Supreme Court Rulings: Constitutionality of the Death Penalty, Guidelines for Judges and Juries, Jury Selection, and Sentencing Procedures

"Supreme Court Rulings: Constitutionality of the Death Penalty, Guidelines for Judges and Juries, Jury Selection, and Sentencing Procedures."*Capital Punishment:Cruel and Unusual?* . Kim Masters Evans. Information Plus® Reference Series. 2008 Detroit: Cengage/ Gale, 2008. *Opposing Viewpoints Resource Center* . Gale. BRYAN HIGH SCHOOL. 26 July 2010 <http://find.galegroup.com/ovrc/infomark.do?&contentSet=GSRC&type=retrieve&tabID=T001&prodId=OVRC&docId=EJ3011840102&source=gale&srcprod=OVRC&userGroupName=omah81992&version=1.0>.

In 1967 a coalition of anti-death penalty groups sued Florida and California, the states with the most inmates on death row at that time, challenging the constitutionality of state capital punishment laws. An unofficial moratorium (temporary suspension) of executions resulted, pending U.S. Supreme Court decisions on several cases on appeal. The defendants in these cases claimed that the death penalty is a cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. Moreover, they alleged that the death penalty also violated the Fourteenth Amendment, which prevents states from denying anyone equal protection of the laws. This moratorium lasted until January 17, 1977, when convicted murderer Gary Gilmore, virtually at his own request, was executed by the state of Utah.

Is the Death Penalty Constitutional?

On June 29, 1972, a split 5-4 Supreme Court reached a landmark decision in *Furman v. Georgia* (408 U.S. 238, which included *Jackson v. Georgia* and *Branch v. Texas*), holding that "as the statutes before us are now administered...?. [The] imposition and carrying out of death penalty in these cases held to constitute a cruel and unusual punishment in violation of Eighth and Fourteenth Amendments." In other words, the justices did not address whether capital punishment as a whole is unconstitutional. Rather, they considered capital punishment in the context of its application in state statutes (laws created by state legislatures). The justices, whether they were of the majority opinion or of the dissenting opinion, could not agree on the arguments explaining why they opposed or supported the death penalty. As a result, the decision consisted of nine separate opinions, the lengthiest ruling in Court history to date.

Majority Opinions in *Furman*

Justice William O. Douglas (1898-1980), in his concurring majority opinion, quoted the former U.S.

attorney general Ramsey Clark's (1927-) observation in his book *Crime in America: Observations on Its Nature, Causes, Prevention, and Control* (1970): "It is the poor, the sick, the ignorant, the powerless, and the hated who are executed." Douglas added, "We deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12...?. Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."

Justice William J. Brennan (1906-1997) stated, "At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."

Justice Potter J. Stewart (1915-1985) stressed another point, saying, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."

This did not mean that Justice Stewart would rule out the death penalty. He believed that the death penalty was justified, but he wanted to see a more equitable system of determining who should be executed. He explained, "I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."

Justice Byron R. White (1917-2002), believing that the death penalty was so seldom imposed that executions were ineffective deterrents to crime, chose instead to address the role of juries and judges in imposing the death penalty. He concluded that the cases before the courts violated the Eighth Amendment because the state legislatures, having authorized the application of the death penalty, left it to the discretion of juries and judges whether or not to impose the punishment.

Justice Thurgood Marshall (1908-1993) thought that "the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment." He added 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." Justice Marshall also noted that the death penalty was applied with discrimination against certain classes of people (the poor, the uneducated, and members of minority groups) and that innocent people had been executed before they could prove their innocence. He also believed that it hindered the reform of the treatment of criminals and that it promoted sensationalism during trials.

Dissenting Opinions

Chief Justice Warren Burger (1907-1995), disagreeing with the majority, observed that "the constitutional prohibition against 'cruel and unusual punishments' cannot be construed to bar the imposition of the punishment of death." Justice Harry A. Blackmun (1908-1999) was disturbed by Justices Stewart's and White's remarks that as long as capital punishment was mandated for specific crimes, it could not be considered unconstitutional. He feared "that statutes struck down today will be re-enacted by state legislatures to prescribe the death penalty for specified crimes without any alternative for the imposition of a lesser punishment in the discretion of the judge or jury, as the case may be."

Justice Lewis F. Powell Jr. (1907-1998) declared, "I find no support—in the language of the Constitution, in its history, or in the cases arising under it—for the view that this Court may invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology...?. This Court has long held that legislative decisions in this area, which lie within the special competency of that branch, are entitled to a presumption of validity."

In other words, the Court would not question the validity of a government entity properly doing its job unless its actions were way out of line.

Justice William H. Rehnquist (1924-2005) agreed with Justice Powell, adding, "How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?"

Summary of Court Decision

Only Justices Brennan and Marshall concluded that the Eighth Amendment prohibited the death penalty for all crimes and under all circumstances. Justice Douglas, while ruling that the death penalty statutes reviewed by the high court were unconstitutional, did not necessarily require the final abolition of the death penalty. Justices Stewart and White also did not rule on the validity of the death penalty, noting instead that, because of the capricious imposition of the sentence, the death penalty violated the Eighth Amendment. However, Justices Rehnquist, Burger, Powell, and Blackmun concluded that the Constitution allows capital punishment.

