was unclear whether capital punishment would remain on the books or fall into disuse. Clearly, the death penalty remains today, so the significance of the case lies in its articulation of a new principle: that the death penalty *as applied* was unconstitutional because states employed it in an arbitrary manner, especially with regard to race.

The facts of the case are not particularly unusual. On August 11, 1967, the victim, William Micke, awoke in the middle of the night to find William Henry Furman, an African-American who already had four burglary convictions and was

currently on parole, committing robbery in his house. Micke was ultimately shot and killed. At trial, in an unsworn statement allowed under Georgia criminal procedure, Furman said that while trying to escape, he tripped and accidentally discharged his weapon, killing the victim. This contradicted his previous statement, given to police, that he had blindly fired a shot into the darkness before running away.

No matter the true sequence of events, since the shooting occurred during the commission of a felony, Furman would have been eligible for the death penalty because, under Georgia's state law, felony murders were a capital crime in which intent to kill was not required. Furman was found guilty, and the jury returned a sentence with no recommendation for mercy, meaning Furman would be put to death.

The Furman case was particularly suited for the Court to decide on the constitutionality of the death penalty because the alleged problems with Georgia's statutes were emblematic of issues with other states' laws. As David M. Oshinsky notes,

the Furman case mirrored the sort of problems that plagued death penalty trials throughout the nation. Some states defined felony murder as a capital offense; others did not. Some states used a single trial to determine guilt or innocence...other states used a two phase model...some states provided for the mandatory review of each death sentence by the State Supreme Court to insure fairness and uniformity; others did not.<sup>67</sup>

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<sup>67</sup> Oshinsky, David M. *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*. Lawrence, KS: University Press of Kansas, 2010. pp 3

Of particular consequence were statutes regarding jury discretion in selecting a death penalty sentence. Although, “some states offered modest guidance to the jury regarding the life-and-death decision they were about to make; not so in Georgia.”<sup>68</sup> Furman’s attorney, Anthony Amsterdam, argued that in many jurisdictions, juries typically sentenced a defendant to death in only one out of twelve or thirteen cases in which the death penalty was legally applicable; furthermore, over time, only a third or a half of defendants sentenced to death were actually executed.<sup>69</sup> Even more striking was the fact that the statistics, as reported by the state, were unreliable and could not discern whether, as Justice Stewart asked during oral argument, “juries are imposing the death penalty in only one out every twelve defendants or [whether] only one out of every twelve juries [is] imposing the death sentence?”<sup>70</sup> Using these examples of jury inconsistency, Amsterdam argued that the Georgia law giving the jury the power to determine whether convicted murderers should be sentenced to death resulted in arbitrary and capricious sentencing, in violation of Fourteenth Amendment’s equal protection clause and of the Eighth Amendment’s cruel and unusual punishment clause.

The Court agreed, issuing a short *per curiam* opinion that, rather than explaining its reasoning about the case, simply indicated a five-four split in favor of Furman.<sup>71</sup> The opinion is quite minimal, stating only, “the Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and

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<sup>68</sup> *Ibid*

<sup>69</sup> *Furman v. Georgia* 408 U.S. 238, oral arguments for the petitioner.

<sup>70</sup> *Furman v. Georgia* 408 U.S. 238 oral arguments for the petitioner.

<sup>71</sup> Justices Brennan, Marshall, White, Douglas, and Stewart formed the majority, and Justices Rehnquist, Burger, Powell, and Blackmun were the dissenters.

unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.”<sup>72</sup> The per curiam opinion was followed by nine separate concurring and dissenting opinions, making the decision the longest in the Court’s history.<sup>73</sup> The concurring opinions address many different elements of the case and employ different legal reasoning, but taken together, the concurrences argue that Georgia’s death penalty scheme was unconstitutional *as applied*, because it was used arbitrarily.

In their concurrences, Justices Brennan and Marshall held that the death penalty was *inherently* cruel and unusual. Justice Marshall considered whether capital punishment was excessive or unnecessary, and perhaps that factor would render it unconstitutional. He found that the death penalty was excessive, but he went on to contend that, “even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.”<sup>74</sup> He focused on how the death penalty, on its face, violated “evolving standards of decency” in American society, an idea first put forth in *Trop v Dulles* 365 U.S. 86 (1958). Marshall boldly asserted, “I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance...assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone

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<sup>72</sup> *Furman v. Georgia* 408 U.S. 238, per curiam at 239-240

<sup>73</sup> Epstein, Lee and Thomas G. Walker. *Constitutional Law for a Changing America: Rights, Liberties, and Justice*. 7<sup>th</sup> ed. Washington, DC: CQ Press, 2010. pp 552.

<sup>74</sup> *Furman*, Marshall, J. concurring at 360

capital punishment cannot stand.”<sup>75</sup> Justice Brennan made similar claims, offering four principles that, if met, rendered the death penalty cruel and unusual. He found that capital punishment met all four, and that consequently, it was incompatible with human dignity:

Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is almost total; and there is no reason to believe it serves a penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.<sup>76</sup>

Brennan and Marshall therefore both concluded that the death penalty was unconstitutional as a whole.

Justice Douglas took a different route in his concurrence, claiming that the death penalty was applied in discriminatory manner. He wrote, “we know that the discretion of judges and juries in imposing the death penalty enables the death penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, lacking political clout, or if he is a member of a suspect or unpopular minority.”<sup>77</sup> The Georgia laws, he continued, “are pregnant with discrimination and discrimination is not an ingredient compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”<sup>78</sup> Justice Stewart’s concurrence focused on how the death penalty was applied capriciously. He famously asserted, “these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual...the Eighth and Fourteenth

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<sup>75</sup> *Furman*, Marshall, J. concurring at 363

<sup>76</sup> *Furman*, Brennan J. concurring at 305

<sup>77</sup> *Furman*, Douglas, J. concurring at 255

<sup>78</sup> *Furman*, *ibid* at 257

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.”<sup>79</sup>

Finally, Justice White centered his opposition to the Georgia laws on the grounds that the punishment was so infrequently or haphazardly used that it was rendered ineffective. He wrote, “I cannot avoid that conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice...capital punishment within the confines of the statutes now before us has for all practical purposes run its course.”<sup>80</sup> White, Stewart, and Douglas thus agreed that capital punishment itself was not unconstitutional, but Georgia’s use of it was. Though they employ different reasoning, these three opinions formed the loosely defined principle, but nevertheless landmark, principle that arbitrariness was the central constitutional problem with states’ capital punishment schemes.

Each of the four dissenters also filed an opinion. Of note are Chief Justice Burger and Justice Powell’s dissents, which the two other dissenters, Justice Rehnquist and Justice Blackmun<sup>81</sup>, also signed onto. Burger claimed that the death penalty was a legislative prerogative and that the Court should avoid overstepping state legislatures. “There are no obvious indications that capital punishment offends the conscience of society to use a degree,” he wrote, “that our traditional deference

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<sup>79</sup>*Furman*, Stewart, J. concurring at 309-310

<sup>80</sup> *Furman*, White, J. concurring at 313

<sup>81</sup> Recall that Justice Blackmun later reversed his position on capital punishment, as seen in his 1994 dissent in *Callins v. Collins*.

to the legislative judgment must be abandoned.”<sup>82</sup> Burger defended states’ authority to allow a jury to have discretion, stating, “there is no empirical basis for concluding that juries have generally failed to discharge in good faith the responsibility described in *Witherspoon*<sup>83</sup>—that of choosing between life and death in individual cases according to the dictates of community values.”<sup>84</sup> Further, “the [Eighth] Amendment does not prohibit all punishments the States are unable to prove necessary to deter or control crime. The Amendment is not concerned with the process by which a State determined that a particular punishment is to be imposed in a particular case.”<sup>85</sup> Burger went on to argue that it was inappropriate to focus on the punishment’s supposed ineffectiveness, “the Eighth Amendment, as I have noted, was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy.”<sup>86</sup> In his dissent, Justice Powell questioned Justice Marshall’s assertion that the American public did not support the death penalty, claiming that capital punishment has enjoyed historical acceptance from the public and the Court. Further, Powell contends that, “whatever punishments the Framers of the Constitution may have intended to prohibit under the ‘cruel and unusual’ language, there cannot be the slightest doubt that they

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<sup>82</sup> *Furman*, Burger, J. dissenting at 385

<sup>83</sup> *Witherspoon v. Illinois*, 391 U.S. 510 (1968) was a 6-3 decision in which the Court ruled that a state statute providing the state unlimited challenge for cause of jurors who have any objection to the death penalty violated the Sixth Amendment, because it did not ensure an impartial jury or a cross-section of the community.

<sup>84</sup> *Furman*, Burger, J. dissenting at 389

<sup>85</sup> *Furman*, Burger, J. dissenting at 397

<sup>86</sup> *Furman*, Burger, J. dissenting at 391

intended no absolute bar on the Government's authority to impose the death penalty".<sup>87</sup>

Yet, the five-justice majority, in favor of Furman, won the day. From the diverse concurrences of the plurality opinions, each of which drew on different doctrinal sources, came one significant claim: that the death penalty *as applied* was unconstitutional because states were employing it in an arbitrary manner, and such application was inconsistent with the Eighth and Fourteenth Amendments. The American death penalty, for the moment, had effectively been shut down.

*Furman* was a shocking decision, and the fractured nature of the Court's opinions served only to intensify the confusion surrounding the future of the capital punishment. The one salient idea that emerged was the new idea that arbitrariness was impermissible. Yet, there were still lingering questions about the contours of this new doctrine, and within a few years, the Court would consider the issue of capital punishment once more.

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<sup>87</sup> *Furman*, Powell, J. dissenting at 419



## Chapter II

### ***Gregg v. Georgia* and the Model Death Penalty Code**

While the Court did not explicitly state so, its decision in *Furman* left state legislatures with two options: make the death penalty mandatory for specific crimes (known as “mandatory imposition”), or craft procedures that restrict the jury’s discretion in capital cases (known as “guided discretion”).

Four years after *Furman*, the Court ruled mandatory imposition to be unconstitutional in *Woodson v. North Carolina* 428 U.S. 280 (1976). North Carolina had enacted legislation making the death penalty mandatory for all first-degree murder convictions. The Court struck this down for three reasons. First, the law “depart[ed] markedly from contemporary standards”<sup>88</sup>, because historically, the public had rejected mandatory death sentences. Second, the law failed to provide standards for jurors’ discretion.<sup>89</sup> Third, the statute failed to allow consideration of the character and record of individual defendants before inflicting the death penalty.<sup>90</sup> The Court concluded that, “instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury’s willingness to act lawlessly,”<sup>91</sup> and thus, North Carolina’s law was unconstitutional.

On the same day that the Court rejected North Carolina’s scheme, the Court approved Georgia’s new system in *Gregg v. Georgia* 428 U.S. 153. Troy Leon Gregg had been convicted of murdering Fred Edward Simmons and Bob Durwood Moore

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<sup>88</sup> *Woodson v. North Carolina* 428 U.S. 280, Stewart, J. majority opinion at 301

<sup>89</sup> *Woodson*, at 302-303

<sup>90</sup> *Woodson*, at 303-305

<sup>91</sup> *Woodson*, at 303

on November 21, 1973 in order to rob them. The two victims had given Gregg and another man, Dennis Weaver, a ride when they were hitchhiking.<sup>92</sup> Gregg had been convicted and sentenced under a brand-new capital punishment scheme, and the task at hand in *Gregg* was to determine whether Georgia's revised capital punishment laws passed the concerns of *Furman*. The Court ultimately accepted Georgia's new laws because of their emphasis on "guided discretion".

In the 7-2 majority opinion, authored by Justice Stewart, the Court first clarified that the death penalty does not generally violate the Eighth Amendment, for two reasons. First, it meets contemporary standards of decency, for several reasons: when properly sentenced and administered, it is proportional to the crime and does not unnecessarily inflict pain; it is deeply rooted in the nation's history; and it has popular acceptance via the strong state legislative response to amend capital punishment laws after *Furman*.<sup>93</sup> The majority claimed, "all of the post-*Furman* statutes make clear that capital punishment has itself not been rejected by the elected representatives of the people."<sup>94</sup>

Second, the majority claimed that the death penalty was not wholly unconstitutional because it served two social purposes: a deterrent for potential offenders and retribution for wrongs. The opinion states, "in part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered

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<sup>92</sup> *Gregg v. Georgia* 428 U.S. 153, Stewart, J., majority opinion at 158-159

<sup>93</sup> *Gregg*, at 169-173

<sup>94</sup> *Gregg*, at 180-181

society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”<sup>95</sup>

Taken together, these factors led the Court to conclude that the death penalty *on the whole* was not constitutionally impermissible, “we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong...we hold that the death penalty is not a form of punishment that may never be imposed”.<sup>96</sup> It is worth remembering that Justices Brennan and Marshall asserted just the opposite in *Furman*, and as the two dissenters in *Gregg*, they once again reiterated the death penalty’s blanket unconstitutionality.

As for Georgia’s specific death penalty code, which had been revised post-*Furman*, the majority found that it was constitutional. The new laws utilized certain trial procedures and appeals processes designed to prevent the punishment from being arbitrarily imposed, which was the main constitutional objection found in *Furman*.<sup>97</sup> The majority wrote, “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”.<sup>98</sup>

Georgia’s new procedures prevented arbitrariness, and thus met *Furman*’s concerns, by providing due process in several ways. First, the guilt and penalty phases were bifurcated, so that sentencing did not occur in the same trial as

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<sup>95</sup> *Gregg*, at 183

<sup>96</sup> *Gregg*, at 186-187

<sup>97</sup> Latzer 47

<sup>98</sup> *Gregg*, at 155

determination of guilt. Second, the jury was required to find, beyond a reasonable doubt, at least one aggravating factor out of ten potential ones specified in the state statute. Generally speaking, aggravating factors are those that “make a murder more reprehensible than other homicides, and thus support the death penalty.”<sup>99</sup> For example, an aggravating factor may include a prior record of criminal convictions, that the murder was performed for monetary gain, or that the crime was especially heinous.<sup>100</sup> Under Georgia’s new laws, the death sentence could be imposed only if one of the statutorily defined aggravating factors was found and if the jury, which was required to specify the factor, then chose to impose the sentence. The defendant was also permitted to introduce mitigating factors, which are not defined in the statute, but are generally, “circumstances of the crime or characteristics of the defendant that make the offense less reprehensible and therefore support a less harsh punishment”.<sup>101</sup> Finally, the jury’s death penalty decision automatically went before the Georgia Supreme Court for review on three grounds: whether the sentence had been determined “under the influence of passion, prejudice, or anything arbitrary factor”, whether the evidence supported the jury’s chosen aggravating factor, and whether the sentence was proportional to the crime.<sup>102</sup>

Thus, *Gregg* eased the justices’ basic concerns about arbitrary and capricious sentencing that were present in *Furman*, because Georgia’s revised statutes were

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<sup>99</sup> Latzer 47-48

<sup>100</sup> Post-*Gregg*, the Court has struck down “vague” aggravating factors, an issue that will be examined later in the thesis

<sup>101</sup> Latzer 47-48

<sup>102</sup> *Gregg*, Stewart, J., majority opinion at 204-206

carefully crafted to eliminate the problems of unbridled jury discretion and randomness. Justice Stewart concluded,

Under the procedures before the Court in that case [*Furman*], 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...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 can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines...we hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution.<sup>103</sup>

Thus, whereas it had struck down the death penalty as applied in *Furman*, the Court upheld it as applied in *Gregg* because Georgia's laws provided due process and did not violate equal protection— they were applied neutrally and procedurally, rather than arbitrarily and capriciously.

A new era of death penalty jurisprudence was set in motion. States began to model their capital punishment laws after Georgia's "model death penalty code", which consisted of a bifurcated trial, aggravating and mitigating circumstance considerations, and automatic state Supreme Court review. We will see in the next chapter, however, that this new course of "ideal" capital punishment founded on guided discretion did *not* solve the arbitrariness problem.

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<sup>103</sup> *Gregg*, at 206-207

### Chapter III

#### Supreme Court Jurisprudence on State Statutes

The purpose of this section is twofold. First, it will present an overview of the Court's jurisprudence on post-*Gregg* state statutes, discussing cases in which the Court has upheld or invalidated state laws. Second, this section will demonstrate how, through its confused and contradictory jurisprudence, the Court has retreated from the essence of the Eighth and Fourteenth Amendment jurisprudence.

After the Court approved a "proper" death penalty scheme in *Gregg*, emphasizing guided jury discretion, a bifurcated trial with an individualized sentencing phase, and appellate court review, the future of capital punishment was clear: states merely had to follow the Court's mandates. Or so it seemed. Although the *Gregg* decision did set constitutional limits, it also necessarily invited the Court to further scrutinize state procedures to ensure that they complied with the demands of *Furman*.

As a result, capital punishment cases have become a significant part of the Court's docket. James S. Liebman notes, "between 1937 and 1967, the Court issued only two decisions addressing the constitutionality of a death sentence or execution... [But b]etween 1972 and 2006, the Court issued at least 209 opinions in capital cases in which capital-specific issues were raised."<sup>104</sup> Douglas A. Berman acknowledges that while, "it is perhaps understandable that, during the 1970s and 1980s when the Supreme Court first became actively involved in regulating the operation of the death penalty, a sizeable portion of the Court's docket and the

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<sup>104</sup> Liebman, James S. "Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963-2006". *Columbia Law Review*. Vol. 107, No. 1 (Jan. 2007) pp 14 footnote 42.

