Dark Year on Death Row: Guiding Sentencer Discretion After *Zant*, *Barclay*, and *Harris*

Oh, I am, Father, I say, most heartily sorrowful. You are paying a heavy penalty for it, he says. Oh, I am, Father, I say, I would be hard put to think of a worse one.

THOMAS FLANAGAN
The Year of the French

INTRODUCTION

In *Furman v. Georgia*,[1] the United States Supreme Court held that if a jury imposed a death sentence using a statute that failed to guide and channel the jury's discretion, that sentence violated the eighth[2] and fourteenth[3] amendments' prohibition of cruel and unusual punishment.[4]

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[1] 408 U.S. 238 (1972) (per curiam).

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[3] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

The eighth amendment was incorporated into the fourteenth amendment and made applicable to the states in Robinson v. California, 370 U.S. 660 (1962). Interestingly, the second major case applying the eighth amendment to the states was *Furman* itself. 408 U.S. at 240.

[4] As a per curiam judgment, there was no single rationale to the *Furman* opinion. Four years later, in Gregg v. Georgia, 428 U.S. 153 (1978), the Court held *Furman*'s concurrences to have established that "the decision to impose [death] had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Id.* at 199. Though the *Furman* Court mentioned the fourteenth amendment, it did not pursue an extended due process analysis. In its review of death sentences the Court has drawn almost exclusively from its eighth amendment jurisprudence. *See* Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 8-11 (1980). However, *Furman*'s best known concurrence mentioned a "procedural content"

Most state legislatures responded with statutes employing "guided discretion" schemes. These schemes consisted of bifurcated guilt and penalty phases at the trial and two safeguards to reduce and uncover error: statutory aggravating circumstances (circumstance safeguards) and judicial review (review safeguards).[5]

Guided discretion statutes which contain circumstance safeguards require the trial court to instruct the jury that it cannot impose death unless it finds one of several "aggravating circumstances" or "aggravating factors." These are phrases or labels such as "escape from confinement" and "outrageously and wantonly vile" that aggravate in favor of the death sentence. The phrases are read to the sentencer in the instructions; the sentencer can impose death if it finds the phrases applicable to the evidence of the defendant's crime. The sentencer may also consider as "mitigating circumstances" or "mitigating factors" aspects of the defendant's character or offense that might militate against the death sentence.[6] If death is imposed in a state with review safeguards, the supreme court of the state reviews the sentence to discern whether it was imposed arbitrarily (arbitrariness review) or whether it was proportional to the defendant's crime (proportionality review). Many states with judicial review employ both types.[7]

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in the eighth amendment, noting that wanton and freakish imposition of the death penalty was intolerable under the eighth amendment. 408 U.S. at 309-10 (Stewart, J., concurring). In Woodson v. North Carolina, 428 U.S. 280 (1976), the Court held that the eighth amendment's "fundamental respect for human dignity" calls for objective standards to guide and render reviewable the process for imposing the death penalty. *Id.* at 304. The Court expanded upon the procedural aspect of the eighth amendment's human dignity component in Jurek v. Texas, 428 U.S. 262 (1976). The *Jurek* plurality held that the eighth amendment required an individualized sentence, and construed a state statute to allow the defendant to offer mitigating circumstances to his jury. *Id.* at 271. The message of this developing eighth amendment due process doctrine is clear: given the special nature of the punishment of death, it must be imposed with a special degree of procedural due process.

[5] *See, e.g.*, FLA. STAT. ANN. § 921.141 (West 1973 & Supp. 1983) (circumstance and review safeguards); GA. CODE ANN. §§ 26-3102, 27-2503 to -2514, -2528, -2534.1, -2537 (1983 & Supp. 1983) (circumstance and review safeguards); TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981 & Supp. 1983) (circumstance and review safeguards).

[6] As examples of mitigating circumstances, the Court has mentioned youth, absence of any prior criminal conviction, and the influence of drugs, alcohol, or extreme emotional disturbance. Roberts v. Louisiana, 431 U.S. 633, 637 (1977).