Consequently, most state legislatures went to work to revise their capital punishment laws. They strove to make these laws more equitable to swing the votes of Stewart and White (and later that of John Paul Stevens [1920-], who replaced the retired Justice Douglas).

Proper Imposition of the Death Penalty

Four years later, on July 2, 1976, the Supreme Court ruled decisively on a series of cases. In *Gregg v. Georgia* (428 U.S. 153), perhaps the most significant of these cases, the justices concluded 7-2 that the death penalty was, indeed, constitutional as presented in

some new state laws. With Justices Brennan and Marshall dissenting, the Court stressed (just in case *Furman* had been misunderstood) that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." Furthermore, "the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."

The Court upheld death penalty statutes in Georgia (*Gregg v. Georgia*), Florida (*Proffitt v. Florida*, 428 U.S. 242, 1976), and Texas (*Jurek v. Texas*, 428 U.S. 262, 1976), but struck down laws in North Carolina (*Woodson v. North Carolina*, 428 U.S. 280, 1976) and Louisiana (*Roberts v. Louisiana*, 428 U.S. 40, 1976). It ruled that laws in the latter two states were too rigid in imposing mandatory death sentences for certain types of murder.

Citing the new Georgia laws in *Gregg*, Justice Stewart supported the bifurcated (two-part) trial system, in which the accused is first tried to determine his or her guilt. Then, in a separate trial, the jury considers whether the convicted person deserves the death penalty or whether mitigating factors (circumstances that may lessen or increase responsibility for a crime) warrant a lesser sentence, usually life imprisonment. This system meets the requirements demanded by *Furman*. Noting how the Georgia statutes fulfilled these demands, Justice Stewart observed:

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

In addition, the Georgia law required that all death sentences be automatically appealed to the state supreme court, an "important additional safeguard against arbitrariness and caprice." The bifurcated trial system has since been adopted in the trials of all capital murder cases.

In *Proffitt v. Florida*, the high court upheld Florida's death penalty laws that had a bifurcated trial system similar to Georgia's. In Florida, however, the sentence was determined by the trial judge rather than by the jury, who assumed an advisory role during the sentencing phase. The Court found Florida's sentencing guidelines adequate in preventing unfair imposition of the death sentence.

Predictability of Future Criminal Activity

In *Jurek v. Texas* , the issue centered on whether a jury can satisfactorily determine the future actions of a convicted murderer. The Texas statute required that during the sentencing phase of a trial, after the defendant had been found guilty, the jury would determine whether it is probable the defendant would commit future criminal acts of violence that would threaten society. Even though agreeing with Jurek's attorneys that predicting future behavior is not easy, Justice Stewart noted:

> The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice.

Flexible Guidelines for Judges and Jurors Are Required

In *Woodson v. North Carolina* , the Supreme Court addressed for the first time the question of whether the jury's handing down of a death sentence under North Carolina's mandatory death penalty for all first-degree murders constituted a cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments. If a person was convicted of first-degree murder in North Carolina, he or she was automatically sentenced to death. The justices held that as a whole the American public rejected the idea of mandatory death sentences long ago. In addition, North Carolina's new statute provided "no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die." Furthermore, the North Carolina law did not let the jury consider the convicted defendant's character, criminal record, or the circumstances of the crime before the imposition of the death sentence.

The Louisiana mandatory death sentence for first-degree murder suffered from similar inadequacies. It did, however, permit the jury to consider lesser offenses such as second-degree murder. In *Roberts v. Louisiana* , the Supreme Court rejected the Louisiana law because it forced the jury to find the defendant guilty of a lesser crime to avoid imposing the death penalty. In other words, if the crime was not heinous enough to warrant the death penalty, then the jury was forced to convict the defendant of second-degree murder or a lesser charge. The jury did not have the option of first determining if the accused was indeed guilty of first-degree murder for the crime he or she had actually committed and then recommending a lesser sentence if there were mitigating circumstances to support it.

As a result of either *Furman* or *Gregg* or both, virtually every state's capital punishment statute had to be rewritten. These statutes would provide flexible guidelines for judges and juries so that they might fairly decide capital cases and consider, then impose, if necessary, the death penalty.

Jury May Consider a Lesser Charge

In 1977 Gilbert Beck was convicted of robbing and murdering eighty-year-old Roy Malone. According to Beck, he and an accomplice entered Malone's home and were tying up the victim to rob him when Beck's accomplice unexpectedly struck and killed Malone. Beck admitted to the robbery but claimed the murder was not part of the plan. Beck was tried under an Alabama statute for "robbery or attempts thereof when the victim is intentionally killed by the defendant."

Under Alabama law the judge was specifically prohibited from giving the jury the option of convicting the defendant of a lesser, included offense. Instead, the jury was given the choice of either convicting the defendant of the capital crime, in which case he possibly faced the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime. The judge could not have offered the jury the lesser alternative of felony murder, which did not deal with the accused's intentions at the time of the crime.