Justices' energies were invested in reviewing capital cases and adjudicating the claims of death row defendants,"<sup>105</sup> it is striking that, "a full three decades after the Court first actively took up death penalty issues, however, the Justices continue to devote an extraordinary amount of time and attention to capital cases."<sup>106</sup> Berman remarks that, "after having virtually no capital cases on its merits docket for most of its history, the Supreme Court has over the last three decades adjudicated, on average, six capital cases each and every term."<sup>107</sup>

Even though states that retained the death penalty generally modeled their statutes after Georgia's, challenges to these new laws did not abate. The Court has embarked on a tenuous balance between upholding and overturning state capital punishment statutes, and its jurisprudence has taken on a conflicting and contradictory character in several significant areas.

### **A. Upholding State Statutes**

The Court's approval of state law is of particular importance in two areas: aggravating factors and judge versus jury sentencing. Beginning with a case handed down the same day as *Gregg*, the Court began to uphold many new state laws.<sup>108</sup> In *Proffitt v. Florida* 428 U.S. 242 (1976), the Court approved Florida's capital punishment scheme that allowed judges, rather than juries, to act as the sole sentencing authorities, because the statutory procedure tightly prescribed their

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<sup>105</sup> Berman, Douglas A. "A Capital Waste of Time? Examining the Supreme Court's 'Culture of Death'." 34 Ohio N.U.L. Rev. 861 (2008). pp 869

<sup>106</sup> *Ibid*

<sup>107</sup> *Ibid* 868

<sup>108</sup> A table of these cases is provided in the Appendix, Table 4

relevant decision-making process.<sup>109</sup> The procedure required sentencing judges to focus on the crime's circumstances and the defendant's character by weighing eight statutory aggravating factors against seven statutory mitigating factors.<sup>110</sup> Further, sentencing judges were required to submit a written explanation of the finding of a death sentence, for the purpose of automatic review by Florida's Supreme Court.<sup>111</sup> The Court found that such strict requirements sufficiently safeguarded against the presence of any constitutional deficiencies arising from an arbitrary or capricious imposition of the death penalty.<sup>112</sup>

In yet another Georgia case, *Zant v. Stephens* 462 U.S. 862 (1983), Justice Stevens, writing for the majority, emphasized that the purpose of aggravating factors is merely to, “genuinely narrow the class of persons eligible for the death penalty...[and to] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”<sup>113</sup> According to *Zant*, a constitutional death penalty statute must provide an “objective, evenhanded, and substantively rational way” of drawing this distinction.<sup>114</sup> The absence of legislative or court-imposed standards to govern the jury’s consideration of aggravating circumstances did *not* render the Georgia capital sentencing statute invalid because, “the Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage. We [the Court] therefore remain convinced, as we were in 1976, that the structure of

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<sup>109</sup> *Proffitt v. Florida* 428 U.S. 242, Powell, J. majority opinion at 251-259

<sup>110</sup> *Proffitt*, at 247-253

<sup>111</sup> *Proffitt*, at 250

<sup>112</sup> *Proffitt* at 253

<sup>113</sup> *Zant v. Stephens* 462 U.S. 862 (1983), Stevens, J. majority opinion at 877

<sup>114</sup> *Zant*, at 879



the statute is constitutional.”<sup>115</sup> In the early 1980s, the Court therefore remained committed to the “model” death penalty scheme initially approved in *Gregg v. Georgia*, which emphasized individual determination via the sentencer’s narrow discretion.

After cases concerning jury versus judicial sentencing, the Court soon began the task of approving or rejecting statutorily defined aggravating factors. In *Lowenfield v. Phelps* 484 U.S. 231 (1988), the Court upheld one of Louisiana’s statutorily defined aggravating circumstance that was necessarily an element of the underlying offense of first-degree murder.<sup>116</sup> The defendant had been sentenced to death on three counts of first degree murder, and the jury found one statutory aggravating circumstance to support all three: “knowingly creat[ing] a risk of death or great bodily harm to more than one person.”<sup>117</sup> The defendant argued that this circumstance was a necessary element of capital murder and was therefore merely duplicative evidence. The Court disagreed. Chief Justice Rehnquist, writing for the majority, claimed that the narrowing function of aggravating circumstances, as prescribed in *Zant v. Stephens*, “may constitutionally be provided in either of two ways: the legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase, as most States have done, or the legislature may itself narrow the definition of capital offenses so that the jury finding at the guilt phase responds to this concern, as Louisiana has

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<sup>115</sup> *Zant* at 879

<sup>116</sup> *Lowenfield v. Phelps* 484 U.S. 231

<sup>117</sup> *Lowenfield*, Rehnquist, C.J. majority opinion at 235

done here.”<sup>118</sup> Therefore, Rehnquist stated, “the duplicative nature of the statutory aggravating circumstance did not render petitioner's sentence infirm, since the constitutionally mandated narrowing function was performed at the guilt phase, and the Constitution did not require an additional aggravating circumstance finding at the penalty phase.”<sup>119</sup>

In *Walton v Arizona* 497 U.S. 639 (1990), the Court upheld two aspects of Arizona’s capital punishment scheme: sentencing by a judge, not a jury<sup>120</sup>, and the aggravating factor that specified the crime was “especially heinous, cruel, or depraved”.<sup>121</sup> Arizona’s aggravating factor was not unconstitutionally vague because the state high court clarified the meaning and independently applied it to the facts of the case. The Arizona Supreme Court stated “a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death,” and that “[m]ental anguish includes a victim's uncertainty as to his ultimate fate.”<sup>122</sup> “The definition given to the ‘especially cruel’ provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer,” Justice White wrote for the majority. The Court added, “nor can we fault the state court's statement that a crime is committed in an especially ‘depraved’ manner when the perpetrator ‘relishes the murder, evidencing debasement or perversion,’ or ‘shows an indifference to the suffering of the victim

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<sup>118</sup> *Lowenfield* at 261

<sup>119</sup> *Lowenfield* at 262

<sup>120</sup> Later overturned by *Ring v. Arizona* 536 U.S. 584 (2002). As will be discussed later, *Spaziano v. Florida* 468 U.S. 447 (1984) is also noteworthy, for although the decision in *Spaziano* allowing a judge to override a jury's recommendation of life and substitute death was essentially overruled by *Ring v. Arizona* 536 U.S. 584 (2002), *Spaziano* may still hold and *Ring* may not apply in states where the jury has no part in sentencing and only the judge does so.

<sup>121</sup> *Walton v Arizona* 497 U.S. 639

<sup>122</sup> *Walton*, White, J. majority opinion at 654

and evidences a sense of pleasure' in the killing."<sup>123</sup> The Court thus concluded, "If the Arizona Supreme Court has narrowed the definition of the 'especially heinous, cruel or depraved' aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor."<sup>124</sup>

The Court also upheld Idaho's aggravating factor that the defendant "exhibited utter disregard for human life" in *Arave, Warden v. Creech* 507 U.S. 463 (1993).<sup>125</sup> As in *Walton* in 1990, the Court determined that it was unnecessary to parse the phrase "utter disregard for human life" for constitutionality, because the Idaho Supreme Court had adopted a limiting construction that met constitutional requirements.<sup>126</sup> The Idaho court had clarified that the phrase is "meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer."<sup>127</sup>

In both *Walton* and *Arave*, the Court did not deem it relevant whether the state statute actually narrowed the aggravating factor to circumscribe a class of "death penalty worthy" defendants. The Court merely rested faith in the state court to narrow the factor's application in a given case. As will be discussed later in this section, the Court's decisions in these cases have resulted in the arbitrary application of already ambiguous statutes. Instead of defining the class of death-eligible defendants through legislative precision, state courts are left to themselves

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<sup>123</sup> *Walton*, at 655

<sup>124</sup> *Walton* at 653-654

<sup>125</sup> *Arave, Warden v. Creech* 507 U.S. 463

<sup>126</sup> *Arave*, O'Connor, J. majority opinion at 470-471

<sup>127</sup> *State v. Osborn*, 102 Idaho 405, 631 P. 2d 187 (1981)

to ascertain meaning in aggravating factors, and they do so in an inconsistent manner, which the Court has permitted.

In *Harris v. Alabama* 513 U.S. 504 (1995), an 8-1 Court approved Alabama's sentencing scheme wherein capital sentencing authority was vested in the trial judge, but the judge was required to "consider" an advisory jury verdict.<sup>128</sup> The Court held that the Eighth Amendment does *not* require a state to define the weight that the sentencing judge must give to an advisory jury verdict.<sup>129</sup> The majority acknowledged that Alabama's sentencing scheme was much like Florida's, except that in Florida the judge was required to give "great weight" to the jury's recommendation, while the Alabama judge merely had to "consider" the advice. While Florida's was favorable, Alabama's was also acceptable. Justice O'Connor wrote for the majority: "the hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results," which Alabama's statutes did.<sup>130</sup>

While the preceding discussion is only a sample of Court-approved statutes, these cases highlight the Court's tendency to approve statutorily defined aggravating circumstances, no matter how vague or repetitive, as long as the state's high court clarifies the circumstance when applying it in a given case. This case history also demonstrates the Court's willingness to allow states to choose between jury and judge sentencing. Permitting states to employ different standards for the

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<sup>128</sup> *Harris v. Alabama* 513 U.S. 504 (1995)

<sup>129</sup> *Harris*, O'Connor, J. majority opinion at 508-515

<sup>130</sup> *Harris*, at 504

ultimate sentencing authority leads to randomness in sentencing, especially when judges can overrule jury advisory verdicts with little or no consideration of the jury's recommendation.

Furthermore, as we will see, the Court has overturned several state statutes, often on the same grounds that it upheld them in previous cases. The Court has contradicted itself on significant principles regarding the application of aggravating factors and the essence of sentencing procedures, allowing some states to keep (arguably) arbitrary standards, while striking down similar provisions in other states.

### **B. Overturning State Statutes<sup>131</sup>**

A decade before the Court approved aggravating factors in both *Walton v. Arizona* (1990) and *Arave, Warden v. Creech* (1993), it struck down Georgia's aggravating factor that the crime was "outrageously or wantonly vile, horrible, and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In *Godfrey v Georgia* 446 U.S. 420 (1980), the Court viewed the application of that factor to the specific case as impermissibly vague, but allowed the factor itself to stand.<sup>132</sup> The majority opinion, authored by Justice Stewart, determined that the Georgia courts did not limit the statute to the facts of the present case, since, "petitioner did not torture or commit an aggravated battery upon his victims, or cause either of them to suffer any physical injury preceding their deaths...petitioner's crimes cannot be said to have reflected a consciousness

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<sup>131</sup> <sup>131</sup> A table of these cases is provided in the Appendix, Table 5

<sup>132</sup> *Godfrey v Georgia* 446 U.S. 420

materially more ‘depraved’ than that of any person guilty of murder.”<sup>133</sup> At trial, the prosecutor repeatedly informed the jury that the murder did not involve torture; <sup>134</sup> the Court also highlighted that the victims were killed instantaneously, and after the killings, the petitioner acknowledged his responsibility and the heinous nature of his crimes.<sup>135</sup> As William S. Geimer notes, *Godfrey* resulted in, “a commitment of the Supreme Court to micro-management...the high Court became involved in monitoring the way in which discretion was guided by the application of statutory aggravating factors to a given case.”<sup>136</sup>

Eight years later in *Maynard v Cartwright* 486 U.S. 356 (1988) the majority struck down Oklahoma’s aggravating factor, “especially heinous, atrocious or cruel” for vague application. Justice White wrote for the majority in *Maynard*, ruling similarly to *Godfrey* because:

“the language of the Oklahoma provision gave no more guidance to the jury here than did the ‘outrageously or wantonly vile, horrible, or inhuman’ language that was held unconstitutional in *Godfrey*. Moreover, Oklahoma’s addition of the word ‘especially’ no more limited the overbreadth of the aggravating factor than did the addition of ‘outrageously or wantonly’ to the word ‘vile’ in the language considered in *Godfrey*. Furthermore, the state appellate court’s factual approach to construction was indistinguishable from the action of the Georgia court in *Godfrey*, which failed to cure the jury’s unfettered discretion and to satisfy the Eighth Amendment.”<sup>137</sup>

Recall that in *Walton v Arizona* (1990) the Court upheld Arizona’s aggravating factor, “especially heinous, cruel, and depraved” because, unlike in *Godfrey*, the state high

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<sup>133</sup> *Godfrey* Stewart, J. majority opinion at 421 and 432-433

<sup>134</sup> *Godfrey* at 432

<sup>135</sup> *Godfrey* at 433

<sup>136</sup> Geimer, William S. “Death at Any Cost: A Critique of the Supreme Court’s Recent Retreat From Its Death Penalty Standards”. *12 Fla. St. U.L. Rev.* 737. Winter 1985. pp 752-754

<sup>137</sup> *Maynard v Cartwright* 486 U.S. 356, White, J. majority opinion at 367

court clarified the meaning and independently applied it to the facts of the case. Again, we see how the Court relies merely on the state court's expertise and experience in clarifying these aggravating factors, rather than examining the content of the factors themselves. It is also noteworthy that Florida currently employs the same statute that was rejected in *Maynard*. Based on the Court's jurisprudence, it seems that the Florida factor would only be struck down if its high court did a poor job of explaining and applying it.

Court rejection of state law also extends to the workings of the judge and the jury. In *Hitchcock v Dugger* 481 U.S. 393 (1987), the Court unanimously ruled for the defendant, finding that it was unconstitutional for the trial judge to instruct the advisory jury not to consider, and for the judge himself not to consider, mitigating circumstances not specifically enumerated in Florida's death penalty statute.<sup>138</sup> However, Justice Scalia's majority opinion did not question whether the judge's unconstitutional actions were actually required by Florida law.<sup>139</sup> The Court did note that other Florida judges conducting sentencing proceedings believed that Florida law excluded consideration of non-statutory mitigating circumstances; that at least three death sentences were overturned for this reason; and that the Florida legislature had since removed the phrase "as enumerated [in the statutory list]" from the provisions about the jury and judge's consideration of mitigating circumstances.<sup>140</sup>

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<sup>138</sup> *Hitchcock v Dugger* 481 U.S. 393. This case also reaffirmed *Lockett v. Ohio*, 438 U. S. 586 and *Eddings v. Oklahoma*, 455 U. S. 104.

<sup>139</sup> *Hitchcock* Scalia, J. majority opinion at 397

<sup>140</sup> *Hitchcock* at 397

In *Ring v Arizona* 536 U.S. 584 (2002), the Court declared that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty. *Ring* therefore overruled a portion of *Walton v. Arizona*, and it also essentially overruled the provisions of *Spaziano v. Florida* 468 U.S. 447 (1984), which allowed a judge to impose a death sentence and to override a jury's recommendation of life imprisonment.

Under Arizona law, Ring could not be sentenced to death unless a judge at a separate sentencing hearing made further findings. The judge was required to determine the existence or nonexistence of statutorily enumerated aggravating circumstances and any mitigating circumstances, and a death sentence could be imposed only if the judge found at least one aggravating circumstance and no mitigating circumstances that were “sufficiently substantial to call for leniency”.<sup>141</sup> Because the jury had convicted Ring of felony murder, not premeditated murder, Ring would be eligible for the death penalty only if he was the victim’s actual killer.<sup>142</sup> The judge found that Ring was the killer and found two aggravating factors, as well as one mitigating factor, and ruled that the latter did not call for leniency.<sup>143</sup> Ring argued that this scheme, “violated the Sixth Amendment’s jury trial guarantee by entrusting to a judge the finding of a fact raising the defendant’s maximum penalty.”<sup>144</sup>

It is important to note that, ten years after *Walton v. Arizona*, the Court had held in *Apprendi v. New Jersey*, 530 U. S. 466 (2000), that the Sixth Amendment does

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<sup>141</sup> *Ring v Arizona* 536 U.S. 584, syllabus at 584

<sup>142</sup> *Ibid*

<sup>143</sup> *Ibid*

<sup>144</sup> *Ibid*



not permit a defendant to be “expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.”<sup>145</sup> Thus, the Court found that *Apprendi* and *Walton* were irreconcilable. Justice Ginsburg, writing for the majority, declared, “*Walton* is overruled to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty<sup>146</sup>...capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”<sup>147</sup>

### C. Confusion and Retraction

The Court has deviated from the concerns first identified in the *Furman* plurality in many ways. The problem is not that the Court has backtracked on a crystalline *Furman* doctrine, since there is no singular, doctrinal sound bite in that case. Rather, the Court is at fault because it appears to be uncomfortable with interstate arbitrariness, but it has retreated from the protections of the Eighth and Fourteenth Amendments by permitting, and even encouraging, such variation.

This process began with *Gregg*, the case that initiated the Court’s fine-tuning of state statutes and procedures. Although the Court approved Georgia’s revised scheme for its emphasis on guided jury discretion and individualized sentencing, by approving subsequent state laws that allow judicial sentencing and overrides and

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<sup>145</sup> *Apprendi v. New Jersey*, 530 U. S. 466 at 483

<sup>146</sup> *Ring*, syllabus at 585

<sup>147</sup> *Ring*, Ginsburg, J. majority opinion at 585

vague aggravating circumstances, the Court has departed from the stated goal of capital punishment: to prevent arbitrariness.