[7] *See, e.g.*, ALA. CODE § 13A-5-53(b) (1982) (arbitrariness and proportionality review); CAL. PENAL CODE §§ 190.1 to .6 (West Supp. 1984) (arbitrariness and proportionality review); CONN. GEN. STAT. ANN. § 53a-46b(b) (West Supp. 1983) (arbitrariness and proportionality review).

In *Gregg v. Georgia*,[8] the Supreme Court approved guided discretion schemes, but did not mention whether either of their safeguards, circumstance or review, were constitutionally indispensable. Because of the Court's silence on this matter, considerable controversy arose in lower courts[9] and among commentators.[10] Circumstance safeguards have proven the source of particular confusion. Most questions center on whether sentencers may deviate from the scheme and consider nonstatutory factors, and on the problems that arise when an aggravating circumstance proves to be constitutionally infirm.[11] In addition, no Supreme Court case has made clear just what kinds of misapplications of circumstance safeguards would be deemed errors of constitutional significance.

In its last two Terms, the United States Supreme Court heard *Zant v. Stephens*,[12] *Barclay v. Florida*,[13] and *Pulley v. Harris*,[14] three death penalty cases that gave it the opportunity to clear the confusion surrounding circumstance and review safeguards. The Court held that rigid directives for the use of circumstance safeguards were not constitutionally necessary in the advanced stages of deliberations.[15] It also held that the mechanics of most guided discretion schemes were such

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[8] 428 U.S. 153 (1976) (sentencing scheme containing bifurcated trial, circumstance and review safeguards not unconstitutional).

[9] *Compare* Henry v. Wainwright, 661 F.2d 56, 71 (5th Cir. 1981) (constitution precludes statutes which allow sentencers to consider nonstatutory aggravating circumstances in imposing death), *vacated and remanded on other grounds*, 457 U.S. 1114 (1982) *with* Harris v. Pulley, 692 F.2d 1189, 1194 (9th Cir. 1982) (constitution permits consideration of nonstatutory aggravating circumstances so long as sentence not based entirely upon them), *rev'd*, 104 S. Ct. 871 (1984); *compare* Brooks v. Estelle, 697 F.2d 586, 588 (5th Cir. 1982) (proportionality review not a constitutional requirement) *with Harris*, 692 F.2d at 1196 (proportionality review of each death sentence is constitutionally required).

[10] *See, e.g.*, Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L. REV. 97, 159 (1979) (judicial review is a deficient safeguard as reviewing courts have not derived general rules from their comparative analyses); Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIM. 800, 840 (1983) (evolving standards of decency and equal protection concerns call for rigorous judicial review of death sentences).

[11] Henry v. Wainwright, 661 F.2d 56, 71 (5th Cir. 1981) (statutes permitting sentencer consideration of nonstatutory aggravating circumstances unconstitutional); State v. Cherry, 298 N.C. 86, 113, 257 S.E.2d 551, 567-68 (1979) (sentence based in part on invalid aggravating circumstance must be set aside), *cert. denied*, 446 U.S. 941 (1980).

[12] 103 S. Ct. 2733 (1983).

[13] 103 S. Ct. 3418 (1983) (plurality opinion).

[14] 104 S. Ct. 871 (1984).

[15] *Barclay*, 103 S. Ct. at 3424-28; *Zant*, 103 S. Ct. at 2749-50.

that if one statutory aggravating circumstance were found constitutionally infirm, the validity of a sentence based on the entire scheme was unaffected and need not be set aside.[16] The Court also ruled that proportionality review was not constitutionally necessary in every case.[17] By its silence on other types of judicial review, the Court may have implied that such a safeguard was not a necessary component of any death sentencing statute.

This Comment examines the controversies surrounding the constitutional requirements of circumstance and review safeguards that have surfaced in state and federal courts. It then documents and appraises the Supreme Court's attempts to resolve these controversies in *Zant*, *Barclay*, and *Harris*. This Comment concludes that the three decisions indicate a disturbing retreat from the Court's previous policy of strict sentencer guidance and appellate scrutiny for death sentencing statutes.

I. The Components of a Constitutional Death Sentencing Statute

A. Guided Discretion Schemes

In *Furman v. Georgia*,[18] the Supreme Court established that juries may not deliver death sentences without guided discretion.[19] No single

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[16] *Zant*, 103 S. Ct. at 2744-50.