Beck appealed, claiming this law created a situation in which the jury was more likely to convict. The Supreme Court, in *Beck v. Alabama* (447 U.S. 625, 1980), agreed and reversed the lower court's ruling, thus vacating (annulling) his death sentence. The high court observed that, while not a matter of due process, it was virtually universally accepted in lesser offenses that a third alternative be offered. The Court noted, "That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction."

According to the ruling, such a risk could not be tolerated in a case where the defendant's life was at stake. *Beck* , however, did not require a jury to consider a lesser charge in every case, but only where the consideration would be justified.

Exclusion from Juries of Those against Capital Punishment

In *Witherspoon v. Illinois* (391 U.S. 510, 1968), the Supreme Court held that a death sentence cannot be carried out if the jury that imposed or recommended such punishment was selected by excluding prospective jurors simply because they have qualms against the death penalty or reservations against its infliction. The Court found that the prosecution excluded those who opposed the death penalty without determining whether their beliefs would compel them to reject capital punishment out of hand. The defendant argued that this selective process had resulted in a jury that was not representative of the community.

The justices could not definitively conclude that the exclusion of jurors opposed to the death penalty results in an unrepresentative jury. However, they believed that a person who opposes the death penalty can still abide by his or her duty as a juror and consider the facts presented at trial before making his or her decision about the defendant's punishment. The Court observed, "If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all

who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die."

The Court specifically noted that its findings in *Witherspoon* did not prevent the infliction of the death sentence when the prospective jurors excluded had made it "unmistakably clear" that they would automatically vote against the death sentence without considering the evidence presented during the trial or that their attitudes toward capital punishment would keep them from making a fair decision about the defendant's guilt. Consequently, based on *Witherspoon* , it has become the practice in most states to exclude prospective jurors who indicate that they could not possibly in good conscience return a death penalty.

This ruling was reinforced in *Lockett v. Ohio* (438 U.S. 586, 1978). The defendant in Lockett contended, among several things, that the exclusion of four prospective jurors violated her Sixth Amendment right to trial by an impartial jury and Fourteenth Amendment rights under the principles established in *Witherspoon* . The Supreme Court upheld *Witherspoon* in this case because the prospective jurors told the prosecutor that they were so against the death penalty they could not be impartial about the case. They had also admitted that they would not take an oath saying they would consider the evidence before making a judgment of innocence or guilt.

A Special Selection Process Is Not Required When Selecting Jurors in Capital Cases

In *Wainwright v. Witt* (469 U.S. 412, 1985), a 7-2 Supreme Court decision eased the strict requirements of *Witherspoon* . Writing for the majority, Justice Rehnquist declared that the new capital punishment procedures left less discretion to jurors. Rehnquist indicated that potential jurors in capital cases should be excluded from jury duty in a manner similar to how they were excluded in noncapital cases. (In a noncapital case, the prospective jurors typically go through a selection process in which the prosecution and the defense question them about their attitudes toward the crime and the people and issues related to it to determine if they are too biased to be fair.)

No longer would a juror's "automatic" bias against imposing the death penalty have to be proved with "unmistakable clarity." A prosecutor could not be expected to ask all the questions necessary to determine if a juror would automatically rule against the death penalty or fail to convict a defendant if he or she were likely to face execution. Fundamentally, the question of exclusion from a jury should be determined by the interplay of the prosecutor and the defense lawyer and by the decision of the judge based on his or her initial observations of the prospective juror. Judges can see firsthand whether prospective jurors' beliefs would bias their ability to impose the death penalty.

In his dissent, Justice Brennan claimed that making it easier to eliminate those who opposed capital punishment from the jury created a jury not only more likely to impose the death sentence but also more likely to convict. He also attacked the majority interpretation that now treated exclusion from a capital case as being similar to exclusion from any other case.

It Does Not Matter If "Death-Qualified" Juries Are More Likely to Convict

In *Lockhart v. McCree* (476 U.S. 162, 1986), the Supreme Court firmly resolved the issue presented in *Witherspoon* regarding a fair trial with a death-qualified jury. (A death-qualified jury is another name for a jury that is willing to sentence a person to death after hearing the evidence of the case.)

Ardia McCree was convicted of murdering Evelyn Boughton while robbing her gift shop and service station in Camden, Arkansas, in February 1978. In accordance with Arkansas law, the trial judge removed eight prospective jurors because they indicated they could not, under any circumstances, vote for the imposition of the death sentence. The resulting jury then convicted McCree and, even though the state sought the death penalty, sentenced the defendant to life imprisonment without parole.

McCree appealed, claiming that the removal of the so-called *Witherspoon* excludables violated his right to a fair trial under the Sixth and Fourteenth Amendments. These amendments guaranteed that his innocence or guilt would be determined by an impartial jury selected from a representative cross-section of the community, which would include people strongly opposed to the death penalty. McCree cited several studies, revealing that death-qualified juries were more likely to convict. Both the federal district court and the federal court of appeals agreed with McCree, but in a 6-3 decision, the Supreme Court disagreed.