A number of scholars have noted the Court's inconsistent approach to examining state statutes. Jeffrey L. Kirchmeir argues:

after initially appearing to strictly regulate the use of capital punishment, the Court has withdrawn from its early statements in this area and has permitted a growing arbitrariness that appears inconsistent with the fundamental concerns of *Gregg* and *Furman*. In short, the Court no longer seems concerned with whether the determination of who receives the death penalty parallels getting struck by lightning. This trend is illustrated by the Court's increasing tolerance of vague statutory aggravating factors and open-ended non-statutory aggravating factors."<sup>148</sup>

He continues, "as long as not all murderers are condemned, the Court has divorced itself from regulating whether the death penalty is applied consistently. The *post-Furman* cases have not solved the problem of the *pre-Furman* death penalty system in theory or in practice."<sup>149</sup>

To be fair, the Court has made *some* sincere attempts to narrow the class of "death-penalty eligibles" to only those who have committed the most heinous crimes and for whom the punishment is the most appropriate. Yet, instead of focusing its efforts on the substantive rights of all capital defendants or in declaring a societal standard for determining who those defendants should be, the Court has concentrated on streamlining and regularizing the operation of the death penalty in the handful of states that regularly litigate in front of the Court, particularly Alabama, Florida, Georgia, and other southern states. Though written in 1991, Welsh S. White's comment still speaks to this problem:

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<sup>148</sup> Kirchmeir, Jeffrey L. "Aggravating and Mitigating Factors: the Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme." 6 *William & Mary Bill of Rights Journal*, 435 (1998) pp 361

<sup>149</sup> Kirchmeir 390

the Court is very reluctant to take any action that would even temporarily frustrate the operation of the system of capital punishment. The Court has retained a position from which it will be able to closely monitor procedures employed in capital cases...the present Court holds that maintaining the smooth functioning of our system of capital punishment is a higher priority than protecting the rights of capital defendants.<sup>150</sup>

Through an extensive series of decisions, “the Supreme Court has essentially designed and monitored the basic legal structure and many procedural particulars for the operation of modern capital punishment systems throughout the nation.”<sup>151</sup>

These decisions have been lengthy, but not substantive, dealing most recently with minute procedural norms in only a handful of states. As Berman quips, “the Supreme Court's modern constitutional regulation of the death penalty has evolved over three decades with little consensus and lots of words; precious few of the Supreme Court's significant capital punishment rulings have been unanimous, and even fewer could be read fully during the average subway ride.”<sup>152</sup> The justices have “shied away from imposing their own substantive visions of who is most deserving of death, instead rubber-stamping states’ selections.”<sup>153</sup> What results is that the Court does not dwell on substantive differences between aggravating factors that it strikes down or upholds, only on the relevant state’s application of the factor.

Its treatment of *Godfrey* and *Maynard* versus *Walton* and *Arave* exemplifies this dilemma. In *Godfrey* and *Maynard*, the Court criticized the relevant state supreme courts for failing to constitutionally limit the aggravating circumstance at hand;

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<sup>150</sup> White, Welsh S. *The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment*. Ann Arbor: University of Michigan Press, 1991. pp 207

<sup>151</sup> Berman 868

<sup>152</sup> Ibid 868-869

<sup>153</sup> Sharon, Chelsea Creo. “The ‘Most Deserving’ of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes”. *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46. (2011). pp 242

accordingly, in *Walton* and *Arave*, the Court praised the state supreme court for limiting the circumstance to the specific case.

Yet, the Court did not discuss the substantive ambiguity of the factors themselves. The Arizona and Oklahoma factors, from the *Walton* and *Maynard* cases, are nearly identical (“especially heinous, atrocious or cruel” vs. “especially heinous, cruel, and depraved”, respectively), but the Court could only focus on the application of the factor. Either it did not occur to the Court that the carefully vague phrasing was the heart of the problem, or the Court was simply satisfied that the Arizona court was able to appropriately apply its factor, while Oklahoma was not. Either approach contradicts the *Zant* mandate that the purpose of an aggravating factor is to, “genuinely narrow the class of persons eligible for the death penalty...[and to] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”<sup>154</sup> Contrary to what *Zant* insists, in *Godfrey*, *Maynard*, *Walton*, and *Arave*, the constitutionality of the factor rests not with whether the factor truly narrows the class of offenders and justifies the imposition, but with the factor’s random and changing application. The decisions to uphold in *Walton* and *Arave* therefore do not comport with *Zant*.

Even more shocking is the decision in *Lowenfield v. Phelps* that permits a statutorily defined aggravating circumstance (“knowingly creating a risk of death or great bodily harm to more than one person) that is necessarily an element of the first-degree murder. An element of first-degree murder used against the defendant is obvious and appropriate at the guilt phase. But at the sentencing phase, such an

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<sup>154</sup> *Zant* at 877

element cannot possibly “genuinely narrow the class of persons eligible for the death penalty...[and] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”<sup>155</sup> Indeed, it only expands that class and justifies the imposition to any first-degree murder.

Furthermore, the Court has struck an odd balance between trying to channel juror discretion in some cases, while expanding it other cases. The decisions in *Proffitt* and *Harris* greatly empower the discretion of judges over juries, and these cases do not attempt to narrow that discretion at all. Karin E. Garvey notes that Court seriously bungled the *Harris* decision. “The manner in which judges have treated jury sentence recommendations provides no discernable pattern. The amount of weight accorded to the advisory sentences varies from one judge to another as well as from one case to another,” she claims, concluding that, “this type of random, arbitrary sentencing mechanism is exactly the type of sentencing scheme which *Furman* and the Eighth Amendment seek to prevent.”<sup>156</sup> Even though the *Ring* decision held that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty, *Ring* may not apply in states where the jury has no part in sentencing and only the judge does so. Thus, since Alabama invests actual sentencing authority in the judge and reserves only an advisory role for the jury, it is unclear whether *Ring* overturns the *Harris* decision.

As Banner notes, “the tragedy of the Court’s 8<sup>th</sup> Amendment jurisprudence is

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<sup>155</sup> *Zant* at 877

<sup>156</sup> Garvey, Karin E. “The Constitutionality of the Alabama Capital Sentencing Scheme”. *The Journal of Criminal Law and Criminology*, Vol. 86, No. 4 (Summer 1996). pp 1430.

that all of the complexity serves scarcely any purpose.”<sup>157</sup> It is clear is that, “the U.S. Supreme Court’s current interpretation of its Eighth Amendment role [is] one of risk management,”<sup>158</sup> because the Court abandoned its pursuit of, and insistence on, schemes that substantively protect against arbitrary imposition. Instead, it retreated and, “recast *Furman* to require procedures that merely reduced a substantial risk of arbitrariness,”<sup>159</sup> when in fact, “*Furman* mandates procedures that expose arbitrariness.”<sup>160</sup> With the *Gregg* decision, the Court began its business of selectively chipping away (or, depending on the case outcome, enhancing) a handful of state statutes.

By vigilantly regulating at the state level, the Court actually “deregulated death” *across* the states to the point where capital punishment laws function at a pre-*Furman* level. The Court has a latent concern for preventing defendants from being “struck by lightning”, yet it has continued to let the lightning strike. The Court behaves as though there is moral content in *Furman*, drawn from the Eighth and Fourteenth Amendments, but it remains deeply divided over how to entrench that moral content into adequate protection for death penalty defendants.

Thus, as long as states more or less conform to a broad understanding of *Furman*’s loose statement about preventing arbitrariness, states are largely free to retain their own uniquely constructed death penalty statutes and employ procedures that may or may not withstand constitutional scrutiny in another state.

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<sup>157</sup> Banner 288

<sup>158</sup> Hoeffel, Janet C. “Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases”. 46 B.C. L. Rev. 771 at 771

<sup>159</sup> Ibid, abstract.

<sup>160</sup> Ibid, abstract.

Whether the state's laws actually defend against arbitrariness in practice is another matter, and is largely one that the Court has abandoned. The next section will analyze four states' death penalty statutes in order to fully illustrate the problems of arbitrariness and inconsistencies within, and between, states' laws.

## Section II

This section will examine the specifics of two capital punishment procedures in four states' statutes, and will illuminate areas of notable difference between them. The purpose of the section is to demonstrate exactly how these differences produce arbitrariness *among* states. Later in the next section, I will argue that such differences violate the Equal Protection Clause of the Fourteenth Amendment and the evolving standards doctrine, because these practices produce arbitrariness and inconsistency at the sentencing level of capital trials.

### Chapter IV Overview of Five State Statutes

This chapter will briefly enumerate and explain the capital murder definitions, trial procedures, and sentencing procedures of four states: Alabama, Florida, Missouri, and Pennsylvania. These states were chosen for several reasons.<sup>161</sup> On a general level, because the initial round of death penalty reports issued by the ABA included Alabama, Missouri, Florida, and Pennsylvania, there is a wealth of data on these states' policies and statutes. These states also geographically represent the South, the Middle Atlantic, and the Midwest regions of the country.

More specifically, these states have unique features that exemplify the various ways states have attempted to deal with problems identified in *Furman* and *Gregg*. Two key areas in these states are of note: judge vs. jury sentencing authority and vague vs. defined aggravating circumstances. Furthermore, the U.S. Supreme

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<sup>161</sup> All basic state information obtained from: *Death Penalty Information Center*. [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org). A complete appendix of each state's death penalty codes is also included at the end of this thesis.



Court has reviewed these areas of capital punishment sentencing, but has not necessarily reviewed statutes in these specific states; yet, even when the Court has upheld or struck down statutes, it has often reached different conclusions on similar state procedures. Thus, examining these state statutes in conjunction with the Court's often tangled rulings will illuminate weaknesses and areas of arbitrariness.

### **Alabama**

More specifically, Alabama warrants examination because is one of only three states (along with Florida and Delaware) that allow judges to override jury sentencing recommendations and is the only state that allows a judge, *without restriction*, to override when the jury votes for a life sentence. The state's death penalty statute also includes eighteen aggravating circumstances, one of which is that "the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses." As will be discussed in a later section, the Supreme Court has struck down similar aggravating circumstances as being unconstitutionally vague. For example, the Court rejected Georgia's aggravating factor that the crime was, "outrageously or wantonly vile, horrible, and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,"<sup>162</sup> or Oklahoma's factor that the crime was, "especially heinous, atrocious or cruel."<sup>163</sup> Thus, Alabama's aggravating factor is often criticized for unconstitutional vagueness.

Alabama's death penalty statutes are contained in a single section in the Code of Alabama, under Title 13A Chapter 5 Article 2.<sup>164</sup> § 13A-5-39 defines capital

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<sup>162</sup> *Godfrey v Georgia* 446 U.S. 420 (1980)

<sup>163</sup> *Maynard v Cartwright* 486 U.S. 356 (1988)

<sup>164</sup> Ala. Code § 13A-5-39 to §13A-5-59 (1975).

murder as, “an offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole according to the provisions of this article.”<sup>165</sup> § 13A-5-40 lists eighteen possible capital offenses;<sup>166</sup> § 13A-5-41 to 13A-5-44 describe the trial or “guilt” phase;<sup>167</sup> § 13A-5-45 to 13A-5-47 explain the sentencing phase; § 13A-5-48 to 13A-5-52 define the aggravating and mitigating factors and describe the process of establishing them at sentencing;<sup>168</sup> and finally, § 13A-5-53 to 13A-5-59 explain automatic appellate court review, appointment of defense counsel, and interpretation and applicability of the articles.<sup>169</sup>

### **Florida**

Florida is one of the three states (including Alabama) that permit judicial override of jury recommendation for life imprisonment without the possibility of parole, but it places restrictions on this power. Florida and Alabama will therefore make a good comparison. Florida also leads the nation in both the number of new death sentences handed down each year *and* in the number of death row inmates who were later exonerated, acquitted, or had their charges dropped, and it also includes the death penalty for crimes other than murder (drug trafficking).<sup>170</sup> Thus, Florida is a good example of a state with unusual sentencing provisions and controversial practices.

Florida’s death penalty statutes are scattered throughout Florida State Code (2012). Title XLVI Chapter 782.04 describes the following as murder in the first

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<sup>165</sup> Ala. Code § 13A-5-39 (1975).

<sup>166</sup> Ala. Code § 13A-5-40 (1975).

<sup>167</sup> Ala. Code § 13A-5-41 to 13A-5-44 (1975).

<sup>168</sup> Ala. Code § 13A-5-48 to 13A-5-52 (1975).

<sup>169</sup> Ala. Code § 13A-5-53 to 13A-5-59 (1975).

<sup>170</sup> “Florida’s Death Penalty Needs a Fresh Look”. *Tampa Bay Times*. 3 January 2013. Editorial.

degree, constituting a capital felony: “the unlawful killing of a human being 1) when perpetrated from a premeditated design to effect the death of the person killed or any human being; 2) when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any of eighteen other crimes<sup>171</sup>; or 3) which resulted from the unlawful distribution of certain substances<sup>172</sup> by a person eighteen years of age or older, when such drug is proven to be the proximate cause of the death of the user. Title XLVI Chapter 775.082 provides that any person convicted of a capital felony shall be sentenced to death or life imprisonment without the possibility of parole, and it also describes procedures in the event the death penalty is rendered unconstitutional.<sup>173</sup> For example, if a particular method of execution is held unconstitutional, death sentences will not be vacated, but if the penalty as a whole is rendered unconstitutional, a defendant shall appear before the court having jurisdiction over him and he will be resentenced to life imprisonment. Title XLVII Chapter 913.13 explains the process of jury selection;<sup>174</sup> Chapter 918 delineates the trial or guilt phase;<sup>175</sup> and finally, Chapter 921.141 describes the sentencing procedures, including automatic appellate court review, aggravating and mitigating

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<sup>171</sup> Trafficking offense prohibited by s. 893.135(1), arson, sexual battery, robbery, burglary, kidnapping, escape, aggravated child abuse, aggravated abuse of an elderly person or disabled adult, aircraft piracy, unlawful throwing, placing, or discharging of a destructive device or bomb, carjacking, home-invasion robbery, aggravated stalking, murder of another human being, resisting an officer with violence to his or her person, aggravated fleeing or eluding with serious bodily injury or death, or a felony that is an act of terrorism or is in furtherance of an act of terrorism

<sup>172</sup> any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or methadone

<sup>173</sup> Fla. Stat. § 775.082 (2012)

<sup>174</sup> Fla. Stat. § 913.13 (2012)

<sup>175</sup> Fla. Stat. § 918 (2012)

factors, the admission of victim impact evidence, and interpretation and applicability of the articles.<sup>176</sup>

### **Missouri**

Missouri has seventeen aggravating circumstances, many of which are broad and could be applicable to almost any murder. For example, similar to Alabama, it lists that “the murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind” is an aggravating circumstance,<sup>177</sup> so it serves as a good example of a state with vague and potentially arbitrary statutes that have been examined by the Supreme Court.

Missouri State Code TITLE XXXVIII, Chapter 565.020 defines first-degree murder as if a person, “knowingly causes the death of another person after deliberation upon the matter.”<sup>178</sup> Chapter 565.020 also states that, “murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.”<sup>179</sup> Chapter 565.030 describes the trial procedure;<sup>180</sup> Chapter 565.032 specifies aggravating and mitigating factors;<sup>181</sup> Chapter 565.035 provides for and

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<sup>176</sup> Fla. Stat. § 921.141 (2012).

<sup>177</sup> Mo. Rev. Stat. § 565.032 Rule 7 (2012)

<sup>178</sup> Mo. Rev. Stat. § 565.020 (2012)

<sup>179</sup> Ibid

<sup>180</sup> Mo. Rev. Stat. § 565.030 (2012)

<sup>181</sup> Mo. Rev. Stat. § 565.032 (2012)

explains the process of automatic appellate court review and executive clemency<sup>182</sup>; and Chapter 565.040 explains procedure if the death penalty is held unconstitutional; for example, “anyone convicted of murder in the first degree will be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment.”<sup>183</sup> If a particular death sentence is rendered unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall resentence the defendant.<sup>184</sup> Title XXXVII Chapter 546.680 to 546.820 describe the post-sentencing procedures of warrants for execution, the manner of execution, and procedure for special circumstances such as when the defendant is a pregnant woman.<sup>185</sup>

### **Pennsylvania**

Lastly, at 204 prisoners, Pennsylvania has the fourth largest death row population, yet the last execution in the state occurred in 1999, and it ranks second to last in number of executions.<sup>186</sup> It will provide a unique study of a state with a large death row population that rarely executes.

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<sup>182</sup> Mo. Rev. Stat. § 565.035 (2012)

<sup>183</sup> Mo. Rev. Stat. § 565.040(2012)

<sup>184</sup> Mo. Rev. Stat. § 565.040(2012)

<sup>185</sup> Mo. Rev. Stat. § 546.680 to § 546.820 (2012)

<sup>186</sup> Thompson, Charles. “Pennsylvania has a log-jam of death penalty cases nearing the ends of their appeal processes.” *The Patriot-News*. 30 Sept 2012

The death penalty sections of the Pennsylvania State Code are quite extensive. Title 18 § 1102 describes murder in the first degree;<sup>187</sup> Title 42 § 9711 details the trial and sentencing procedures, including aggravating and mitigating evidence, automatic appellate court review, and maintenance of execution records.<sup>188</sup> Title 234 Rules 800-811 describe “special rules for cases in which death is authorized”, including a uniquely rigorous section on qualifications for defense counsel.<sup>189</sup>

The next chapter will analyze these statutes and will demonstrate that, despite general similarity among the states —bifurcated trials, the balance of mitigating and aggravating evidence, and appellate court review, all of which came from *Gregg v. Georgia*— there are significant areas of difference that produce arbitrariness. The chapter will highlight two features of these states’ capital punishment schemes produce arbitrariness: the practice of judicial override and the proliferation of vague aggravating circumstances.

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<sup>187</sup> 18 Pa. Const. Stat. § 1102

<sup>188</sup> 42 Pa. Const. Stat. § 9711

<sup>189</sup> 234 Pa. Const. Stat. § 800-811

## **Chapter V**

### **Interstate Comparisons**

This chapter will argue that two aspects of death penalty statutes—the practice of judicial override and the existence of vague aggravating factors—produce arbitrariness and inconsistency at the sentencing level of capital trials. The chapter is broken into three sections, each with three subparts.

The first section explains how judicial override operates in Alabama and Florida, while also reviewing court precedent and scholarship on the topic. The second section describes the statutory provisions of the “Grave Risk of Death” aggravating factor used in Alabama and Pennsylvania, as well as the “Heinous, Atrocious and Cruel” aggravating factor used in Alabama, Florida, and Missouri. The second section also explains case law and scholarship in this area.