[17] *Harris*, 104 S. Ct. at 876.

[18] 408 U.S. 238 (1972). For an account of the historical and judicial background of the *Furman* decision, see M. Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (1973).

[19] In addition to the per curiam opinion, nine different opinions were filed, five concurring and four dissenting. Justice Stewart gave perhaps the best known formulation of *Furman*'s rationale, fixing on the "wanton" and "freakish" nature of an overwhelming punishment that is imposed arbitrarily. The imposition of the death penalty, he said, is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 309 (Stewart, J., concurring). Justice White, on the other hand, focused on the death penalty's failure as a social tool. Stating that all punishments must serve both a retributive and deterrent purpose, he pointed out that a punishment imposed as infrequently as the death penalty serves neither. *Id.* at 312 (White, J., concurring). Justice Douglas noted that the overwhelming majority of executed defendants were nonwhite and poor. He thus saw a discriminatory effect to death sentencing which violated an implicit equal protection component contained in the cruel and unusual punishments clause. *Id.* at 256-57 (Douglas, J., concurring). For commentary on the high concentration of poor inmates on death row, see Greenberg, *Capital Punishment as a System*, 91 Yale L.J. 908, 910-11 (1982) (virtually all capital defendants are indigent, many of them sentenced when free legal services were rare and automatic appeal rights did not exist in their states); *cf.* Ehrmann, *The Human Side of Capital Punishment*, in A. Bedau, The Death Penalty in America 492, 510-11 (rev. ed.

rationale was given, but the message was clear: execution is cruel and unusual unless imposed so as to avoid the risk of arbitrariness arising from jurors' discriminatory or capricious impulses.

In 1976 the Court gave the states an idea of what it expected of sentencing statutes by approving those challenged in *Gregg v. Georgia*,[20] *Proffitt v. Florida*,[21] and *Jurek v. Texas*.[22] The *Gregg* scheme was the most representative of state sentencing statutes,[23] and its complex structure merits some analysis. The scheme had three elements: a bifurcated trial with one jury sitting for both guilt and sentencing phases,[24] instructions mandating consideration of aggravating and miti-

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1967) (vast majority of death sentenced defendants are poor).

[20] 428 U.S. 153 (1976). The *Gregg* defendant was found guilty of two counts of armed robbery and two counts of first degree murder in the course of a felony. Two men had picked him up hitchhiking. During a roadside stop, he waited in their car until they returned, then shot and robbed them and stole their car. *Id.* at 158-60.

[21] 428 U.S. 242 (1976). The *Proffitt* defendant, like the defendant in *Gregg*, was convicted of first degree murder in the course of a felony. While burglarizing a home, he stabbed one of the sleeping occupants to death and brutally beat another. *Id.* at 245-46. He was convicted and sentenced under Florida's death penalty statute, FLA. STAT. ANN. § 921.141 (West Supp. 1976-77) (current version at FLA. STAT. ANN. § 921.141 (West 1973 & Supp. 1983)), which includes a bifurcated trial and aggravating and mitigating circumstances similar to Georgia's statute, GA. CODE ANN. § 27-2534.1(b) (Supp. 1975) (current version at GA. CODE ANN. § 27-2534.1(b) (1983 & Supp. 1983)). The statute provided for automatic review by the Supreme Court of Florida, but this provision differed from Georgia's in that it did not require the court to conduct any specific form of judicial review.

[22] 428 U.S. 262 (1976). The *Jurek* defendant was convicted of kidnapping a 10 year old girl, choking her, and throwing her unconscious body into a river. He was convicted of first degree murder. *Id.* at 266-67. The defendant was then sentenced under the Texas statute, TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon Supp. 1975-76) (current version at TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981 & Supp. 1983)), which requires that the jury affirmatively answer three questions before it can condemn the defendant:

> (1) whether the conduct of the defendant . . . was committed deliberately and with the reasonable expectation that . . . death . . . would result;
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> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
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> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. § 37.071(b) (quoted in *Jurek*, 428 U.S. at 269.

[23] This general scheme is used by 21 of the 35 death penalty states. *See* Gillers, *supra* note 4, at 102-19 (tables listing sentencing schemes of each state).