The high court majority did not accept the validity of the studies. Speaking for the majority, Justice Rehnquist argued that, even if the justices did accept the validity of these studies, "the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." Justice Rehnquist further observed:

> The exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an "appearance of unfairness."
>
> [Nevertheless], unlike blacks, women, and Mexican-Americans, "*Witherspoon* -excludables" are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "*Witherspoon* -excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death qualification" hardly can be said to create an "appearance of unfairness."

Writing in dissent, Justice Marshall observed that if the high court thought in *Witherspoon* that excluding those who opposed the death penalty meant that a convicted murderer would not get a fair hearing during the sentencing part of the trial, it would also logically mean that he or she would not get a fair hearing during the initial trial part. The Court minority generally accepted the studies showing "that 'death qualification' in fact produces juries somewhat more

'conviction-prone' than 'non-death-qualified' juries."

Does the Buck Stop with the Jury?

During the course of a robbery Bobby Caldwell shot and killed the owner of a Mississippi grocery store in October 1980. He was tried and found guilty. During the sentencing phase of the trial Caldwell's attorney pleaded for mercy, concluding his summation by emphasizing to the jury, "I implore you to think deeply about this matter...?. You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility."

Responding to the defense attorney's plea, the prosecutor played down the responsibility of the jury, stressing that a life sentence would be reviewed by a higher court: "[The defense] would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision...?. Your job is reviewable...?. They know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court."

The jury sentenced Caldwell to death, and the case was automatically appealed. The Mississippi Supreme Court upheld the conviction, but split 4-4 on the validity of the death sentence, thereby upholding the death sentence by an equally divided court. Caldwell appealed to the Supreme Court.

In a 5-3 decision (Justice Powell took no part in the decision), the Supreme Court, in *Caldwell v. Mississippi* (472 U.S. 320, 1985), vacated (annulled) the death sentence. Writing for the majority, Justice Marshall noted, "It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe, as the jury was in this case, that the responsibility for determining the appropriateness of the defendant's death rests elsewhere...?. [This Court] has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State."

Furthermore, the high court pointed out that the appeals court was not the place to make this life-or-death decision. Most appellate courts would presume that the sentencing was correctly done, which would leave the defendant at a distinct disadvantage. The jurors, expecting to be reversed by an appeals court, might choose to "send a message" of extreme disapproval of the defendant's acts and sentence him or her to death to show they will not tolerate such actions. Should the appeals court fail to reverse the decision, the defendant might be executed when the jury only intended to "send a message."

The three dissenting judges believed "the Court has overstated the seriousness of the prosecutor's comments" and that it was "highly unlikely that the jury's sense of responsibility was diminished."

Keeping Parole Information from the Jury

In 1990 Jonathan Dale Simmons beat an elderly woman to death in her home in Columbia, South Carolina. The week before his capital murder trial began, he pleaded guilty to first-degree burglary and two counts of criminal sexual conduct in connection with two prior assaults on elderly women. These guilty pleas resulted

in convictions for violent offenses, which made him ineligible for parole if convicted of any other violent crime.

At the capital murder trial, over the defense counsel's objection, the court did not allow the defense to ask prospective jurors if they understood the meaning of a "life" sentence as it applied to the defendant. Under South Carolina law a defendant who was deemed a future threat to society and receiving a life sentence was ineligible for parole. The prosecution also asked the judge not to mention parole.

During deliberation, the jurors asked the judge if the imposition of a life sentence carried with it the possibility of parole. The judge told the jury, "You are instructed not to consider parole or parole eligibility in reaching your verdict...?. The terms life imprisonment and death sentence are to be understood in their plan [*sic*] and ordinary meaning."

The jury convicted Simmons of murder, sentencing him to death. On appeal the South Carolina Supreme Court upheld the sentence. The case was brought before the U.S. Supreme Court. In *Simmons v. South Carolina* (512 U.S. 154, 1994), the high court overruled in the South Carolina Supreme Court in a 6-2 decision, concluding:

> Where a defendant's future dangerousness is at issue, and state law prohibits his release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. An individual cannot be executed on the basis of information which he had no opportunity to deny or explain. Petitioner's jury reasonably may have believed that he could be released on parole if he were not executed. To the extent that this misunderstanding pervaded its deliberations, it had the effect of creating a false choice between sentencing him to death and sentencing him to a limited period of incarceration. The trial court's refusal to apprise the jury of information so crucial to its determination, particularly when the State alluded to the defendant's future dangerousness in its argument, cannot be reconciled with this Court's well established precedents interpreting the Due Process Clause.

Judge Sentencing

Florida

Under Florida's capital trial system the jury decides the innocence or guilt of the accused. If the jury finds the defendant guilty, it recommends an advisory sentence of either life imprisonment or death. The trial judge considers mitigating and aggravating circumstances, weighs them against the jury recommendation, and then sentences the convicted murderer to either life or death. (Mitigating circumstances may lessen the responsibility for a crime, whereas aggravating circumstances may increase the responsibility for a crime.)