The final section argues that the varying application of both judicial override and vague aggravating factors in these states is unconstitutional under the Court’s “evolving standards” doctrine. Therefore, the differences among these statutes amount to a violation of the Equal Protection Clause of the Fourteenth Amendment. This final section concludes that applying Equal Protection analysis to different states’ death penalty laws provides a new avenue for constitutional challenge, and perhaps abolition.

### A. Alabama and Florida: Judicial Override

Judicial override of jury sentencing recommendations is a controversial aspect of Alabama and Florida's death penalty statutes, and is ripe for comparison.<sup>190</sup> Both Alabama and Florida permit judicial override of the jury's sentence recommendation and specifically state that the jury's verdict is merely *advisory*. The key difference between how Alabama and Florida employ this practice is that Alabama allows the judge, *without restriction*, to overturn the jury's recommendation of a life sentence without the possibility of parole, but Florida Supreme Court precedent specifies that judges must give "great weight" to the jury's advisory verdict.<sup>191</sup> Although such leniency does not happen frequently, the practice of judicial override *does* allow a judge to reduce the severity of jury's advisory sentence by overturning the death penalty and imposing life imprisonment instead. Thus, judicial override may be said to "run in both directions".

#### a. Statutory Provisions and Judicial Override in Practice

Alabama offers no statutory constraints on the judge's override power. Once the jury returns a sentencing recommendation, the trial judge must enter specific written findings of the existence or non-existence of each statutory aggravating and mitigating factor, along with any additional non-statutory mitigating factors, and the judge must independently weigh those factors, but there is no statutory guidance on how much weight should be given or on how the judge should determine the

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<sup>190</sup> Interestingly, a third state, Delaware, also permits judicial override, but no one in Delaware is on death row as a result of an override.

<sup>191</sup> *Tedder v. State*, 322 So. 2d 908 (Fla. 1975)



sentence.<sup>192</sup> “While the jury’s recommendation concerning sentence shall be given consideration, it is not binding upon the court,”<sup>193</sup> unless the jury did not find at least one aggravating circumstance required to sentence death, in which case the life imprisonment sentence is binding upon the court. It is noteworthy that the Alabama Rules of Criminal Procedure state that the trial judge generally is not to provide the jury with a copy of the charged against the defendant or the written jury instructions, though in a “complex case” the court may submit the materials at its discretion.<sup>194</sup>

In contrast to Alabama, Florida law requires the trial judge to give “great weight” to the jury’s recommendation. In *Tedder v. State*, 322 So. 2d 908, the Florida Supreme Court prohibited overrides of a jury’s life verdict unless, “the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.”<sup>195</sup> This became known as the *Tedder* standard.

Though judicial override can run in both “directions”, in Alabama, this power is used almost exclusively for overturning life imprisonment recommendations in favor of death sentences. Since 1976, Alabama judges have overridden jury verdicts 107 times.<sup>196</sup> Although judges may override death verdicts, and instead impose life-without-parole, this occurred in only nine cases during the same period, resulting in

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<sup>192</sup> Ala. Code § 13A-5-47 (d) (2005)

<sup>193</sup> Ala. Code § 13A-5-47 (e) (2005)

<sup>194</sup> Ala. R. Crim. P. 21.1

<sup>195</sup> *Tedder* at 910

<sup>196</sup> “The Death Penalty in Alabama: Judge Override”. Equal Justice Initiative. July 2011. pp 4

98 overturns in favor of death.<sup>197</sup> Of the 199 prisoners on death row in Alabama, as of 2011, about 21.5% of them were sentenced via judicial override.<sup>198</sup>

In Florida, between 1972 and June 2011, there were 166 cases in which death was imposed following a jury recommendation of life imprisonment.<sup>199</sup> Between 1974 and 1991, Florida judges used the override power to impose life imprisonment sentences in 88 cases, or 53% of the time.<sup>200</sup> However, the last override in favor of death occurred in 1999. Thus, whereas about 20% of the people on Alabama's death row were condemned by override, judicial override accounts for less than 2% of Florida's current death sentences.<sup>201</sup>

#### **b. Consequences of Judicial Override**

What results from this expansive power of judicial override is that jurors underestimate their power in the sentencing phase of a capital trial and fail to take their roles as seriously as should be appropriate, given the severity of the potential punishment. Citing various data sets from William J. Bower's many empirical examinations of juror behavior and decision making, the ABA's Alabama assessment report notes that, "the practice of 'judicial override' makes jurors feel less personally responsible for the sentencing decisions, resulting in shorter juror sentencing deliberations and with less disagreement among jurors...interviewed Alabama capital jurors felt they had secondary responsibility for sentencing the

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<sup>197</sup> Ibid 7

<sup>198</sup> Radelet, Michael L. *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Requiem*. 2011 Mich. St. L. Rev. 793, pp 802

<sup>199</sup> Ibid 809

<sup>200</sup> Ibid 813

<sup>201</sup> <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (Apr. 1, 2010)

defendant.”<sup>202</sup> The report contends that, “while certain states have chosen to institute ‘judicial override’ as a way to protect against arbitrary sentencing by juries, the practice of ‘judicial override’ has had the opposite effect in Alabama.”<sup>203</sup> Indeed, other scholars have noted the state’s distinctive use of this practice:

Alabama is a different beast. It is an outlier. In contrast to every other death penalty state, it not only regularly allows life-to-death overrides, but also does so without standards...and with a continuing practice of sending those with life recommendations to its death chamber. The way that Alabama treats capital cases with life recommendation is utterly unique; it is different in both forms and practice from all other death penalty states.<sup>204</sup>

The Equal Justice Initiative, a nonprofit organization that provides legal representation to indigent defendants and prisoners, has also claimed, “no capital sentencing procedure in the United States has come under more criticism as unreliable, unpredictable, and arbitrary than the unique Alabama practice of permitting elected trial judges to override jury verdicts of life and impose death sentences.”<sup>205</sup>

After reaching similar conclusions, the ABA Alabama assessment team therefore recommended, “the State of Alabama should give jurors the final decision-making authority in capital sentencing proceedings by eliminating judicial override.”<sup>206</sup> Based on similar problems with capital jurors identified in Florida, the Florida assessment team recommended that the state, “should give the jury final decision-making authority in capital sentencing proceedings, and thus should

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<sup>202</sup> “Ensuring Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report”. *The Death Penalty Moratorium Implementation Project*. American Bar Association. June 2006. pp 208

<sup>203</sup> *Ibid* pp 209

<sup>204</sup> Radelet, pp 816

<sup>205</sup> “The Death Penalty in Alabama: Judge Override” pp 4

<sup>206</sup> ABA Alabama report pp 209

eliminate judicial override in cases where the jury recommends life imprisonment without the possibility of parole.”<sup>207</sup>

### **c. Supreme Court Precedent on Judicial Override**

Yet, throughout the modern death penalty era, the Supreme Court has largely accepted the practice of judicial override. In *Proffitt v. Florida* 428 U.S. 242 (1976), the Court approved Florida’s judicial sentencing because the statutory procedure tightly prescribed their relevant decision-making process.<sup>208</sup> The Florida procedure required sentencing judges to focus on the crime's circumstances and the defendant's character by weighing eight statutory aggravating factors against seven statutory mitigating factors.<sup>209</sup> Further, sentencing judges were required to submit a written explanation of the finding of a death sentence, for the purpose of automatic review by Florida's Supreme Court.<sup>210</sup> The Court found that such strict requirements sufficiently safeguarded against the presence of any constitutional deficiencies arising from an arbitrary or capricious imposition of the death penalty.<sup>211</sup> The plurality opinion of Justices Stewart, Stevens, and Powell states, “this Court has pointed out that jury sentencing in a capital case can perform an important societal function, but it has never suggested that jury sentencing is constitutionally required.”<sup>212</sup>

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<sup>207</sup> ABA Alabama report 308

<sup>208</sup> *Proffitt* at 251-259

<sup>209</sup> *Ibid* at 247-253

<sup>210</sup> *Ibid* at 250

<sup>211</sup> *Ibid* at 253

<sup>212</sup> *Ibid* at 252

The Court adhered to this precedent in *Spaziano v. Florida*, 468 U. S. 447<sup>213</sup>, and later, *Hildwin v. Florida*, 490 U.S. 638 (1989). The *Hildwin* per curiam opinion states:

the Sixth Amendment does not require that the specific findings authorizing the imposition of the death sentence be made by a jury. Since the Court has held that the Amendment permits a judge to impose a death sentence when the jury recommends life imprisonment, *Spaziano v. Florida*, 468 U. S. 447, it follows that the Amendment does not forbid the judge to make written findings authorizing the imposition of a death sentence when the jury unanimously makes such a recommendation.<sup>214</sup>

In *Harris v. Alabama* 513 U.S. 504 (1995), an 8-1 Court approved Alabama's use of judicial override. The Court held that the Eighth Amendment does *not* require a state to define the weight that the sentencing judge must give to an advisory jury verdict.<sup>215</sup> The majority acknowledged that while Florida's statutory requirement that the judge give "great weight" to the jury was favorable, Alabama's lack of such a requirement was also acceptable. Justice O'Connor wrote for the majority: "the hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results," which Alabama's statutes did.<sup>216</sup> As Bryan A. Stevenson, former executive director of the Equal Justice Initiative, notes, "the Court was not swayed by the uniqueness of the statute or by what the majority called the 'ostensibly surprising statistics' on the frequency with which Alabama

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<sup>213</sup> Holding that "there is no constitutional requirement that a jury's recommendation of life imprisonment in a capital case be final, so as to preclude the trial judge from overriding the jury's recommendation and imposing the death sentence." *Spaziano v. Florida*, 468 U. S. 447, syllabus at 448.

<sup>214</sup> *Hildwin v. Florida*, 490 U.S. 638, per curiam opinion.

<sup>215</sup> *Harris*, O'Connor, J. majority opinion at 508-515

<sup>216</sup> *Harris* at 504

judges override life recommendations.”<sup>217</sup> Instead, the majority claimed, “The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury’s recommendation and trusts the judge to give it the proper weight.”<sup>218</sup>

However, with the decision in *Ring v Arizona* 536 U.S. 584 (2002), judicial override jurisprudence changed swiftly. In *Ring*, the Court declared that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty. Under Arizona law, Ring could not be sentenced to death unless a judge at a separate sentencing hearing made further findings. The judge was required to determine the existence or nonexistence of statutorily enumerated aggravating circumstances and any mitigating circumstances, and a death sentence could be imposed only if the judge found at least one aggravating circumstance and no mitigating circumstances that were “sufficiently substantial to call for leniency”.<sup>219</sup> Because the jury had convicted Ring of felony murder, not premeditated murder, Ring would be eligible for the death penalty only if he was the victim’s actual killer.<sup>220</sup> The judge found that Ring was the killer and found two aggravating factors, as well as one mitigating factor, and ruled that the latter did not call for leniency.<sup>221</sup> Ring argued that this scheme, “violated the Sixth Amendment’s jury trial guarantee by entrusting to a judge the finding of a fact raising the defendant’s maximum penalty.”<sup>222</sup>

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<sup>217</sup> *Harris* at 513

<sup>218</sup> *Harris* at 515

<sup>219</sup> *Ring v Arizona* 536 U.S. 584, syllabus at 584

<sup>220</sup> *Ring* at 584

<sup>221</sup> *Ring* at 584

<sup>222</sup> *Ring* at 584

It is important to note that, ten years after *Walton v. Arizona*, which had upheld judicial sentencing in 1990, the Court held in *Apprendi v. New Jersey*, 530 U. S. 466 (2000), that the Sixth Amendment does not permit a defendant to be “expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.”<sup>223</sup> Thus, in *Ring*, the Court found that *Apprendi* and *Walton* were irreconcilable. Justice Ginsburg, writing for the majority, declared, “*Walton* is overruled to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty<sup>224</sup>...capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”<sup>225</sup> Bryan A. Stevenson states, “the crux of *Ring*'s ruling is that the accused is entitled, under the Sixth Amendment, to a jury finding on all elements of the offense, and this right extends to aggravating circumstance findings that render a capital defendant subject to the death penalty.”<sup>226</sup> Understandably, *Ring* holds important ramifications for the future of judicial override.

#### **d. Implications for Judicial Override After *Ring***

Years before *Ring*, in *Harris v. Alabama*, Justice Stevens argued in sole dissent, “in Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death--even though a jury has

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<sup>223</sup> *Apprendi v. New Jersey*, 530 U. S. 466 at 483

<sup>224</sup> *Ring* at 585

<sup>225</sup> *Ring* at 585

<sup>226</sup> Stevenson, Bryan A. “Two Views on the Impact of *Ring v. Arizona* on Capital Sentencing: The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing.” 54 Ala. L. Rev. 1091, Summer 2003. pp 1117-18

determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence.”<sup>227</sup> His words still ring true. Yet, in the wake of *Ring*, Alabama has not addressed, or indicated that it intends to address, this controversial and unconstitutional practice. Marc R. Shapiro notes that, “since *Ring*, only Alabama and Florida have decided to retain their capital sentencing statutes, asserting in effect that the Court’s decision in *Ring* had no impact on their sentencing schemes.”<sup>228</sup>

The direction of judicial override is further complicated by the ruling in *Caldwell v Mississippi* 472 U.S. 320 (1985). In this case, the Court declared that misleading the jury about its role in sentencing is unconstitutional. Writing for the majority, Justice Marshall concluded it was, “constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”<sup>229</sup> Such statements are unconstitutional because they indicate that a higher court would automatically review the jury’s decision and, therefore, the jury’s decision would not be the final decision in the case. The Court held that the danger from these statements—that the jury would minimize the importance of its role—violates the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case, “this Court’s Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a

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<sup>227</sup> *Harris*, Stevens, J. dissenting opinion at 515

<sup>228</sup> Shapiro, Marc R. “Re-Evaluating the Role of the Jury in Capital Cases After *Ring v. Arizona*”. NYU Annual Survey of American Law, Vol. 59:633 (2004). pp 652.

<sup>229</sup> *Caldwell v Mississippi* 472 U.S. 320, Marshall, J. majority opinion at 328-29



specific human being should die at the hands of the State.”<sup>230</sup> Consequently, after *Ring*, in which the Court ruled that the jury *must* play a determinative role as to the finding of facts at the sentencing phase of a capital trial, instructions to the jury that its verdict is “advisory” or merely a “recommendation” violate *Caldwell* because they diminish the jury’s understanding of the scope and power of its role and responsibility. Therefore, as many scholars and observers have begun to argue, the Alabama and Florida judicial override practices violate both *Ring* and *Caldwell*, and should be struck down as unconstitutional on both Sixth and Eighth Amendment grounds.

**B. Vague Aggravating Circumstances:  
Alabama, Florida, Missouri, and Pennsylvania**

Two types of unconstitutionally vague aggravating factors are of note: those that state the defendant created a great risk of death to many persons, and those that state the defendant committed the crime in an especially heinous, atrocious, cruel, or depraved fashion. These two factors are attacked because they unnecessarily duplicate an element of capital murder, or because they essentially apply to all capital murders, and thus do not perform their constitutionally mandated narrowing function, as prescribed by *Zant v Stephens* 462 U.S. 862 (1983)

Briefly, the core of this case emphasized that the purpose of aggravating factors is to, “genuinely narrow the class of persons eligible for the death penalty...[and to] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”<sup>231</sup> According to *Zant*, a constitutional

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<sup>230</sup> *Caldwell* at 329

<sup>231</sup> *Zant* at 877

death penalty statute must provide an “objective, evenhanded, and substantively rational way” of drawing this distinction.<sup>232</sup>

**a. Great/Grave Risk of Death**

In *Lowenfield v. Phelps* 484 U.S. 231 (1988), the Court upheld one of Louisiana’s statutorily defined aggravating circumstances that the defendant “knowingly creat[ed] a risk of death or great bodily harm to more than one person.”<sup>233</sup> In this case, the defendant had been sentenced to death on three counts of first-degree murder, and the jury found this statutory aggravating circumstance supported all three. The defendant argued that this circumstance was a necessary element of capital murder and was therefore merely duplicative evidence. The Court disagreed. Chief Justice Rehnquist, writing for the majority, claimed that the narrowing function of aggravating circumstances, as prescribed in *Zant v Stephens*, “may constitutionally be provided in either of two ways: the legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase, as most States have done, or the legislature may itself narrow the definition of capital offenses so that the jury finding at the guilt phase responds to this concern, as Louisiana has done here.”<sup>234</sup> Therefore, Rehnquist stated, “the duplicative nature of the statutory aggravating circumstance did not render petitioner’s sentence infirm, since the constitutionally mandated narrowing function was performed at the guilt phase.”<sup>235</sup> Thus, a circumstance that

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<sup>232</sup> *Zant* at 879

<sup>233</sup> *Lowenfield* at 235

<sup>234</sup> *Lowenfield* at 261

<sup>235</sup> *Lowenfield* at 262

was necessarily an element of the underlying offense of first-degree murder was not unconstitutional.

Currently, Alabama has ten statutorily defined aggravating circumstances,<sup>236</sup> including that the “the defendant knowingly created a great risk of death to many persons”.<sup>237</sup> As the ABA Alabama assessment report notes, the Alabama Supreme Court has ruled that, at a minimum, more than two people must have been at great risk of death in order to find the existence of this aggravating circumstance.<sup>238</sup> In addition to murdered victims, victims who were intended to be killed but survived may also be used to determine whether the “defendant knowingly created a great risk of death to many persons,”<sup>239</sup> and this “great risk of death to many persons” must have been “certainly foreseeable.”<sup>240</sup> In contrast, the Florida Supreme Court’s interpretation of the “grave-risk” factor states that a great risk to four or more persons<sup>241</sup>, besides the victim, satisfies this aggravating circumstance, while great risk to three or fewer persons<sup>242</sup> does not meet the qualification.