[24] *Gregg*, 428 U.S. at 163-64.

gating circumstances,[25] and judicial review by the state supreme court to determine if the jury had returned an arbitrary or disproportionate sentence.[26]

As later explained by the Georgia Supreme Court in response to the *Zant v. Stephens*[27] Court's request for information, the sentencing process worked as follows. Once a defendant was found guilty of capital murder, the sentencer could consider her eligible for the death penalty only if it found that her offense could be described by one of the aggravating circumstances.[28] This phase of sentencing is the defining or qual-

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[25] *Id.* at 164-66 (citing GA. CODE ANN. § 27-2534.1(b) (Supp. 1975)).

[26] *Id.* at 166-67 (citing GA. CODE ANN. §§ 27-2534.1, 27-2537 (Supp. 1975)).

[27] 103 S. Ct. 2733, 2739-40 (1983).

[28] The Georgia statute as quoted in *Gregg*, 428 U.S. at 165 n.9, listed the following aggravating circumstances:

> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
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> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
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> (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
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> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
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> (5) The murder of a judicial officer, former judicial officer, district attorney or soliciter or former district attorney or soliciter during or because of the exercise of his official duty.
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> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
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> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
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> (8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
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> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
>
> (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confine-

ifying stage in which statutory circumstances are used to determine whether the death penalty may be imposed on the defendant.[29] The jury then enters a selection stage in which it is free to consider all evidence, whether or not it fits one of the statutory labels.[30] This includes, of course, any mitigating circumstances which would lead to mercy.[31]

1. Loosely and Strictly Structured Guided Discretion Schemes

By 1978, two years after *Gregg*, two principal types of guided discretion schemes existed: loosely structured and strictly structured. The schemes can be distinguished by what the sentencer is instructed to do in the selection stage of deliberations. The *Gregg*-type statute just described is loosely structured because once the jury has identified an aggravating circumstance and thus passed through the defining stage by death-qualifying the individual, it is given a fair amount of freedom in weighing and balancing aggravating and mitigating circumstances.[32]

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ment, of himself or another.

GA. CODE ANN. § 27-2534.1(b) (1975) (current version at GA. CODE ANN. § 27-2534.1(b) (1983)).

[29] The terms "defining," "qualifying," and "selection," which the Court used in *Zant*, are taken from Gillers, *supra* note 4. To illustrate this process, imagine the sentencer is read the 10 circumstances of the Georgia death sentencing statute. The jury finds that the statutory label "escape from confinement" applies to the defendant's activity, i.e., that she did in fact escape from jail immediately prior to or during the commission of the murder. In so finding, the jury has performed the defining stage of death sentencing. The sentencer has used one of the legislative labels to bring the defendant into the class of persons who *may* be sentenced to death. *See Zant*, 103 S. Ct. at 2740 (quoting the Georgia Supreme Court's response to certified question).

[30] In the selection stage, the jurors decide whether the defendant, an individual who *may* be death sentenced, should in fact be put to death. In making this decision, the jurors may consider not only the statutory circumstances read to them, but all evidence heard during the trial. *Zant*, 103 S. Ct. at 2740.

[31] Indeed, mercy may be granted even in the absence of mitigation. If the jury grants mercy, it is not required to give its reasons for doing so. But if death is the sentence, the aggravating circumstances that death-qualified the defendant must be written out and read to the court. *Zant*, 103 S. Ct. at 2737 (quoting trial court's jury instructions).

[32] The Georgia scheme and those like it are loosely structured in the sense that they do not contain specific balancing instructions for the use of circumstance safeguards during the selection stage of deliberations. For example, instructions might mention that the sentencer may impose death if aggravating circumstances outweigh mitigating circumstances. Death is not required simply because the former outnumber the latter, as mitigating circumstances may be given independent weight. *See infra* text accompanying notes 34-42. Additionally, in loosely structured schemes no particular number of aggravating circumstances necessitates death. Likewise, the jury is not required to spare the defendant if a particular mitigating circumstance or number of such circumstances is found.