In 1975 a Florida jury convicted Joseph Spaziano of torturing and murdering two women. The jury recommended that Spaziano be sentenced to life imprisonment, but the trial judge, after considering the mitigating and aggravating circumstances, sentenced the defendant to death. In his appeal, Spaziano claimed the judge's overriding of the jury's recommendation of life imprisonment violated the Eighth Amendment's prohibition against a cruel and unusual punishment. The Supreme Court, in a 5-3 decision in *Spaziano v. Florida* (468 U.S. 447, 1984), did not agree.

Spaziano's lawyers claimed juries, not judges, were better equipped to make reliable capital-sentencing decisions and that a jury's decision of life imprisonment should not be superseded. They reasoned that the death penalty was unlike any other sentence and required that the jury have the ultimate word. This belief had been upheld, Spaziano claimed, because thirty out of thirty-seven states with capital punishment had the jury decide the prisoner's fate. Furthermore, the primary justification for the death penalty was retribution and an expression of community outrage. The jury served as the voice of the community and knew best whether a particular crime was so terrible that the community's response must be the death sentence.

The high court indicated that even though Spaziano's argument had some appeal, it contained two fundamental flaws. First, retribution played a role in all sentences, not just death sentences. Second, a jury was not the only source of community input: "The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined." That trial judges imposed sentences was a normal part of the judicial system. The Supreme Court continued, "In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional."

The Court added that just because thirty out of thirty-seven states let the jury make the sentencing decision did not mean states that let a judge decide were wrong. The Court pointed out that there is no one right way for a state to establish its method of capital sentencing.

Writing for the dissenters, Justice Stevens indicated, "Because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense...?. I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official [because a jury] is best able to 'express the conscience of the community on the ultimate question of life or death.'"

Justice Stevens also gave weight to the fact that thirty out of thirty-seven states had the jury make the decision, attesting to the "high level of consensus" that communities strongly believe life-or-death decisions should remain with the people—as represented by the jury—rather than relegated to a single government official.

Alabama

In March 1988 Louise Harris asked a coworker, Lorenzo McCarter, with whom she was having an affair, to find someone to kill her husband. McCarter paid two accomplices $100, with a promise of more money after they killed the husband. McCarter testified against Harris in exchange for the prosecutor's promise that he would not seek the death penalty against McCarter. McCarter testified that Harris had asked him to kill her husband so they could share in his death benefits. An Alabama jury convicted Harris of capital murder. At the sentencing hearing witnesses testified to her good background and strong character. She was rearing seven children, held three jobs simultaneously, and was active in her church.

Alabama law gives capital sentencing authority to the trial judge, but requires the judge to "consider" an advisory jury verdict. The jury voted 7-5 to give Harris life imprisonment without parole. The trial judge

then considered her sentence. He found one aggravating circumstance (the murder was committed for monetary gain), one statutory mitigating circumstance (Harris had no prior criminal record), and one nonstatutory mitigating circumstance (Harris was a hardworking, respected member of her church).

Noting that she had planned the crime, financed it, and stood to benefit from the murder, the judge felt that the aggravating circumstance outweighed the other mitigating circumstances and sentenced her to death. On appeal, the Alabama Supreme Court affirmed the conviction and sentence. It rejected Harris's arguments that the procedure was unconstitutional because Alabama state law did "not specify the weight the judge must give to the jury's recommendation and thus permits the arbitrary imposition of the death penalty."

On appeal, the U.S. Supreme Court upheld the Alabama court's decision (*Harris v. Alabama* [513 U.S. 504], 1995). Alabama's capital-sentencing process is similar to Florida's. Both require jury participation during sentencing but give the trial judge the ultimate sentencing authority. Nevertheless, even though the Florida statute requires that a trial judge must give "great weight" to the jury recommendation, the Alabama statute requires only that the judge "consider" the jury's recommendation.

As in the *Spaziano* case, the high court ruled that the Eighth Amendment does not require the state "to define the weight the sentencing judge must give to an advisory jury verdict." The Court stated, "Because the Constitution permits the trial judge, acting alone, to impose a capital sentence...it is not offended when a State further requires the judge to consider a jury recommendation and trusts the judge to give it the proper weight."

Jury Sentencing

In 2002 the Supreme Court decided a case concerning death sentencing in Arizona involving the Sixth Amendment right to an impartial jury (as opposed to the Eighth Amendment, which bars a cruel and unusual punishment). Timothy Stuart Ring was convicted of murder in the armed robbery of an armored-car driver in 1994. According to Arizona law, Ring's offense was punishable by life imprisonment or death. He would only be eligible for the death penalty if the trial judge held a separate hearing and found that aggravating factors warranted the death penalty.

One of Ring's accomplices, who negotiated a plea bargain in return for a second-degree murder charge, testified against him at a separate sentencing hearing without a jury present. The same judge who had presided at Ring's trial concluded that Ring committed the murder and that the crime was committed "in an especially heinous, cruel or depraved manner." Weighing the two aggravating circumstances against the mitigating evidence of Ring's minimal criminal record, the judge sentenced Ring to death.