Similar to Florida and Alabama, one of Pennsylvania’s eighteen circumstances lists a “grave-risk” factor. It states, “in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense,”<sup>243</sup> thus requiring that only one person besides the victim be at grave risk of death. The ABA Pennsylvania assessment report notes that courts are not

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<sup>236</sup> Ala. Code § 13A-5-48 to 13A-5-52 (1975).

<sup>237</sup> Ala. Code § 13A-5-49(3), (1975)

<sup>238</sup> *Ashlock v. State*, 367 So. 2d 560, 561 (Ala. Crim. App. 1979)

<sup>239</sup> *Smith v. State*, 2000 WL 1868419 (Ala. Crim. App. Dec. 22, 2000)

<sup>240</sup> *McGahee v. State*, 554 So. 2d 454, 470 (Ala. Crim. App. 1989)

<sup>241</sup> *Johnson v. State* 696 So. 2d 317 at 325 (Fla. 1997)

<sup>242</sup> *Bello v. State* 547 So. 2d 914 at 917 (Fla. 1989)

<sup>243</sup> 42 Pa. Const. Stat. § 9711 (d) (7) (2007)

required to provide instructions as to the layman's definitions of the differences between mitigating and aggravating circumstances<sup>244</sup>, even though the Pennsylvania Supreme Court has determined what those definitions are.<sup>245</sup> In a study conducted by the Capital Jury Project, despite the fact that Pennsylvania law prohibits consideration of future dangerousness as an aggravating circumstance,<sup>246</sup> 37 percent of interviewed Pennsylvania capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence the defendant to death.<sup>247</sup> Interestingly, while Pennsylvania's suggested jury instructions state that the jury must unanimously find beyond a reasonable doubt at least on aggravating circumstance<sup>248</sup>, and the instructions provide two different explanations of reasonable doubt,<sup>249</sup> these instructions merely list the circumstances, without explaining the terms used. Pennsylvania's instructions, in particular, should be criticized for failure to properly inform jurors of the definitions, applicability, and scope of aggravating factors.

As we see, there is no consensus on the number of persons "required" to be in danger in order to constitute a "grave risk." Florida requires four or more, Alabama requires two or more, and Pennsylvania requires only one. The difference between one additional person at risk and four additional persons is quite significant, especially considering that the original *Lowenfield* case defined the factor as

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<sup>244</sup> "Ensuring Fairness and Accuracy in State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report". *The Death Penalty Moratorium Implementation Project*. American Bar Association. October 2007. pp 215

<sup>245</sup> Commonwealth v. Stevens, 739 A.2d 507, 527 (Pa. 1999)

<sup>246</sup> 42 PA. CONS. STAT. § 9711(d) (2007)

<sup>247</sup> Bowers, William J. and Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68 (2003). *supra* note 133, at 73

<sup>248</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(2) (2005)

<sup>249</sup> *Ibid*

applying to a grave risk, “to more than one person.” There are distressing problems with the meaning and scope of “grave” or “great” risk and the number of persons involved, as well as with the overall legibility of the instructions, and this factor has come under attack for unconstitutional vagueness.

### **b. Heinous, Atrocious, and Cruel (HAC) Factor**

Alabama, Florida, and Missouri include an aggravating factor stating, “the capital offense was especially heinous, atrocious or cruel compared to other capital offenses,” or some nearly identical derivative thereof. This is sometimes called the “HAC factor”, and it has an intricate case history. The United States Supreme Court has reviewed it several times, at first striking it down in *Maynard v Cartwright* 486 U.S. 356 (1988) because Oklahoma applied it too vaguely. Yet, In *Walton v Arizona* 497 U.S. 639 (1990), the Court upheld Arizona’s aggravating factor that specified the crime was “especially heinous, cruel, or depraved”, which is nearly identical to the standard HAC factor.<sup>250</sup> Arizona’s aggravating factor was not unconstitutionally vague because the state high court clarified the meaning and independently applied it to the facts of the case. “The definition given to the ‘especially cruel’ provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer,” Justice White wrote for the majority. The Court added, “nor can we fault the state court’s statement that a crime is committed in an especially ‘depraved’ manner when the perpetrator ‘relishes the murder, evidencing debasement or perversion,’ or ‘shows an indifference to the suffering of the victim

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<sup>250</sup> *Walton v Arizona* 497 U.S. 639

and evidences a sense of pleasure' in the killing."<sup>251</sup> The Court thus concluded, "If the Arizona Supreme Court has narrowed the definition of the 'especially heinous, cruel or depraved' aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor."<sup>252</sup>

At the state level, Alabama courts have attempted to clarify its HAC factor.<sup>253</sup> "Because there is nothing inherent in the words 'especially heinous, atrocious, or cruel' to place any restraint on the arbitrary and capricious imposition of the death penalty, the Supreme Court of Alabama has held that this aggravating circumstance applies only to 'those conscienceless or pitiless homicides which are unnecessarily tortuous to the victim.'"<sup>254</sup> The case that established this standard was *Ex parte Kyzer* 399 So. 2d 330 (Ala 1981), and there, the court also ruled that the jury must be instructed on the meaning of the circumstance to give it a consistent and narrow interpretation. However, the trial court is not required to inform the jury of other offenses where the death penalty was based on this factor, so the consistency that the Alabama Supreme Court in *Kyzer* mandated is essentially vacant.<sup>255</sup>

The Florida Standard Jury Instructions define its HAC factor<sup>256</sup> in this way: "Heinous" means extremely wicked or shockingly evil; "Atrocious" means outrageously wicked and vile; and "Cruel" means designed to inflict a high degree of

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<sup>251</sup> *Walton* at 655

<sup>252</sup> *Walton* 653-654

<sup>253</sup> Ala. Code § 13A-5-49(8), (1975)

<sup>254</sup> ABA Alabama report 189-190

<sup>255</sup> *Ibid* 190

<sup>256</sup> Fla. Stat. § 921.141 (h) (2012).

pain with utter indifference to, or even enjoyment of, the suffering of others.”<sup>257</sup> The instructions also indicate that crimes under the HAC factor are “ones accompanied by additional acts that show the crime was conscienceless or pitiless and was unnecessarily tortuous to the victim,” and are thus similar to Alabama’s limitation.<sup>258</sup> In *Sochor v. Florida*, 504 U.S. 527 (1992), the United States Supreme Court criticized Florida’s definitions of “heinous, atrocious, or cruel”, but approved of the limiting portion of Florida’s HAC instruction.<sup>259</sup>

Of seventeen aggravating factors, Missouri employs one factor similar to the HAC factor. It states, “the murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind,” but there are no specific juror instructions regarding the meaning of the factor.<sup>260</sup>

The aggravating factors described above have received no shortage of criticism. Although most states began the post-*Furman* era by adopting the Model Penal Code’s guided discretion model of eight aggravating factors, of which one was required to be proven beyond a reasonable doubt to make the defendant death eligible, since this initial state, aggravating factors have proliferated.<sup>261</sup> Aggravating factors, “frequently fail to perform this constitutionally required function designated for them by *Furman* and its progeny. Rather than confining death eligibility to the worst offenders, most state death penalty statutes list a litany of aggravating factors that apply to nearly every first-degree murder.”<sup>262</sup> “The problem starts with the

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<sup>257</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>258</sup> *Ibid*

<sup>259</sup> *Sochor v. Florida*, 504 U.S. 527 (1992),

<sup>260</sup> Mo. Rev. Stat. § 565.032 (7) (2012)

<sup>261</sup> Sharon 233

<sup>262</sup> *Ibid* 232.

subjective nature of the terms used in the especially heinous statutes,"<sup>263</sup> Richard A. Rosen argues, emphasizing that, "as the Supreme Court has noted repeatedly, for a person of ordinary sensibilities, every first degree murder could be "heinous," "cruel," "atrocious," "vile," or "depraved."<sup>264</sup> Further, even when appellate courts attempt to clarify the meanings, they typically use equally subjective language. Rosen contends, "If the especially heinous circumstance truly operated as a meaningful standard, there would be some unifying thread connecting all of the cases in which especially heinous findings have been approved, a core of meaning that could explain why some cases are especially heinous and others are not...the only thing that the cases have in common is that the reviewing courts have been able to find *something* disturbing in each case. This is simply not enough."<sup>265</sup> Recall that Missouri does not provide any definition of the "depravity" standard. The assumption that, "aggravating factors would draw principled distinctions that would enable jurors to select those most deserving of death"<sup>266</sup> has not borne out through decades of legislative expansion and subsequent refinement, or through judicial interpretation.

The final section of this thesis will consider how states' failures to address and amend judicial override and vague aggravating circumstances violate the Equal Protection Clause of the Fourteenth Amendment. These practices can be constitutionally challenged because they do not pass the "evolving standards of

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<sup>263</sup> Rosen, Richard A. "The 'Especially Heinous' Aggravating Circumstance in Capital Cases—The Standardless Standard." 64 N.C.L. Rev. 941 (June 1986). pp 968

<sup>264</sup> Ibid 968, Quoting *Godfrey*, 446 U.S. at 422-23; *Gregg*, 428 U.S. at 201.

<sup>265</sup> Rosen 989

<sup>266</sup> Sharon 232.



decency” test that has been recently revived and revised by the Court. More broadly, the section will argue that the mere *existence* of different death statutes and interstate variation in these practices should be challenged.

### Section III

This section will outline a comprehensive constitutional challenge to inter-state variations, using the Fourteenth Amendment's Equal Protection Clause. The section begins by explaining the development of the "evolving standards of decency" line of analysis and its position as a cornerstone of modern death penalty jurisprudence. Next, the cases of *Atkins v. Virginia* 536 U.S. 304 (2002) and *Roper v. Simmons* 543 U.S. 551 (2005) are analyzed. These cases introduced a new method of determining "evolving standards", and under this new method, judicial override and vague aggravating circumstances can be struck down. Finally, the section argues that these types of inter-state variations violate evolving standards of decency and should be challenged on Fourteenth Amendment grounds.

### Chapter VI

#### Evolving Standards and Equal Protection

##### A. The Development of "Evolving Standards of Decency"

The notion that societal standards of decency are relevant to death penalty analysis began in *Weems v United States* 217 U.S. 349 (1910). Here, the Court overturned the sentence of a U.S. officer in the Philippines who, following his conviction for falsifying a document, had been sentenced to a fifteen-year prison term, hard labor, lifetime surveillance, and loss of his civil rights. Though it was not a death penalty case, it was the first time where the "proportionality of a crime" was considered. The majority opinion by Justice McKenna begins by noting that the meaning of the Eighth Amendment is, "progressive, and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider

meaning as public opinion becomes enlightened by humane justice.”<sup>267</sup> The Court reasoned that the meanings of “cruel and unusual” are not fixed to mean what they did at the time of the drafting of the Constitution, because, “time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions.”<sup>268</sup> The Court found that Weems’s sentence had “gone astray of the traditional American practice of assigning penalties according to the gravity of the defendant’s conduct.”<sup>269</sup> Therefore, in overturning Weems’ sentence, the Court established that a punishment must be appropriate and proportional to the crime.

It was not until 1958 that the Court next considered the reach of the Eighth Amendment, although once again in a non-death penalty case. In *Trop v. Dulles* 365 U.S. 86, the Court ruled it unconstitutional to revoke U.S. citizenship as punishment for deserting the army. Chief Justice Warren’s majority opinion first explains, “citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct, however reprehensible that conduct may be.”<sup>270</sup>

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<sup>267</sup> *Weems v United States* 217 U.S. 349, McKenna, J. majority opinion at 350

<sup>268</sup> *Weems* at 373

<sup>269</sup> Dean, Micheal D. “State Legislation and the ‘Evolving Standards of Decency’: Flaws in the Constitutional Review of Death Penalty Statutes.” *University of Dayton Law Review*. Vol 35:3. Pp 387

<sup>270</sup> *Trop v. Dulles* 365 U.S. 86, Warren, C.J. majority opinion at 92-93

Next, Warren relied on the Court's reasoning in *Weems*, stating, "the Court recognized in that case [*Weems*] that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>271</sup> The Court declared that the Eighth Amendment's meaning was dependent on, and contained within, the current and ever-changing societal definitions of decency and morality.

Following *Trop*, the "evolving standards of decency" tenet became central to death penalty jurisprudence. Michael D. Dean notes, "since *Trop*, the concept of 'evolving standards of decency' has been transformed from passive dicta into constitutional bedrock."<sup>272</sup> Several *Furman* opinions addressed the matter, including Justice Brennan and Marshall's concurrences, as well as Justice Blackmun's dissent. In *Gregg*, the Court also used "evolving standards" to emphasize the constitutionality of the death penalty *on its face* since, "a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction."<sup>273</sup> Thus, in both *Furman* and *Gregg*, the Court paid homage to the notion of evolving standards.

Since *Furman* and *Gregg*, the Court has determined what "evolving standards of decency" are by using a combination of "objective indicia" about the use of the death penalty practice at issue, as well as its own analysis of the practice. Scholars have identified six objective factors that the Court employs: 1) statutes: the number of

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<sup>271</sup> *Trop* at 100-101

<sup>272</sup> Dean 390

<sup>273</sup> *Gregg* at 179

states that permit the practice, and the content of the statute; 2) jury verdicts on the practice; 3) international law and practice; 4) public opinion via polling data; 5) official positions held by professional or religious organizations; and 6) scientific evidence.<sup>274</sup> To this, Dwight Aarons adds “history”: whether this class of defendants had been historically subjected to the death penalty; and “judicial precedent”: what the Court has previously said or presumed about the treatment of this class of defendants.<sup>275</sup> However, because these two factors almost always enter Court opinions as a matter of practice, they are not unique to death penalty analysis and should not be considered “objective indicia”. According to the Court, “the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures”<sup>276</sup>; therefore, state legislation is given primacy. The Court’s own subjective analysis turns on whether the practice furthers the penological goals of retribution or deterrence, as well as the proportionality of the crime and the sentence.<sup>277</sup>

These factors are what led the Court to conclude in *Penry v. Lynaugh* 492 U.S. 302 (1989) that the execution of the mentally handicapped passed constitutional muster, because there was a state legislative consensus supporting that practice.<sup>278</sup>

However, in 2002, the definition of consensus changed dramatically, and so did the meaning of “evolving standards”.

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<sup>274</sup> Dean 391; Aarons 445; and Martin, Carrie “COMMENT: Spare the Death Penalty, Spoil the Child: How the Execution of Juveniles Violates the Eighth Amendment's Ban on Cruel and Unusual Punishment in 2005”. 46 *S. Tex. L. Rev.* 695. Spring 2005. Pp 703-704

<sup>275</sup> Aarons, Dwight. “The Abolitionist’s Dilemma: Establishing the Standards for the Evolving Standards of Decency”. *Pierce Law Review*. Vol. 6, No. 3. (2008) pp 445

<sup>276</sup> *Penry* at 331; see also Dean 392;

<sup>277</sup> *Thompson v. Oklahoma* 487 U.S. 815 (1988), O’Connor, J. majority opinion at 834-835

<sup>278</sup> *Penry v. Lynaugh* 492 U.S. 302 (1989), O’Connor, J. majority opinion at 330-335

### **B. *Atkins* and *Roper*: A New Definition of Consensus**

With *Atkins v. Virginia* 536 U.S. 304 in 2002, the Court determined that it was cruel and unusual punishment to execute the mentally handicapped, thus overruling *Penry v. Lynaugh* 492 U.S. 302 (1989). While the substance of that decision was obviously unprecedented, the Court's method of determining a state consensus to constitute "evolving standards" was also new.

While the Court did use state legislative action as evidence, it did not rely on a numerical plurality or a majority of states, but instead, claimed that an emerging *trend* to ban the practice indicated societal norms. At the time of *Penry*, only two states had outlawed the execution of the mentally handicapped, but since then, sixteen states had banned the practice, bringing the total to eighteen (excluding states that had abolished the death penalty entirely).<sup>279</sup> Justice Stevens' majority opinion emphasized, "it is not so much the number of these States that is significant, but the consistency of the direction of change".<sup>280</sup> It was the swiftness and regularity with which states acted to ban the practice that persuaded the Court, not simply how many states had done so. Furthermore, "even in those States that allow the execution of mentally retarded offenders, the practice is uncommon...the practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."<sup>281</sup> The Court also employed its own subjective assessment of the practice, reiterating that, "the objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that

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<sup>279</sup> *Atkins v. Virginia* 536 U.S. 304 (2002). Stevens, J. majority opinion at 315

<sup>280</sup> *Ibid*

<sup>281</sup> *Ibid* at 316

in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”<sup>282</sup> Evolving standards suggested that America no longer viewed this practice as appropriate, and so, without an overwhelming or even a slight state legislative majority, the Court struck the practice down.

The Court followed suit in 2005, striking down the practice of executing juvenile offenders in *Roper v. Simmons* 543 U.S. 551. Using the *Atkins* methodology, Justice Kennedy wrote for the majority:

as in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide significant evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as categorically less culpable than the average criminal.<sup>283</sup>

The Court emphasized that three states had actually executed juveniles in the past decade and five had abolished it since 1989,<sup>284</sup> bringing the total to eighteen, the same as in *Atkins*. Thus, the same type “consensus”, based on direction and speed of change, which was found in *Atkins*, was also found in *Roper*. These two cases have now cemented the new way of determining a consensus.

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<sup>282</sup> *Ibid* at 312, quoting *Coker v. Georgia* 433 U.S. 584 (1977) at 597

<sup>283</sup> *Roper v. Simmons* 543 U.S. 551 (2005). Kennedy, J. majority opinion at 567

<sup>284</sup> *Ibid* at 564-565

### C. Why Interstate Variation Violates Equal Protection

The factors identified in *Atkins* and *Roper*— the rejection of the practice in many states; the infrequency of use even where they remain on the books; and the consistency in the trend toward abolition of the practices—can also be applied to the controversial practices of judicial override and vague aggravating circumstances.