The second type of scheme may be called "strictly structured." It is strictly structured because the scheme gives specific instructions for the use of aggravating and mitigating circumstances during the selection stage of deliberations. Unlike with loosely structured schemes, there is no question that a jury using a strictly structured scheme must specifically consider and weigh all statutory aggravating circumstances during the selection stage.[33] Some strictly structured statutes allow the sentencer to independently weigh each factor but compel the sentencer to impose death if aggravating circumstances outweigh mitigating circumstances.[34] Many of these schemes go farther and call for a specific sen-

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Since the *Gregg* Court did not directly address the issue, it was unclear whether the aggravating circumstances in loosely structured statutes could be ignored entirely by the sentencer in the selection stage. Were such circumstances to guide the sentencer both at the qualifying and the selection stages? This remained unclear until the United States Supreme Court certified this very question to the Georgia Supreme Court in the spring of 1982. *See* Zant v. Stephens, 456 U.S. 410, 416-17 (1982). Interpreting the Georgia court's answer to this question, the United States Supreme Court noted that aggravating circumstances serve only to enable the sentencer to select the defendant, from among the class of all capital murderers, as an individual who is eligible for the death penalty. *Zant*, 103 S. Ct. at 2741. According to the *Zant* Court, aggravating circumstances do not play any further role in guiding the sentencer's discretion in the selection stage, where the actual decision to impose death is made. *Id.* It is highly dubious that the United States Supreme Court in *Gregg* approved the Georgia statute based on such an understanding of its mechanics, as this minimal amount of guidance would seem to fall short of that mandated by *Furman*. *See* discussion *infra* notes 103-15, 127-44 and accompanying text.

For representative examples of loosely structured schemes, see FLA. STAT. ANN. § 921.141 (West 1973 & Supp. 1983); KY. REV. STAT. ANN. §§ 582.025-.075 (Bobbs-Merrill Supp. 1982); LA. CODE CRIM. PRO. ANN. art. 905 - 905.9 (West Supp. 1984); MO. ANN. STAT. § 565.006 -.016 (Vernon 1979 & Supp. 1984).

[33] This specific consideration and weighing does not allow the sentencer to discard an aggravating circumstance altogether after it has been used to death-qualify the defendant. The jury is required to hold each aggravating factor before the mind and duly consider it. The California scheme, CAL. PENAL CODE §§ 190.1 to .6 (West Supp. 1984), operates in this manner. Telephone interview with Steven Parns, California State Public Defender's Office, Sacramento (Sept. 15, 1983). Further references to both types of schemes are based on this interview and on Gillers, *supra* note 4. For examples of strictly structured schemes, see ARIZ. REV. STAT. §§ 13-702, -703 (Supp. 1983-84); COLO. REV. STAT. § 16-11-103 (1973 & Supp. 1983); MD. ANN. CODE art. 27 § 413 (1982 & Supp. 1983); MONT. CODE ANN. §§ 46-18-301 to -404 (Supp. 1981).

[34] As in loosely structured schemes, this does not require use of a strict quantitative formula. The Florida Supreme Court described the process as follows:

> [T]he procedure to be followed by the trial judges and juries is not a mere counting process of *X* number of aggravating circumstances and *Y* number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satis-

tence if a particular combination of aggravating and mitigating circumstances is present.[35]

B. Lockett *and the "New Discretion": The Right to Unlimited Mitigation and Individualization of Sentence*

1. *Lockett v. Ohio*

The degree of discretion left to the death sentencer was arguably broadened in *Lockett v. Ohio*,[36] decided by the Supreme Court in 1978. *Lockett* struck down the Ohio death penalty statute because it limited the amount of mitigating factors the defendant could offer at sentencing, requiring that admissible evidence had to relate to one of three general categories.[37] Chief Justice Burger held:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a

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fied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), *quashed by* State v. Lowery, 419 So. 2d 621 (Fla. 1982). The sentencer may give a great deal of weight to one mitigating factor and allow it to outweigh two aggravating factors, resulting in mercy. But this concept of independent weighing does not allow the strictly structured scheme sentencer to *ignore* aggravating circumstances altogether during the selection stage. *See* CAL. PENAL CODE §§ 190.1 to .6 (West Supp. 1984).

[35] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1983-84) (death required if any aggravating and no mitigating circumstances present); COLO. REV. STAT. § 16-11-103 (1973 & Supp. 1983) (mercy required if any mitigating circumstances found); CONN. GEN. STAT. ANN. 53a-45, -46a (West 1958 & Supp. 1983-84) (mercy required if certain mitigating circumstances found).