Ring appealed to the Arizona Supreme Court, claiming that the state's capital sentencing law violated his Sixth and Fourteenth Amendment rights because it allowed a judge, rather than a jury, to make the factual findings that made him eligible for a death sentence. The court put aside Ring's argument against the Arizona's judge-sentencing system in light of the U.S. Supreme Court's ruling in *Walton v. Arizona* (497 U.S. 639, 1990). The Court held in *Walton* that Arizona's sentencing procedure was constitutional because "the additional facts found by the judge qualified as sentencing considerations, not as 'elements of the offense of capital murder.'" Next, the Arizona Supreme

Court threw out the trial judge's finding of the heinous nature of the crime but concluded that Ring's minimal criminal record was not enough to outweigh the aggravating evidence of "planned, ruthless robbery and killing." The court affirmed the death sentence.

Ring took his case to the U.S. Supreme Court. On June 24, 2002, by a 7-2 vote, the Court ruled in *Ring v. Arizona* (536 U.S. 584) that only juries and not judges can determine the presence of aggravating circumstances that warrant the death sentence. This case differs from the *Harris* and *Spaziano* cases in which the Court ruled simply that a judge could sentence a person to death after hearing a jury's recommendation. In the *Ring* opinion the Court included a discussion of *Apprendi v. New Jersey* (530 U.S. 466, 2000), in which it held that "the Sixth Amendment does not permit a defendant to be 'exposed ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Apprendi* involved a defendant in a noncapital case who received a prison term beyond the maximum sentence. This occurred because New Jersey law allowed sentencing judges to increase the penalty if they found that a crime was racially motivated. In *Apprendi*, the Court held that any fact other than a prior conviction that increases the punishment for a crime beyond the maximum allowed by law must be found by a jury beyond a reasonable doubt. The Court found *Walton* and *Apprendi* irreconcilable. The Court overruled *Walton* "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." Justice Ruth Bader Ginsburg (1933-), who delivered the opinion of the Court, wrote, "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years [referring to *Apprendi*], but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both."

However, Justice Antonin Scalia (1936-), joined by Justice Clarence Thomas (1948-), pointed out in a separate concurring opinion that under *Ring*, states that let judges impose the death sentence may continue to do so by requiring the finding of aggravating factors necessary to the imposition of the death penalty during the trial phase.

Justice Sandra Day O'Connor (1930-), in her dissenting opinion, joined by Chief Justice Rehnquist, claimed that just as the *Apprendi* decision has overburdened the appeals courts, the *Ring* decision will cause more federal appeals. O'Connor observed that *Ring v. Arizona* also invalidates the capital sentencing procedure of four other states. These included Idaho and Montana, where a judge had the sole sentencing authority, as well as Colorado and Nebraska, where a three-judge panel made the sentencing decisions. The Court ruling also potentially affected Alabama, Delaware, Florida, and Indiana, where the jury rendered an advisory verdict, but the judge had the ultimate sentencing authority.

Impact of the *Ring* Decision

As a result of the *Ring* decision, Arizona, Colorado, Delaware, Idaho, Nebraska, Indiana, and Montana passed legislation providing for jury sentencing. As of 2007, Florida and Alabama still allowed judges to override jury sentencing recommendations.

Some legal scholars suggest that states where judges previously made the life-or-death decisions would see fewer death sentences under the jury system. They note that judges are elected public officials who may be driven by political ambitions to issue death sentences and suggest that urban juries would be less likely to impose death sentences.

However, in "Jurors Dish out Death in Arizona; Sentencing Rate up since Judges Lost Say" (*Arizona Republic*, November 13, 2003), Jim Walsh calculates that after the state sentencing laws were revised per *Ring*, juries in that state handed down death sentences at a higher rate than judges had done under the previous system. According to Walsh, within a one-year period (November 2002 to November 2003), jurors in Maricopa County sentenced seven out of eight (87.5%) defendants to death. Statewide, jurors imposed a total of ten death sentences out of fifteen cases heard (66.7%). In comparison, between 1995 and 1999 Maricopa County judges imposed death sentences in eleven out of seventy-five (14.7%) cases. Statewide, within that four-year period, judges sentenced 29 out of 143 (20.3%) defendants to death.

The *Ring* Decision Does Not Retroactively Apply to Those Already Sentenced to Murder

The Arizona death row inmate Warren Summerlin was convicted of brutally crushing the skull of bill collector Brenna Bailey and then sexually assaulting her. Summerlin was convicted by a jury, and an Arizona trial judge sentenced him to death in 1982. After the *Ring* decision was handed down, the U.S. Court of Appeals for the Ninth Circuit ruled 8-3 in *Summerlin v. Stewart* (309 F.3d 1193 [9th Cir., 2003]) that in light of *Ring v. Arizona*, Summerlin's death sentence should be vacated. The appellate court held that the Supreme Court's ruling should apply retroactively, even to those inmates who have exhausted their appeals. The prosecution brought the case to the U.S. Supreme Court.