Judicial override is on the books in three states—Alabama, Delaware, and Florida— but is heavily practiced in only Alabama. Though judicial override can run in both “directions”, in Alabama, this power is used almost exclusively for overturning life imprisonment recommendations in favor of death. Recall that since 1976, Alabama judges have overridden jury verdicts 107 times,<sup>285</sup> but in only nine cases during the same period did a judge strike down a death sentence in favor of life imprisonment. Thus, in 92% of cases, the judge overturned the jury’s recommendation of life. The practice of judicial override exists as an improper outlier, something that Justice Stevens recognized in his sole dissent in *Harris v Alabama* 513 U.S. 504 (1995), “in Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death—even though a jury has determined that death is an inappropriate penalty.”<sup>286</sup> Karin E. Garvey notes, “this type of random, arbitrary sentencing mechanism is exactly the type of sentencing scheme which *Furman* and the Eighth Amendment seek to prevent.”<sup>287</sup> Only four states have employed judicial override in capital cases, and Indiana ended

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<sup>285</sup> “The Death Penalty Override in Alabama: Judge Override”. pp 4

<sup>286</sup> *Harris*, Stevens, J. dissenting opinion at 515

<sup>287</sup> Garvey, 1430.



the practice in 2002 in anticipation of the *Ring v. Arizona* 536 U.S. 584 decision,<sup>288</sup> leaving the three states of Delaware, Florida, and Alabama as the only remaining practitioners. There has never been consensus on this practice, whether one uses the pre-*Atkins* method of numerical tallying or the *Atkins-Roper* method of trends and consistency of change. If anything, these two methods lead to the conclusion that this procedure runs afoul of any form of consensus and of evolving standards of decency. The Court is more likely to strike down practices when they are outliers, and recent decisions such as *Ring* have opened the door to outlawing the controversial practice of judicial override.

As for vague aggravating circumstances, we can look to the “struck by lightning” principle originally put forth by Justice Stewart. His *Furman* opinion famously argued, “these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual...the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”<sup>289</sup> The purpose of the HAC and grave-risk factors is to channel the sentencing decision, but in practice, they *expand* the possible class of offenders.

These factors provide the sentencing authority with ambiguous and overly broad statutes that can render almost any first-degree murder as “death-eligible”. Aggravating factors in general, “frequently fail to perform this constitutionally required function designated for them by *Furman* and its progeny. Rather than confining death eligibility to the worst offenders, most state death penalty statutes

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<sup>288</sup> Radelet pp 796

<sup>289</sup> *Furman*, Stewart, J. concurring at 309-310

list a litany of aggravating factors that apply to nearly every first-degree murder."<sup>290</sup> Since the Supreme Court has allowed these aggravating factors to be so broad and ill-defined, their narrowing purpose has been utterly negated. Richard A. Rosen argues that for the HAC factor, "the problem starts with the subjective nature of the terms used in the especially heinous statutes."<sup>291</sup> He emphasizes, "as the Supreme Court has noted repeatedly, for a person of ordinary sensibilities, every first degree murder could be "heinous," "cruel," "atrocious," "vile," or "depraved."<sup>292</sup> Further, even when appellate courts attempt to clarify the meanings, they typically use equally subjective language. Rosen contends,

If the especially heinous circumstance truly operated as a meaningful standard, there would be some unifying thread connecting all of the cases in which especially heinous findings have been approved, a core of meaning that could explain why some cases are especially heinous and others are not. This core cannot be found... the only thing that the cases have in common is that the reviewing courts have been able to find *something* disturbing in each case. This is simply not enough.<sup>293</sup>

The grave-risk factor also contributes to the "struck by lightning" problem because it does not provide any meaningful distinction for the sentencing authority in deciding why the crime at hand presented a "grave-risk" of death. Thus, rather than limiting or circumscribing a category of defendants who truly "deserve death", these two aggravating factors have returned to the problem of expansive and random sentencing that *Furman* and *Gregg* identified as unconstitutional.

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<sup>290</sup> Sharon, 232.

<sup>291</sup> Rosen, 968

<sup>292</sup> *Ibid*, quoting *Godfrey*, 446 U.S. at 422-23; *Gregg*, 428 U.S. at 201.

<sup>293</sup> Rosen 989

In *Furman*, Justice Douglas claimed, “the idea of equal protection of the laws” was “implicit in the ban on ‘cruel and unusual’ punishments.”<sup>294</sup> Since *Furman*, the Court has attempted, though not always successfully, to articulate and protect what it sees as the underlying imperative of equal protection in death penalty cases. Justice Douglas also emphasized that, “the high service rendered by the ‘cruel and unusual’ punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary.”<sup>295</sup>

As has been shown in the previous discussion, this high service has not been realized. Arbitrariness is built into the statutes in the form of judicial override and vague aggravating circumstances. These developments, therefore, violate the admittedly loose spirit of the *Furman* plurality opinions, and also strike against the intent of *Gregg*, which was to channel a genuinely eligible class of offenders.

With the advent of *Atkins* and *Roper*, the Court has provided a new method of determining “state consensus” on death penalty practices. By claiming that a mere majority or plurality of states is not the only way to discern evolving standards of decency, and by emphasizing that consistent trends can better reveal those standards, the Court offered a subtle path for challenging state practices. After *Atkins* and *Roper*, the time is ripe to identify states that exist as improper outliers, as this section has attempted to do.

If death penalty analysis looks across states through an equal protection lens, it will find that a greater problem exists. One who is guilty of capital murder in Missouri is safe from judicial override on a verdict of life sentence, but one who is

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<sup>294</sup> *Furman* Douglas, J. concurring at 257

<sup>295</sup> *Ibid* at 256

guilty in Florida may or may not have the jury's sentence changed. One who is sentenced in New Hampshire is almost assured to escape the death penalty, since its last execution took place in 1939,<sup>296</sup> the state has a very narrow death penalty statute that is applicable only in six specific circumstances<sup>297</sup>, and there is only one person currently on death row.<sup>298</sup> Conversely, one who is sentenced in Alabama is very likely to receive death sentence, be it because of one of the 18 aggravating factors, the power of judicial override, or other numerous factors.

The geography of arbitrariness in capital punishment is no new fact, but rarely, if ever, is it emphasized that this presents a nation-wide problem best solved by Equal Protection claims. Inter-state variations cut against the heart of the evolving standards and Equal Protection jurisprudence. To expel unconstitutional arbitrariness from the nation's death penalty system, inter-state variations should be identified, challenged, and amended or abolished.

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<sup>296</sup> <http://www.deathpenaltyinfo.org/new-hampshire-1>

<sup>297</sup> N.H. Rev. Stat. Ann. § 630.1

<sup>298</sup> <http://www.deathpenaltyinfo.org/new-hampshire-1>

## Conclusion

This concluding section will comment on recent developments in state capital punishment and will end by reflecting on the future direction of scholarship and the significance of my research, given the Supreme Court's failure to adequately address the problem of arbitrariness.

The future of capital punishment in America is uncertain. Banner notes, "as the 21<sup>st</sup> Century began, capital punishment was an emotionally charged political issue administered within a legal framework so unworkable that it satisfied no one."<sup>299</sup> Yet, with the trends toward abolition in the last five years, and with frequent moratoriums being imposed, it seems likely that more states will soon abandon the ultimate punishment. Many states began the legislative sessions in 2013 with bills that proposed modifications or even total abolition of the death penalty. For example, the Nevada legislature has proposed a bill to fund a comprehensive study of the cost of the death penalty, and the Washington legislature proposed an abolition bill and has conducted hearings, without any testimony given against the repeal bill.<sup>300</sup> Recently, the Delaware Senate voted to repeal the death penalty on March 26, 2013, and the bill now moves on to the House of Representatives.<sup>301</sup> A recent article for *The Economist* described how a surprising number of governors and political leaders, such as Governor John Kitzhaber of Oregon or Martin O'Malley of Maryland, have recently challenged the death penalty,

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<sup>299</sup> Banner 310

<sup>300</sup> "Recent Legislative Activity." *Death Penalty Information Center*. Accessed 11 April 2013.

<sup>301</sup> "Delaware Senate approved repeal of death penalty." *Associated Press*. 26 March 2013.

or have indicated that they would sign a bill repealing the punishment.<sup>302</sup> The article noted, “the politics of death have changed because the country has changed,” and later concluded, “the death-penalty debate has changed in ways that go beyond day-to-day politics. It is less loud and more skeptical, giving thoughtful governors room to question a policy that causes them anguish—because they think it arbitrary, ineffective and costly, and because they impose it.”<sup>303</sup> Views on the death penalty may, therefore, be changing in the direction of abolition.

However, some states have turned in the opposite direction, attempting to either expand their death penalty laws or to uphold the penalty upon challenge. For example, on March 7, 2013, the Kansas legislature voted to keep its death penalty, and the Colorado legislature did the same on March 26, 2013. Additionally, the Georgia legislature passed a bill adding “gang membership” as an aggravating factor, and the bill awaits the governor’s signature.<sup>304</sup> So, some states are fighting to retain capital punishment, even as others begin to chip away. And yet, despite a few abolitionist rumblings in state legislatures, we can still expect that stronghold death penalty states, like Texas, Virginia, Florida, and Alabama, will maintain their systems. Since these states are the ones that most frequently sentence and execute inmates, it may not, in a strictly numerical sense, “matter” if smaller death penalty states do away with the punishment. This is, to put it mildly, a tremendously sobering thought.

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<sup>302</sup> “Death in Little Rock.” Lexington column, *The Economist*. 9 February 2013.

<sup>303</sup> *Ibid*

<sup>304</sup> “Recent Legislative Activity.”

Perhaps the solution to the death penalty dilemma is for the Supreme Court to exercise vigilant oversight. Yet, as discussed, the Court's efforts at streamlining capital punishment in order to combat arbitrariness have been contradictory, paradoxically increasing states' abilities to employ arbitrary practices. In their well-received overview of post-*Furman* capital punishment jurisprudence, Carol S. Steiker and Jordan M. Steiker argue that the Court "remains unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place. Indeed, most surprisingly, the overall effect of twenty-odd years of doctrinal head-banging has been to substantially reproduce the pre-*Furman* world of capital-sentencing."<sup>305</sup>

More and more, the Court itself has begun to acknowledge these faults. Concurring in *Walton v. Arizona* 497 U.S. 639 (1990), Justice Scalia, admittedly a reliable supporter of state control over the death penalty, scorned that the Court's "jurisprudence and logic have long since parted ways."<sup>306</sup> Justice Stevens explained in his concurrence in *Baze v. Rees* 553 U.S. 35 (2008) that while the "decisions in 1976 upholding the constitutionality of the death penalty [*Gregg v. Georgia*] relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application<sup>307</sup> ... more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders." Thus, rigorous Supreme Court oversight and attention to inter-state

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<sup>305</sup> Steiker, Carol S. and Steiker, Jordan M. "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment." *Harvard Law Review*. Vol 109:355 (1995) at 359.

<sup>306</sup> *Walton*, Scalia, J. dissenting at 656

<sup>307</sup> *Baze v. Rees*, 553 U.S. 35 (2008). Stevens, J. concurring at 84-86

variation is not likely to produce anything but complex verbiage and splintered opinions, as has been the norm since *Furman*.

What is to be done? Recent cases like *Atkins* and *Roper* have signaled a new awareness by the Court that a small number of outlying states continue to use unusual practices, and this is where the legal and academic community can fill the void. Soon, The ABA's Death Penalty Moratorium Implementation Project will release the reports for Texas and Virginia.<sup>308</sup> As these are two significant death penalty states, the release of these reports will likely stir some controversy. Hopefully, the ABA's findings will continue the arbitrariness conversation and encourage even more states to carefully examine their statutes and practices. This thesis has advocated that scholars, and attorneys, should embrace the idea that it is not only the substantive parts of state laws, but also the existence of differences between them, that are unconstitutionally arbitrary.

This thesis has demonstrated that death penalty defendants are not guaranteed their equal protection rights under the Fourteenth Amendment because of inter-state variation in death penalty laws. By applying the "evolving standards" framework, we can expose arbitrariness across states. In particular, the unusual practice of judicial override in only a handful of states empowers arbitrary and unaccountable sentencing by judges, rather than by juries, as constitutionally mandated. Further, the existence and proliferation of vague aggravating circumstances in many states expands the class of death-penalty eligible offenders to such a large pool that the death penalty "machine" operates at a pre-*Furman* level.

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<sup>308</sup> "Death Penalty Assessments: Coming Soon". Death Penalty Moratorium Implementation Project, *American Bar Association*. Accessed 11 April 2013.



Permitting different standards of death results in no standards at all. Because of the differences in state statutes and in state courts' interpretations of states' laws and practices, a death penalty defendant is never sure what kind of laws he is up against. When complex geography enters into the equation, a defendant's fate rests more with the state to which he is subject than to the crime for which he was brought before that state. A capital defendant brought before the state of Alabama is in much greater peril than a capital defendant in Delaware. Such a situation is cruel, unusual, and unequal, and violates the Eighth and Fourteenth Amendments.

The task of death penalty scholars and lawyers is to recognize that inter-state variation denies equal protection and to find ways to challenge or change this situation, be it through state legislation, court action, or state constitutional amendments. Providing equal protection in capital punishment might prove such an onerous task for state legislatures and state appellate courts that arbitrary application, particularly in the unusual procedure of judicial override and in the use of vague aggravating circumstances, may fade in time, as evolving standards chip away at these practices. Moreover—and this is the best we can hope for—it may force states to confront the essential truth that Justice Harry Blackmun recognized 1994:

For more than twenty years, I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. <sup>309</sup>

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<sup>309</sup> Justice Harry Blackmun, dissent in the denial of writ of certiorari to the United States Supreme Court, *Callins v. Collins* 114 S.Ct. 1127. (1994).

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## Appendix A: United States Supreme Court Cases

### Table 1: The Capital Jury

Case Name	Citation	Year	Breakdown/Majority Opinion	State at Issue	Result/Doctrine
Witherspoon v. Illinois	391 U.S. 510	1968	6-3 (Justice Stewart)	Illinois	a jury composed after the dismissal of all who oppose the death sentence is biased in favor the death sentence; thus, it impartial and violates Sixth and Fourteenth Amendments.
Lockett v. Ohio	438 U.S. 586	1978	7-1 (Chief Justice Burger; Justice Brennan recused)	Ohio	Sentencers must consider range of mitigating factors
Eddings v. Oklahoma	455 U.S. 104	1982	5-4 (Justice Powell)	Oklahoma	Judge cannot refuse to include mitigating factor
Caldwell v. Mississippi	472 U.S. 320	1985	5-3 (Justice Marshall; Justice Powell recused)	Mississippi	Jury cannot be mislead on the finality of their sentencing role
Lockhart v. McCree	476 U.S. 162	1986	6-3 (Chief Justice Rehnquist)	Arkansas	Jurors unwilling to impose death can be excluded
Morgan v. Illinois	504 U.S. 719	1992	6-3 (Justice White)	Illinois	Jurors who would automatically impose death can be excluded

### Table 2: Defense Counsel

Case Name	Citation	Year	Breakdown/Majority Opinion	State at Issue	Result/Doctrine
Strickland v. Washington	466 U.S. 668	1984	8-1 (Justice O'Connor)	Washington	Established 2-part test for claims of ineffective counsel

**Table 3: Race**

<b>Case Name</b>	<b>Citation</b>	<b>Year</b>	<b>Breakdown/Majority Opinion</b>	<b>State at Issue</b>	<b>Result/ Doctrine</b>
Batson v. Kentucky	476 U.S. 79	1977	7-2 (Justice Powell)	Kentucky	Preemptory challenges cannot be used on basis of race
McClesky v. Kemp	481 U.S. 279	1987	5-4 (Justice Powell)	Georgia	evidence showing that African-Americans are more likely to receive the death penalty does not show <i>purposeful</i> discrimination

**Table 4: State Statutes (Upheld)**

<b>Case Name</b>	<b>Citation</b>	<b>Year</b>	<b>Breakdown/Majority Opinion</b>	<b>State at Issue</b>	<b>Result/ Doctrine</b>
Profitt v. Florida	428 U.S. 242	1976	7-2 (Justice Powell)	Florida	Judges may act as sole sentencing authority
Zant v. Stephens	462 U.S. 862	1983	7-2 (Justice Stevens)	Georgia	Permits absence of legislative standards for jury consideration of aggravating factors
Lowenfield v. Phelps	484 U.S. 231	1988	5-3 (Chief Justice Rehnquist; Justice Kennedy recused)	Louisiana	Approves agg. factor that duplicates an element of first-degree murder
Hildwin v. Florida	490 U.S. 638	1989	Per Curiam	Florida	the Sixth Amendment does not forbid the judge to make written findings authorizing the imposition of a death sentence when the jury unanimously makes such a recommendation
Walton v. Arizona	497 U.S. 639	1990	5-4 (Justice White)	Arizona	Approves "especially heinous, cruel or depraved" agg. factor; also approves judge, not jury, finding of agg. factors
Arave, Warden v. Creech	507 U.S. 463	1993	7-2 (Justice O'Connor)	Idaho	Approves "utter disregard for human life" agg. factor
Harris v. Alabama	513 U.S. 504	1995	8-1 (Justice O'Connor)	Alabama	Permits judges to merely "consider" jury sentencing verdict