[36] 438 U.S. 586 (1978).

[37] Once a verdict of murder with statutory aggravating circumstances had been returned, the statute called for the trial judge, the sentencer under the Ohio statute, to impose death unless she found by a preponderance of the evidence that (i) the victim induced or facilitated the offense; (ii) it was unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation; or (iii) the offense was primarily the product of the offender's psychosis or mental deficiency. *Id.* at 593-94 (citing OHIO REV. CODE ANN. §§ 2929.03-2929.04(B) (Page 1975) (current version at OHIO REV. CODE ANN. § 2929.04(B) (Page 1982)).

The trial court held that no consideration of the offender's character or background resulted in a finding of one of the general mitigating categories. The court then sentenced Lockett to death. 438 U.S. at 595. Ms. Lockett was a 21 year old black woman who drove the getaway car in a robbery-murder perpetrated by her brother and a companion. She had not been in the store when the robbery-shooting took place. *Id.* at 590.

basis for a sentence less than death.[38]

Unlimited mitigation[39] and individualization of sentence[40] are *Lockett*'s key concepts. At first glance they seem to return an enormous degree of discretion to sentencers.[41] Insofar as jurors were unguided in the amount of mitigating information they could consider and the degree of weight they could give it, they could follow their own intuitions in addition to objective factors. This seeming conflict between the guided discretion of *Furman* and the unlimited mitigation and individualization of *Lockett* produced considerable controversy, giving rise to such phrases as the "*Furman-Lockett* paradox" and the "dilemma of discretion."[42]

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[38] 438 U.S. at 604 (footnotes omitted) (emphasis in original).

[39] Chief Justice Burger constitutionalized the principle of unlimited mitigation in the following quote:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Id. at 605.

[40] The Court concluded:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.

Id.

[41] One dissenter saw a return to pre-*Furman* unguided discretion:

> If a defendant as a matter of constitutional law is to be permitted to offer as evidence in the sentencing hearing any fact, however bizarre, which he wishes, even though the most sympathetically disposed trial judge could conceive of no basis upon which the jury might take it into account in imposing a sentence, the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it.

Id. at 631 (Rehnquist, J., concurring in part and dissenting in part).

[42] *See* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1153-54 (1980); *see also* Gillers, *supra* note 4, at 34-38 (noting *Lockett*'s potential conflict with *Furman*); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 314-15 (1983) (attempting to reconcile *Lockett* and *Furman*); Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 373-76 (1981) (*Lockett*'s return of sentencer discretion does not clash with *Furman*); Comment, *The Role of Mitigating Circumstances in Considering the Death Penalty*, 53 TUL. L. REV.

2. *Lockett*'s Impact on Guided Discretion Statutes: The Call for Additional Guidance through Tightened Schemes and Jury Instructions

Despite the seeming *Furman-Lockett* paradox, the two cases are reconcilable. It can be argued that *Lockett* returned the jury's discretion only with regard to mitigating circumstances. The case's sole emphasis on mitigation still mandated guidance for the consideration of aggravating circumstances. This one-sidedness was constitutionally acceptable because aggravation was the only area in which juror caprice could result in death.[43] Under this view of *Lockett*, *Furman* only precludes capricious imposition of the death penalty and not capricious imposition of mercy.[44]

One of *Lockett*'s two main principles, individualization of sentence, shows the Court's continuing concern with the fundamental respect for human dignity contained in the eighth amendment.[45] *Lockett*'s other main principle is a jurisprudential bias in favor of mitigation, allowing the death-eligible defendant every opportunity to avoid a drastic and irreversible punishment.[46] A moment's reflection reveals points of tension between these two principles, especially in loosely structured schemes that arguably permit the sentencer to classify nearly anything

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608, 616 (1979) (noting *Lockett*'s potential clash with many state sentencing schemes).

[43] This is the interpretation of *Lockett* formulated by Goodpaster, *supra* note 42, and by Hertz & Weisberg, *supra* note 42.