In *Schriro v. Summerlin* (No. 03-526, 2004), the Supreme Court reversed the appellate court's decision in a 5-4 vote. The nation's highest court concluded that the *Ring* ruling only changed the procedures involved in a sentencing trial for capital punishment cases and did not alter those fundamental legal guidelines judges and juries follow when sentencing a person to death. As such, the *Ring* ruling does not call into question the accuracy of past convictions and should not be retroactive. Speaking for the majority, Justice Scalia wrote, "[We] give retroactive effect to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding. That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.'"

Double Jeopardy

In 1991 David Sattazahn was convicted for the 1987 murder of a restaurant manager in Berks County, Pennsylvania. Sattazahn and an accomplice killed the manager in the process of robbing him of the day's receipts. The state sought the death sentence and included an aggravating circumstance—the commission of murder while perpetrating a felony. During the sentencing phase the jury could not reach a verdict as to life or death. The trial judge considered the jury as hung and imposed an automatic sentence of life imprisonment

as mandated by state law.

On appeal to the Pennsylvania Superior Court, Sattazahn was granted a new trial. The court held that the trial judge had erred in jury instructions relating to his offenses and reversed his murder conviction. During the second trial the state again sought the death penalty, this time adding a second aggravating factor: the defendant's history of felony convictions involving using or threatening violence to the victim. The jury convicted Sattazahn of first-degree murder and sentenced him to death.

Next, the Pennsylvania Supreme Court heard Sattazahn's case. The death row inmate claimed, among other things, that the Pennsylvania Constitution prohibits the imposition of the death penalty in his case because it guarantees protection from double jeopardy. The Double Jeopardy Clause of the Fifth Amendment states that "no person shall ... be subject for the same offense to be twice put in jeopardy of life or limb." In other words, no person can be tried or punished twice for the same crime.

Relying on its ruling in *Commonwealth v. Martorano* (634 A.2d 1063,1071 [Pa. 1993]), the Pennsylvania Supreme Court affirmed both Sattazahn's conviction and death sentence. In *Martorano* , the Court noted that the jury, as in Sattazahn's first trial, was deadlocked. The hung jury did not "acquit" the defendant of the death sentence. Therefore, there was no double jeopardy prohibition against the death penalty during the second trial.

In *Sattazahn v. Pennsylvania* (537 U.S. 101, 2003), the U.S. Supreme Court, by a 5-4 vote, agreed with the ruling of the Pennsylvania Supreme Court. Justice Scalia, writing the majority opinion, concluded that double jeopardy did not exist in this case. According to the Court, "The touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.' Petitioner here cannot establish that the jury or the court 'acquitted' him during his first capital-sentencing proceeding. As to the jury: The verdict form returned by the foreman stated that the jury deadlocked 9-to-3 on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance. That result—or more appropriately, that non-result—cannot fairly be called an acquittal."

The Court added that the imposition of a life sentence by the judge did not "acquit" the defendant of the death penalty either because the judge was just following the state law. "A default judgment does not trigger a double jeopardy bar to the death penalty upon retrial."

Justice Ginsburg, writing for the dissent, was joined by Justices Stevens, David H. Souter (1939-), and Stephen G. Breyer (1938-). The dissenters argued that jeopardy terminated after the judge imposed a final judgment of life imprisonment when the jury was deadlocked. Therefore, he was "acquitted" of the death penalty the first time, which means that the state could not seek the death penalty the second time. Justice Ginsburg also pointed out that "the Court's holding confronts defendants with a perilous choice...?. Under the Court's decision, if a defendant sentenced to life after a jury deadlock chooses to appeal her underlying conviction, she faces the possibility of death if she is successful on appeal but convicted on retrial. If, on the other hand, the defendant loses her appeal, or chooses to forgo an appeal, the final judgment for life stands. In other words, a defendant in Sattazahn's position must relinquish either her right to file a potentially meritorious appeal, or her state-granted entitlement to avoid the death penalty."

Sentencing Procedures

Comparative Proportionality Review: Comparing Similar Crimes and Sentences

On July 5, 1978, in Mira Mesa, California, Robert Harris and his brother decided to steal a car they would need for a getaway in a planned bank robbery. Harris approached two teenage boys eating hamburgers in a car. He forced them at gunpoint to drive to a nearby wooded area. The teenagers offered to delay telling the police of the car robbery and even to give the authorities misleading descriptions of the two robbers. When one of the boys appeared to be fleeing, Harris shot both of them. Harris and his brother later committed the robbery, were soon caught, and confessed to the robbery and murders.

Harris was found guilty. In California, a convicted murderer could be sentenced to death or life imprisonment without parole only if "special circumstances" existed and the murder had been "willful, deliberate, premeditated, and committed during the commission of kidnapping and robbery." This had to be proven during a separate sentencing hearing.

The state showed that Harris was convicted of manslaughter in 1975; he was found in possession of a makeshift knife and garrote (an instrument used for strangulation) while in prison; he and other inmates sodomized another inmate; and he threatened that inmate's life. Harris testified that he had an unhappy childhood, had little education, and his father had sexually molested his sisters. The jury sentenced Harris to death, and the judge concurred.