**Table 5: State Statutes (Overturned)**

<b>Case Name</b>	<b>Citation</b>	<b>Year</b>	<b>Breakdown/Majority Opinion</b>	<b>State at Issue</b>	<b>Result/ Doctrine</b>
Woodson v. North Carolina	428 U.S. 280	1976	5-4 (Justice Stewart)	North Carolina	mandatory death penalty sentences for certain crimes were unconstitutional because cases must be examined on an individual basis
Godfrey v. Georgia	446 U.S. 420	1980	6-3 (Justice Stewart)	Georgia	Rejects “outrageously or wantonly vile, horrible, and inhuman” agg factor for vagueness
Hitchcock v. Dugger	481 U.S. 393	1987	9-0 (Justice Scalia)	Florida	Judges cannot instruct jury to ignore non- statutorily enumerated mitigating factors
Maynard v. Cartwright	486 U.S. 356	1988	9-0 (Justice White)	Oklahoma	Rejects “especially heinous, atrocious, or cruel” agg factor for vagueness
Ring v. Arizona	536 U.S. 584	2002	7-2 (Justice Ginsburg)	Arizona	Jury, not judge, must find agg. factors (overrules Walton)

**Table 6: Other**

<b>Case Name</b>	<b>Citation</b>	<b>Year</b>	<b>Breakdown/Majority Opinion</b>	<b>State at Issue</b>	<b>Result/ Doctrine</b>
Trop v. Dulles	356 U.S. 86	1958	5-4 (Chief Justice Warren)	United States Fed. Gov't	Beginnings of “evolving standards”
Furman v. Georgia	408 U.S. 238	1972	5-4 (Per curiam, nine separate opinions)	Georgia	Arbitrary and capricious sentencing is unconstitutional
Gregg v. Georgia	428 U.S. 153	1976	7-2 (Justice Stewart)	Georgia	Revised sentencing schemes are approved
Atkins v. Virginia	536 U.S. 304	2002	6-3 (Justice Stevens)	Virginia	Mentally handicapped cannot be executed
Roper v. Simmons	543 U.S. 551	2005	5-4 (Justice Kennedy)	Missouri	Those under age 18 cannot be executed



## **Appendix B: State Statutes**

### **Alabama**

#### **Section 13A-5-40 lists the following as capital offenses:**

- (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.
- (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant.
- (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant.
- (4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant.
- (5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty, regardless of whether the defendant knew or should have known the victim was an officer or guard on duty, or because of some official or job-related act or performance of such officer or guard.
- (6) Murder committed while the defendant is under sentence of life imprisonment.
- (7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire.
- (8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant.
- (9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion.
- (10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct.
- (11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity.
- (12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft.
- (13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction.
- (14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.
- (15) Murder when the victim is less than fourteen years of age.
- (16) Murder committed by or through the use of a deadly weapon fired or otherwise used from outside a dwelling while the victim is in a dwelling.
- (17) Murder committed by or through the use of a deadly weapon while the victim is in a vehicle.
- (18) Murder committed by or through the use of a deadly weapon fired or otherwise used within or from a vehicle.

- (19) (b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined in Section 13A-6-2(a)(1), but not as defined in Section 13A-6-2(a)(2) and (3). Subject to the provisions of Section 13A-5-41, murder as defined in Section 13A-6-2(a)(2) and (3), as well as murder as defined in Section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.
- (20) (c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of Section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.
- (21) (d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under Section 13A-2-23. When the defendant's guilt of that other crime is established under Section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section.

**Sections 13A-5-41 to 13A-5-44 describe the trial or guilt phase:**

1. 13A-5-41: Subject to the provisions of Section 13A-1-9(b), the jury may find a defendant indicted for a crime defined in Section 13A-5-40(a) not guilty of the capital offense but guilty of a lesser included offense or offenses. Lesser included offenses shall be defined as provided in Section 13A-1-9(a), and when there is a rational basis for such a verdict, include but are not limited to, murder as defined in Section 13A-6-2(a), and the accompanying other felony, if any, in the provision of Section 13A-5-40(a) upon which the indictment is based.
2. 13A-5-42: A defendant who is indicted for a capital offense may plead guilty to it, but the state must in any event prove the defendant's guilt of the capital offense beyond a reasonable doubt to a jury. The guilty plea may be considered in determining whether the state has met that burden of proof. The guilty plea shall have the effect of waiving all non-jurisdictional defects in the proceeding resulting in the conviction except the sufficiency of the evidence. A defendant convicted of a capital offense after pleading guilty to it shall be sentenced according to the provisions of Section 13A-5-43(d).
3. 13A-5-43: (a) In the trial of a capital offense the jury shall first hear all the admissible evidence offered on the charge or charges against the defendant. It shall then determine whether the defendant is guilty of the capital offense or offenses with which he is charged or of any lesser included offense or offenses considered pursuant to Section 13A-5-41. (b) If the defendant is found not guilty of the capital offense or offenses with which he is charged, and not guilty of any lesser included offense or offenses considered pursuant to Section 13A-5-41, the defendant shall be discharged. (c) If the defendant is found not guilty of the capital offense or offenses with which he is charged, and is found guilty of a lesser included offense or offenses considered pursuant to Section 13A-5-41, sentence shall be determined and imposed as provided by law. (d) If the defendant is found guilty of a capital offense or offenses with which he is charged, the sentence shall be determined as provided in Sections 13A-5-45 through 13A-5-53.
4. 13A-5-44: (a) The selection of the jury for the trial of a capital case shall include the selection of at least two alternate jurors chosen according to procedures specified by law or court rule. (b) The separation of the jury during the pendency of the trial of a capital case shall be governed by applicable law or court rule. (c) Notwithstanding any other provision of law, the defendant with the consent of the state and with the approval of the court may waive the

participation of a jury in the sentence hearing provided in Section 13A-5-46. Provided, however, before any such waiver is valid, it must affirmatively appear in the record that the defendant himself has freely waived his right to the participation of a jury in the sentence proceeding, after having been expressly informed of such right.

**Sections 13A-5-45 to 13A5-47 explain the sentencing phase:**

1. 13A-5-45: a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in Section 13A-5-47(b). Otherwise, the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report. (b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial. (c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in Sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried. (d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama. (e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing. (f) Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole. (g) The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.
2. 13A-5-46: (a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury as provided in Section 13A-5-44(c), it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section. (b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing

- before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case. (c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules applicable to the separation of the jury during the trial of a capital case. (d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return. (e) After deliberation, the jury shall return an advisory verdict as follows: (1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole; (2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole; (3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death. (f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors. The verdict of the jury must be in writing and must specify the vote. (g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of Section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury.
3. 13A-5-47: (a) After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived as provided in Section 13A-5-46(a) or Section 13A-5-46(g), the trial court shall proceed to determine the sentence.(b) Before making the sentence determination, the trial court shall order and receive a written pre-sentence investigation report. The report shall contain the information prescribed by law or court rule for felony cases generally and any additional information specified by the trial court. No part of the report shall be kept confidential, and the parties shall have the right to respond to it and to present evidence to the court about any part of the report which is the subject of factual dispute. The report and any evidence submitted in connection with it shall be made part of the record in the case. (c) Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case. The order of the arguments shall be the same as at the trial of a case. (d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it. (e) In deciding upon the sentence, the trial court shall

determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

**Sections 13A-548 to 13A-5-52 define the aggravating and mitigating factors and describe the process of establishing them at sentencing.**

1. 13A-5-48: The process described in Sections 13A-5-46(e)(2), 13A-5-46(e)(3) and Section 13A-5-47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death.
2. 13A-5-49: Aggravating circumstances shall be the following:
  - a. (1) The capital offense was committed by a person under sentence of imprisonment;
  - b. (2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;
  - c. (3) The defendant knowingly created a great risk of death to many persons;
  - d. (4) The capital offense 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, rape, robbery, burglary or kidnapping;
  - e. (5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
  - f. (6) The capital offense was committed for pecuniary gain;
  - g. (7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
  - h. (8) The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses;
  - i. (9) The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct; or
  - j. (10) The capital offense was one of a series of intentional killings committed by the defendant.
3. 13A-5-50: The fact that a particular capital offense as defined in Section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in Section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in Section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of Section 13A-5-40.
4. 13A-5-51: Mitigating circumstances shall include, but not be limited to, the following:
  - a. (1) The defendant has no significant history of prior criminal activity;
  - b. (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
  - c. (3) The victim was a participant in the defendant's conduct or consented to it;

- d. (4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;
  - e. (5) The defendant acted under extreme duress or under the substantial domination of another person;
  - f. (6) 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; and
  - g. (7) The age of the defendant at the time of the crime.
5. 13A-5-52: In addition to the mitigating circumstances specified in Section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

**Sections 13A-5-53 to 13A-5-59 explain appellate court review, appointment of defense counsel, and interpretation and applicability of the articles.**

1. 13A-5-53: (a) In any case in which the death penalty is imposed, in addition to reviewing the case for any error involving the conviction, the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall also review the propriety of the death sentence. This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case. If the court determines that an error adversely affecting the rights of the defendant was made in the sentence proceedings or that one or more of the trial court's findings concerning aggravating and mitigating circumstances were not supported by the evidence, it shall remand the case for new proceedings to the extent necessary to correct the error or errors. If the appellate court finds that no error adversely affecting the rights of the defendant was made in the sentence proceedings and that the trial court's findings concerning aggravating and mitigating circumstances were supported by the evidence, it shall proceed to review the propriety of the decision that death was the proper sentence. (b) In determining whether death was the proper sentence in the case the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; 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. (c) The Court of Criminal Appeals shall explicitly address each of the three questions specified in subsection (b) of this section in every case it reviews in which a sentence of death has been imposed. (d) After performing the review specified in this section, the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall be authorized to: (1) Affirm the sentence of death; (2) Set the sentence of death aside and remand to the trial court for correction of any errors occurring during the sentence proceedings and for imposition of the appropriate penalty after any new sentence proceedings that are necessary, provided that such errors shall not affect the determination of guilt and shall not preclude the imposition of a sentence of death where it is determined to be proper after any new sentence proceedings that are deemed necessary; or (3) In cases in which the death penalty is deemed inappropriate under subdivision (b)(2) or (b)(3) of this section, set the sentence of death aside and remand to the trial court with directions that the defendant be sentenced to life imprisonment without parole.
2. 13A-5-54: Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law.

3. 13A-5-55: In all cases in which a defendant is sentenced to death, the judgment of conviction shall be subject to automatic review. The sentence of death shall be subject to review as provided in Section 13A-5-53.
4. 13A-5-56: The Alabama Supreme Court shall promulgate pattern indictment forms for use in cases in which indictments charging offenses defined in Section 13A-5-40(a) are thereafter returned. The Alabama Supreme Court shall also promulgate pattern verdict forms and pattern jury instructions for the trial and sentencing aspects of cases tried thereafter under this article, insofar as such verdicts and instructions relate to the particularities of cases tried under this article.
5. 13A-5-57: (a) This article applies only to conduct occurring after 12:01 A.M. on July 1, 1981. Conduct occurring before 12:01 A.M. on July 1, 1981 shall be governed by pre-existing law. (b) Sections 13A-5-30 through 13A-5-38 are hereby repealed. All other laws or parts of laws in conflict with this article are hereby repealed. This repealer shall not affect the application of pre-existing law to conduct occurring before 12:01 A.M. on July 1, 1981.
6. 13A-5-58: This article shall be interpreted, and if necessary reinterpreted, to be constitutional.
7. 13A-5-59: It is the intent of the Legislature that if the death penalty provisions of this article are declared unconstitutional and if the offensive provision or provisions cannot be reinterpreted so as to provide a constitutional death penalty, or if the death penalty is ever declared to be unconstitutional per se, that the defendants who have been sentenced to death under this article shall be re-sentenced to life imprisonment without parole. It is also the intent of the Legislature that in the event that the death penalty provisions of this article are declared unconstitutional and if they cannot be reinterpreted to provide a constitutional death penalty, or if the death penalty is ever declared to be unconstitutional per se, that defendants convicted thereafter for committing crimes specified in Section 13A-5-40(a) shall be sentenced to life imprisonment without parole.

## Florida

### **Title XLVI Chapter 775.082**

- 1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.
- 2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

### **Title XLVI Chapter 782.04**

- (1)(a)The unlawful killing of a human being:
- 1.When perpetrated from a premeditated design to effect the death of the person killed or any human being;
  - 2.When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
    - a.Trafficking offense prohibited by s. 893.135(1),
    - b.Arson,
    - c.Sexual battery,
    - d.Robbery,
    - e.Burglary,
    - f.Kidnapping,

- g. Escape,
  - h. Aggravated child abuse,
  - i. Aggravated abuse of an elderly person or disabled adult,
  - j. Aircraft piracy,
  - k. Unlawful throwing, placing, or discharging of a destructive device or bomb,
  - l. Carjacking,
  - m. Home-invasion robbery,
  - n. Aggravated stalking,
  - o. Murder of another human being,
  - p. Resisting an officer with violence to his or her person,
  - q. Aggravated fleeing or eluding with serious bodily injury or death,
  - r. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or
3. Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or methadone 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, is murder in the first degree and constitutes 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.

### **Title XLVII Chapter 913.13**

A person who has beliefs which preclude her or him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

### **Title XLVII Chapter 921.141**

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
- (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall



enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
- (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(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; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or 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.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

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

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her 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 or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) APPLICABILITY.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

## Missouri

### Title XXXVIII Chapter 565.020

1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

### Title XXXVIII 565.030

1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single stage trial in which guilt and punishment are submitted together.
2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558.
3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.
4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence

concerning the murder victim and the impact of the crime upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

- (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or
- (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
- (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
- (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.

If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

5. Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact as provided in subsection 4 of this section.

6. As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

7. The provisions of this section shall only govern offenses committed on or after August 28, 2001.

#### **Title XXXVIII 565.032**

1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:

- (1) Whether a statutory aggravating circumstance or circumstances enumerated in subsection 2 of this section is established by the evidence beyond a reasonable doubt; and
- (2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor. In determining the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the statutory aggravating or mitigating circumstances set out in subsections 2 and 3 of this section. If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he considers to be aggravating or mitigating.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

- (1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;

- (2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;
  - (3) The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person 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 in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;
  - (5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;
  - (6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;
  - (7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;
  - (8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;
  - (9) The murder in the first degree 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 in the first degree 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;
  - (11) The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195;
  - (12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;
  - (13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;
  - (14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance;
  - (15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195;
  - (16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195;
  - (17) The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421.
3. Statutory mitigating circumstances shall include the following:
- (1) The defendant has no significant history of prior criminal activity;
  - (2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;
  - (3) The victim was a participant in the defendant's conduct or consented to the act;
  - (4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;
  - (5) The defendant acted under extreme duress or under the substantial domination of another person;
  - (6) 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;
  - (7) The age of the defendant at the time of the crime.

**Title XXXVIII 565.035.**

1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme 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 the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

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

4. Both the defendant and the state shall have the right to submit briefs within the time provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or

(3) Set the sentence aside and remand the case for retrial of the punishment hearing. A new jury shall be selected or a jury may be waived by agreement of both parties and then the punishment trial shall proceed in accordance with this chapter, with the exception that the evidence of the guilty verdict shall be admissible in the new trial together with the official transcript of any testimony and evidence properly admitted in each stage of the original trial where relevant to determine punishment.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorized to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. In addition to the mandatory sentence review, there shall be a right of direct appeal of the conviction to the supreme court of Missouri. This right of appeal may be waived by the defendant. If an appeal is taken, the appeal and the sentence review shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

**Title XXXVIII 565.040**

1. In the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be unconstitutional or invalid

for another reason, the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment pursuant to subsection 5 of section 565.036.

2. In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

### **Pennsylvania**

#### **18 Pa. Const. Stat. § 1102. Sentence for murder, murder of unborn child and murder of law enforcement officer.**

##### **(a) First degree.--**

(1) Except as provided under section 1102.1 (relating to sentence of persons under the age of 18 for murder, murder of an unborn child and murder of a law enforcement officer), a person who has been convicted of a murder of the first degree or of murder of a law enforcement officer of the first degree shall be sentenced to death or to a term of life imprisonment in accordance with 42 Pa.C.S. § 9711 (relating to sentencing procedure for murder of the first degree).

(2) The sentence for a person who has been convicted of first degree murder of an unborn child shall be the same as the sentence for murder of the first degree, except that the death penalty shall not be imposed. This paragraph shall not affect the determination of an aggravating circumstance under 42 Pa.C.S. § 9711(d)(17) for the killing of a pregnant woman.

#### **42 Pa. Const. Stat. § 9711. Sentencing procedure for murder of the first degree.**

##### **(a) Procedure in jury trials.--**

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible. Additionally, evidence may be presented as to any other matter that the court deems relevant and admissible on the question of the sentence to be imposed. Evidence shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e), and information concerning the victim and the impact that the death of the victim has had on the family of the victim. Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

**(b) Procedure in nonjury trials and guilty pleas.--**If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury as provided in subsection (a).

##### **(c) Instructions to jury.--**

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) The aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) The mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it shall consider, in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim's family. The court shall also instruct the jury on any other matter that may be just and proper under the circumstances.

**(d) Aggravating circumstances.--**Aggravating circumstances shall be limited to the following:

(1) The victim was a firefighter, peace officer, public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), judge of any court in the unified judicial system, the Attorney General of Pennsylvania, a deputy attorney general, district attorney, assistant district attorney, member of the General Assembly, Governor, Lieutenant Governor, Auditor General, State Treasurer, State law enforcement official, local law enforcement official, Federal law enforcement official or person employed to assist or assisting any law enforcement official in the performance of his duties, who was killed in the performance of his duties or as a result of his official position.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), or a substantially equivalent crime in any other jurisdiction, committed either before or at the time of the offense at issue.

(13) The defendant committed the killing or was an accomplice in the killing, as defined in 18 Pa.C.S. § 306(c) (relating to liability for conduct of another; complicity), while in the perpetration of a felony under the provisions of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and punishable under the provisions of 18 Pa.C.S. § 7508 (relating to drug trafficking sentencing and penalties).