Harris claimed the U.S. Constitution, as interpreted in previous capital punishment rulings, required the state of California to give his case comparative proportionality review to determine if his death sentence was not out of line with that of others convicted of similar crimes. In comparative proportionality review, a court considers the seriousness of the offense, the severity of the penalty, the sentences imposed for other crimes, and the sentencing in other jurisdictions for the same crime. Courts have occasionally struck down punishments inherently disproportionate and, therefore, cruel and unusual. Georgia, by law, and Florida, by practice, had incorporated such reviews in their procedures. Other states, such as Texas and California, had not.

When the case reached the U.S. Ninth Circuit Court of Appeals, the court agreed with Harris and ordered California to establish proportionality or lift the death sentence. In *Pulley v. Harris* (465 U.S. 37, 1984), the U.S. Supreme Court, in a 7-2 decision, did not agree. The Court noted that the California procedure contained enough safeguards to guarantee a defendant a fair trial and those convicted, a fair sentence. The high court added, "That some [state statutes] providing proportionality review are constitutional does not mean that such review is indispensable...?. To endorse the statute as a whole is not to say that anything different is unacceptable...?. Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement."

Justice Brennan, joined by Justice Marshall, dissented. He noted that the Supreme Court had thrown out the existing death penalty procedures during the 1970s because they were deemed arbitrary and capricious. He believed they still were, but the introduction of proportionality might "eliminate some, if only a small part, of the irrationality that currently surrounds the imposition of the death penalty."

Due Process and Advance Notice of Imposing the Death Penalty

Robert Bravence and Cheryl Bravence were beaten to death at their campsite near Santiam Creek, Idaho, in 1983. Two brothers, Bryan Lankford and Mark Lankford, were charged with two counts of first-degree murder. At the arraignment (a summoning before a court to hear and answer charges), the trial judge advised Bryan Lankford that, if convicted of either of the two charges (he was charged with both murders), the maximum punishment he might receive was either life imprisonment or death.

After the arraignment Bryan Lankford's attorney made a deal with the prosecutor. Bryan Lankford entered a plea bargain in which he agreed to take two lie-detector tests in exchange for a lesser sentence. Even though the results were somewhat unclear, they convinced the prosecutor that Lankford's older brother, Mark, was primarily responsible for the crimes and was the actual killer of both victims. Bryan Lankford's attorney and the prosecutor agreed on an indeterminate sentence with a ten-year minimum in exchange for a guilty plea, subject to commitment from the trial judge that he would impose that sentence. The judge refused to make such a commitment, and the case went to trial.

The judge also refused to instruct the jury that a specific intent to kill was required to support a conviction of first-degree murder. The jury found Bryan Lankford guilty on both counts. The sentencing hearing was postponed until after Mark Lankford's trial. He was also charged with both murders.

Before the sentencing trial, at Bryan Lankford's request, the trial judge ordered the prosecutor to notify the court and Lankford whether it would seek the death penalty and, if so, to file a statement of the aggravating circumstance on which the death penalty would be based. The prosecutor notified the judge that the state would not recommend the death penalty. Several proceedings followed, including Lankford's request for a new attorney, a motion for a new trial, and a motion for continuance of the sentencing hearing. At none of the proceedings was there any mention that Lankford might receive the death penalty.

At the sentencing hearing the prosecutor recommended a life sentence, with a minimum ranging between ten and twenty years. The trial judge indicated that he considered Lankford's testimony unbelievable and that the seriousness of the crime warranted more severe punishment than recommended by the state. He sentenced Lankford to death.

Lankford appealed, asserting that the trial judge violated the U.S. Constitution by failing to give notice that he intended to impose the death penalty in spite of the state's earlier notice that it would not seek the death penalty. The judge maintained that the Idaho Code provided Lankford with sufficient notice. The judge added that the fact the prosecutor said he would not seek the death penalty had "no bearing on the adequacy of notice to petitioner that the death penalty might be imposed." The Idaho Supreme Court agreed with the judge's decision.

In *Lankford v. Idaho* (500 U.S. 110, 1991), the U.S. Supreme Court reversed the state supreme court ruling and remanded the case for a new trial. Writing for the majority, Justice Stevens stated that the due process clause of the Fourteenth Amendment was violated. Stevens noted, "If defense counsel had been notified that the trial judge was contemplating a death sentence based on five specific aggravating circumstances, presumably she would have advanced arguments that addressed these circumstances; however, she did not make these arguments, because they were

entirely inappropriate in a discussion about the length of petitioner's possible incarceration."

Stevens further indicated that the trial judge's silence, in effect, hid from Lankford and his attorney, as well as from the prosecutor, the principal issues to be decided.

In a dissenting opinion, Justice Scalia wrote that Lankford's due process rights were not violated because he knew that he had been convicted of first-degree murder, and the Idaho Code clearly states that "every person guilty of murder of the first degree shall be punished by death or by imprisonment for life." At the arraignment the trial judge told Lankford that he could receive either punishment. Scalia further noted that, in Idaho, the death penalty statute places full responsibility for determining the sentence on the judge.

Gale Document Number: EJ3011840102