(14) At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device

and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

(15) At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

(16) The victim was a child under 12 years of age.

(17) At the time of the killing, the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy.

(18) At the time of the killing the defendant was subject to a court order restricting in any way the defendant's behavior toward the victim pursuant to 23 Pa.C.S. Ch. 61 (relating to protection from abuse) or any other order of a court of common pleas or of the minor judiciary designed in whole or in part to protect the victim from the defendant.

**(e) Mitigating circumstances.**--Mitigating circumstances shall include the following:

- (1) The defendant has no significant history of prior criminal convictions.
- (2) The defendant was under the influence of extreme mental or emotional disturbance.
- (3) 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.
- (4) The age of the defendant at the time of the crime.
- (5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.
- (6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.
- (7) The defendant's participation in the homicidal act was relatively minor.
- (8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

**(f) Sentencing verdict by the jury.**--

- (1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.
- (2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

**(g) Recording sentencing verdict.**--Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

**(h) Review of death sentence.**--

- (1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.
- (2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).
- (3) The Supreme Court shall affirm the sentence of death unless it determines that:
  - (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
  - or
  - (ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d).
- (4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty



must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

**(i) Record of death sentence to Governor.**--Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition of sentence, opinion and order by the Supreme Court within 30 days of one of the following, whichever occurs first:

- (1) the expiration of the time period for filing a petition for writ of certiorari or extension thereof where neither has been filed;
- (2) the denial of a petition for writ of certiorari; or
- (3) the disposition of the appeal by the United States Supreme Court, if that court grants the petition for writ of certiorari.

Notice of this transmission shall contemporaneously be provided to the Secretary of Corrections.

## 234 Pa. Const. Stat. § 800-811

### **Rule 800. Applicability of Subchapter.**

Except as provided in Rule 801, the rules of this chapter shall apply to the guilt and penalty determination phases of all cases in which the imposition of a sentence of death is authorized by law.

### **Rule 801. Qualifications for Defense Counsel in Capital Cases.**

In all cases in which the district attorney has filed a Notice of Aggravating Circumstances pursuant to Rule 802, before an attorney may participate in any stage of the case either as retained or appointed counsel, the attorney must meet the educational and experiential criteria set forth in this rule.

(1) EXPERIENCE: Counsel shall

- (a) be a member in good standing of the Bar of this Commonwealth;
- (b) be an active trial practitioner with a minimum of 5 years criminal litigation experience; and
- (c) have served as lead or co-counsel in a minimum of 8 significant cases that were given to the jury for deliberations. If representation is to be only in an appellate court, prior appellate or post-conviction representation in a minimum of 8 significant cases shall satisfy this requirement. A "significant case" for purposes of this rule is one that charges murder, manslaughter, vehicular homicide, or a felony for which the maximum penalty is 10 or more years.

(2) EDUCATION:

(a) During the 3-year period immediately preceding the appointment or entry of appearance, counsel shall have completed a minimum of 18 hours of training relevant to representation in capital cases, as approved by the Pennsylvania Continuing Legal Education Board.

(b) Training in capital cases shall include, but not be limited to, training in the following areas:

- (i) relevant state, federal, and international law;
- (ii) pleading and motion practice;
- (iii) pretrial investigation, preparation, strategy, and theory regarding guilt and penalty phases;
- (iv) jury selection;
- (v) trial preparation and presentation;
- (vi) presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts;
- (vii) ethical considerations particular to capital defense representation;
- (viii) preservation of the record and issues for post-conviction review;
- (ix) post-conviction litigation in state and federal courts;
- (x) unique issues relating to those charged with capital offenses when under the age of 18.
- (xi) counsel's relationship with the client and family.

(c) The Pennsylvania Continuing Legal Education Board shall maintain and make available a list of attorneys who satisfy the educational requirements set forth in this rule.

#### **Comment**

The purpose of this rule is to provide minimum uniform statewide standards for the experience and education of appointed and retained counsel in capital cases, to thus ensure such counsel possess the ability, knowledge, and experience to provide representation in the most competent and professional

manner possible. These requirements apply to counsel at all stages of a capital case, including pretrial, trial, post-conviction, and appellate.

The educational and experience requirements of the rule may not be waived by the trial or appellate court. A court may allow representation by an out-of-state attorney pro hac vice, if satisfied the attorney has equivalent experience and educational qualifications, and is a member in good standing of the Bar of the attorney's home jurisdiction.

An attorney may serve as "second chair" in a capital case without meeting the educational or experience requirements of this rule. "Second chair" attorneys may not have primary responsibility for the presentation of significant evidence or argument, but may present minor or perfunctory evidence or argument, if deemed appropriate in the discretion of the court. Service as a "second chair" in a homicide case will count as a trial for purposes of evaluating that attorney's experience under paragraph (1)(c) of this rule.

Paragraph (1)(c) was amended in 2007 to clarify that (1) cases that are tried to a verdict or that end with a mistrial after the case is given to the jury for deliberations satisfy the requirements of the rule, and (2) all cases charging felonies for which the term of imprisonment is 10 or more years will count as "significant cases," see, e.g., Crimes Code, 18 Pa.C.S. § 106(b), and 35 P. S. § 780-113(f)(1).

The CLE Board may approve entire courses focusing on capital litigation, or individual portions of other courses dealing with general areas relevant to capital cases (such as trial advocacy). It is expected that counsel will attend training programs encompassing the full range of issues confronting the capital litigator from the investigative and pretrial stages through appellate and post-conviction litigation in the state and federal courts.

Determination of experience will be accomplished by the appointing or admitting court, by colloquy or otherwise.

For the entry of appearance and withdrawal of counsel requirements generally, see Rule 120.

For the appointment of trial counsel, see Rule 122.

For the entry of appearance and appointment of counsel in post-conviction collateral proceedings, see Rule 904.

Official Note

Adopted June 4, 2004, effective November 1, 2004; amended April 13, 2007, effective immediately; amended October 1, 2012, effective November 1, 2012.

*Committee Explanatory Reports:*

Final Report explaining the April 13, 2007 changes to paragraph (1)(c) published with the Court's Order at 37 Pa.B. 1961 (April 28, 2007).

Final Report explaining the October 1, 2012 changes to the first paragraph published with the Court's Order at 42 Pa.B. 6635 (October 20, 2012).

#### Source

The provisions of this Rule 801 adopted June 4, 2004, effective November 1, 2004, 34 Pa.B. 3105. From June 4, 2004, until November 1, 2004, the educational requirements in Rule 801 shall be phased in as follows: (1) from the date of this Order until the November 1, 2004 effective date, the appointing or admitting court shall determine that the attorney has attended at least 6 hours of courses relevant to representation in capital cases, using the new Rule 801 educational criteria as a guide for relevance; (2) by November 1, 2004, to be eligible for appointment or to enter an appearance pursuant to new Rule 801, an attorney shall have completed a minimum of 6 hours of training relevant to representation in capital cases, as approved by the Continuing Legal Education Board, (3) by November 1, 2005, to be eligible for appointment or to enter an appearance pursuant to new Rule 801, an attorney shall have completed a minimum of 12 hours of training relevant to representation in capital cases, as approved by the Continuing Legal Education Board; and (4) by May 1, 2006, to be eligible for appointment or to enter an appearance pursuant to new Rule 801, an attorney shall have completed a minimum of 18 hours of training relevant to representation in capital cases, as approved by the Continuing Legal Education Board; amended April 13, 2007, effective immediately, 37 Pa.B. 1960; amended October 1, 2012, effective November 1, 2012, 42 Pa.B. 6635. Immediately preceding text appears at serial pages (327020) to (327022).

#### **Rule 802. Notice of Aggravating Circumstances.**

The attorney for the Commonwealth shall file a Notice of Aggravating Circumstances that the Commonwealth intends to submit at the sentencing hearing and contemporaneously provide the

defendant with a copy of such Notice of Aggravating Circumstances. Notice shall be filed at or before the time of arraignment, unless the attorney for the Commonwealth becomes aware of the existence of an aggravating circumstance after arraignment or the time for filing is extended by the court for cause shown.

#### **Comment**

This rule provides for pretrial disclosure of those aggravating circumstances that the Commonwealth intends to prove at the sentencing hearing. See Sentencing Code, 42 Pa.C.S. § 9711(d). It is intended to give the defendant sufficient time and information to prepare for the sentencing hearing. Although the rule requires that notice generally be given no later than the time of arraignment, it authorizes prompt notice thereafter when a circumstance becomes known to the attorney for the Commonwealth at a later time. The language “for cause shown” contemplates, for example, a situation in which, at the time of arraignment, an ongoing investigation of an aggravating circumstance must be completed before the attorney for the Commonwealth can know whether the evidence is sufficient to warrant submitting the circumstance at the sentencing hearing.

The 1995 amendment requires the Commonwealth to file the Notice of Aggravating Circumstances.

For purposes of this rule, the notice requirement is satisfied if the copy of the notice to the defendant sets forth the existing aggravating circumstances substantially in the language of the statute. See 42 Pa.C.S. § 9711(d) The extent of disclosure of underlying evidence is governed by Rule 573.

See Rule 571 concerning arraignment procedures.

If the trial court orders a new sentencing hearing, or the Supreme Court remands a case for a redetermination of penalty pursuant to 42 Pa.C.S. § 9711(h)(4), the attorney for the Commonwealth may not introduce any new aggravating circumstance except when there has been an intervening conviction for an offense committed prior to the present conviction which would constitute an aggravating circumstance. The trial judge must set the time within which the attorney for the Commonwealth must notify the defendant of such an additional circumstance, and the time set for notice must allow the defendant adequate time to prepare for the new sentencing hearing. No additional notice is required for those aggravating circumstances previously offered and not struck down upon review.

#### **Official Note**

Previous Rule 352 adopted July 1, 1985, effective August 1, 1985; renumbered Rule 353 February 1, 1989, effective July 1, 1989. Present Rule 352 adopted February 1, 1989, effective as to cases in which the arraignment is held on or after July 1, 1989; Comment revised October 29, 1990, effective January 1, 1991; amended January 10, 1995, effective February 1, 1995; renumbered Rule 801 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; renumbered Rule 802 June 4, 2004, effective November 1, 2004.

#### *Committee Explanatory Reports:*

Report explaining the October 29, 1990 Comment revision published at 20 Pa.B. 5736 (November 17, 1990).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court’s Order at 30 Pa.B. 1477 (March 18, 2000).

Final Report explaining the May 10, 2002 amendments published with the Court’s Order at 32 Pa.B. 2591 (May 25, 2002).

#### **Source**

The provisions of this Rule 801 amended May 10, 2002, effective September 1, 2002, 32 Pa.B. 2582; amended June 4, 2004, effective November 1, 2004, 34 Pa.B. 3105. Immediately preceding text appears at serial pages (289114) to (289115).

#### **Rule 803. Guilty Plea Procedure.**

(A) When a defendant charged with murder enters a plea of guilty to a charge of murder generally, the degree of guilt shall be determined by a jury unless the attorney for the Commonwealth elects to have the judge, before whom the plea is entered, alone determine the degree of guilt.

(B) If the crime is determined to be murder of the first degree the sentencing proceeding shall be conducted as provided by law.

#### **Comment**

For the procedure for the entry of guilty pleas, see Rule 590. For the sentencing procedure if the crime is determined to be murder of the first degree, see Sentencing Code, 42 Pa.C.S. § 9711(b).

The 2008 amendment to paragraph (A) recognizes the Commonwealth's right to have a jury determine the degree of guilt following a plea of guilty to murder generally. See Article I, § 6 of the Pennsylvania Constitution that provides that "the Commonwealth shall have the same right to trial by jury as does the accused." See also *Commonwealth v. White*, 589 Pa. 642, 910 A.2d 648 (2006).

**Official Note**

Original Rule 352 adopted September 22, 1976, effective November 1, 1976; amended May 26, 1977, effective July 1, 1977; rescinded April 2, 1978, effective immediately. Former Rule 352 adopted July 1, 1985, effective August 1, 1985; renumbered Rule 353 February 1, 1989, effective July 1, 1989; renumbered Rule 802 and amended March 1, 2000, effective April 1, 2001; renumbered Rule 803 June 4, 2004, effective November 1, 2004; amended September 18, 2008, effective November 1, 2008.

**Committee Explanatory Reports:**

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1477 (March 18, 2000).

Final Report explaining the September 18, 2008 amendments to paragraph (A) concerning juries determining degree of guilt published with the Court's Order at 38 Pa.B. 5431 (October 4, 2008).

**Source**

The provisions of this Rule 803 amended June 4, 2004, effective November 1, 2004, 34 Pa.B. 3105; amended September 18, 2008, effective November 1, 2008, 38 Pa.B. 5429. Immediately preceding text appears at serial page (349161).

**Rule 804. Procedure When Jury Trial is Waived.**

(A) In all cases in which the defendant is charged with murder, the defendant and the attorney for the Commonwealth may waive a jury trial with approval by a judge of the court in which the case is pending. In these cases, the trial judge shall alone hear the evidence, determine all questions of law and fact, and render a verdict that shall have the same force and effect as a verdict of a jury.

(B) If the crime is determined to be murder of the first degree the sentencing proceeding shall be conducted as provided by law.

**Comment**

For the procedure for waiver of jury trial, see Rules 620 and 621. For the sentencing procedure if the crime is determined to be murder of the first degree, see Sentencing Code, 42 Pa.C.S. § 9711(b).

**Official Note**

Original Rule 353 adopted September 22, 1976, effective March 1, 1977, effective date extended to April 1, 1977; amended May 26, 1977, effective July 1, 1977; rescinded April 2, 1978, effective immediately. Former Rule 353 adopted July 1, 1985, effective August 1, 1985, renumbered Rule 354 February 1, 1989, effective July 1, 1989; renumbered Rule 803 and amended March 1, 2000, effective April 1, 2001; renumbered Rule 804 June 4, 2004, effective November 1, 2004; amended September 18, 2008, effective November 1, 2008.

**Committee Explanatory Reports:**

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1477 (March 18, 2000).

Final Report explaining the September 18, 2008 amendments to paragraph (A) concerning waiver of a jury trial published with the Court's Order at 38 Pa.B. 5431 (October 4, 2008).

**Source**

The provisions of this Rule 804 amended June 4, 2004, effective November 1, 2004, 34 Pa.B. 3105; amended September 18, 2008, effective November 1, 2008, 38 Pa.B. 5429. Immediately preceding text appears at serial pages (349161) to (349162).

**Rule 805. No Sealed Verdict.**

No sealed verdict shall be permitted under this chapter.

**Official Note**

Original Rule 354 adopted September 22, 1976, effective November 1, 1976; rescinded April 2, 1978, effective immediately. Former Rule 354 adopted July 1, 1985, effective August 1, 1985; renumbered Rule 355 February 1, 1989, effective July 1, 1989; renumbered Rule 804 and amended March 1, 2000, effective April 1, 2001; renumbered Rule 805 June 4, 2004, effective November 1, 2004.

*Committee Explanatory Reports:*

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1477 (March 18, 2000).

**Source**

The provisions of this Rule 805 amended June 4, 2004, effective November 1, 2004, 34 Pa.B. 3105. Immediately preceding text appears at serial pages (289115) to (289116).

**Rule 806. Closing Arguments at Sentencing Hearing.**

After the presentation of evidence at the sentencing hearing, each party shall be entitled to present one closing argument for or against the sentence of death. The defendant's argument shall be made last.

**Comment**

See Sentencing Code, 42 Pa.C.S. § 9711(a)(3).

## Official Note

Rule 356 adopted February 1, 1989, effective July 1, 1989; renumbered Rule 805 and Comment revised March 1, 2000, effective April 1, 2001; renumbered Rule 806 June 4, 2004, effective November 1, 2004.

*Committee Explanatory Reports:*

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1477 (March 18, 2000).

**Source**

The provisions of this Rule 806 amended June 4, 2004, effective November 1, 2004, 34 Pa.B. 3105. Immediately preceding text appears at serial page (289116).

**Rule 807. Sentencing Verdict Slip.**

## (A) JURY

(1) In all cases in which the sentencing proceeding is conducted before a jury, the judge shall furnish the jury with a jury sentencing verdict slip in the form provided by Rule 808.

(2) Before the jury retires to deliberate, the judge shall meet with counsel and determine those aggravating and mitigating circumstances of which there is some evidence. The judge shall then set forth those circumstances on the sentencing verdict slip using the language provided by law.

(3) The trial judge shall make the completed sentencing verdict slip part of the record.

## (B) TRIAL JUDGE

(1) In all cases in which the defendant has waived a sentencing proceeding before a jury and the trial judge determines the penalty, the trial judge shall complete a sentencing verdict slip in the form provided by Rule 809.

(2) The trial judge shall make the completed sentencing verdict slip part of the record.

**Comment**

The purpose of this rule is to provide statewide, uniform jury and trial judge sentencing verdict slips in death penalty cases. The jury sentencing verdict slip is not intended to replace those jury instructions required by law. See Sentencing Code, 42 Pa.C.S. § 9711(c). For the sentencing procedure under paragraph (B), see Sentencing Code, 42 Pa.C.S. § 9711(b).

## Official Note

Rule 357 adopted February 1, 1989, effective July 1, 1989; renumbered Rule 806 and amended March 1, 2000, effective April 1, 2001; renumbered Rule 807 June 4, 2004, effective November 1, 2004.

*Committee Explanatory Reports:*

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1477 (March 18, 2000).

**Source**

The provisions of this Rule 807 amended June 4, 2004, effective November 1, 2004, 34 Pa.B. 3105. Immediately preceding text appears at serial pages (289116) and (264363).

**Rule 808. Form for Jury Sentencing Verdict Slip.**