[44] In fact, all the schemes involved in the 1976 cases provided for unguided discretion in the broader sense of permitting the jury to convict a defendant of a lesser included noncapital offense, or permitting a governor to commute a sentence. But the Court in *Gregg* explained that an unguided choice of mercy for the defendant was not the type of discretion that *Furman* had sought to channel:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Gregg, 428 U.S. at 199.

[45] Portents of the individualization doctrine are apparent in Justice Stewart's conclusion in Woodson v. North Carolina, 428 U.S. 280 (1976), that while individualized sentencing generally reflects policy rather than constitutional considerations, in capital cases eighth amendment humanitarian concerns require consideration of the character and record of the individual offender. *Id.* at 304.

[46] The *Lockett* plurality concluded that a statute that prevented the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed despite factors which may call for a less severe penalty." 438 U.S. at 605.

in the selection stage as a nonstatutory aggravating circumstance.[47] On the one hand this freedom to characterize seems a logical part of individualization, as a factor that may be looked at as aggravating for one defendant may not be so for another.[48] But *Lockett*'s emphasis on mitigation seems to limit a sentencer's freedom to characterize as aggravating nearly any factor it wishes.

The Fifth Circuit discerned a clear message in *Lockett*'s silence on aggravation. Distrusting the freedom of prosecutors and jurors to label as "aggravating" evidence that falls outside the statutory factors, that court of appeals held in *Jordan v. Thigpen*[49] that consideration of nonstatutory aggravating circumstances increased juror discretion to a degree impermissible under *Lockett*. The Fifth Circuit thus required schemes to limit the jury to the consideration of statutory aggravating circumstances.[50] The Ninth Circuit took a different view and adopted a broader position on sentencer discretion, seeing both *Gregg* and *Proffitt v. Florida*[51] as permitting juries to consider nonstatutory factors in the selection stage so long as sentences were not based solely upon those circumstances.[52]

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[47] *See* discussion *supra* note 32. "Nonstatutory aggravating circumstances" are those factors which do not fit into one of the statutory categories, but which may be considered as aggravating in favor of the death sentence.

[48] For example, consider a murder taking place during a petty theft. Under the Georgia Court's interpretation of its statute, a sentencer working with a loosely structured scheme would be justified in considering the theft as a nonstatutory aggravating circumstance. If it were a burglary, the theft would come under the statutory aggravating circumstance of a felony. However, if the defendant were a kleptomaniac this would negate culpability, and the petty theft should not be considered as a nonstatutory aggravating circumstance. Note that in this situation the defendant has been death-qualified. Some activity other than the theft must have fallen under one of the statutory circumstances.

[49] 688 F.2d 395 (5th Cir. 1982), *clarifying* Jordan v. Watkins, 681 F.2d 1067 (5th Cir.). The *Thigpen* court sternly criticized a Mississippi Supreme Court decision that had allowed an instruction which told the jury merely to weigh aggravating and mitigating circumstances against one another. Unless the jury were instructed only to consider the statutory elements of the offense as aggravating circumstances, there would be nothing to prevent it from considering any number of "potentially arbitrary and irrelevant unspecified factors." 688 F.2d at 397. The court noted that the instructional flaw was exacerbated "by the prosecutor's argument to the jury . . . that 'each of you have to determine what is an aggravating circumstance.' " *Id.*; *accord* Henry v. Wainwright, 661 F.2d 56, 58-60 (5th Cir. 1981) (permitting jury to consider nonstatutory aggravating circumstances is constitutional error), *vacated and remanded on other grounds,* 457 U.S. 1114 (1982).

[50] *Thigpen*, 688 F.2d at 397.

[51] 428 U.S. 242 (1976); *see supra* note 21.

[52] Harris v. Pulley, 692 F.2d 1189, 1194 (9th Cir. 1982), *rev'd*, 104 S. Ct. 871

Another question concerning aggravating and mitigating circumstances has come out of *Lockett*. Does *Lockett*'s emphasis on unlimited mitigation and individualization of sentence constitutionally require jury charges that explain the nature of mitigating circumstances and apprise the jury of the option of mercy? This type of instruction may be deemed "focusing" guidance, and both the Fifth[53] and the Eleventh[54] Circuits have read *Lockett* as requiring such guidance. The first major area of controversy following *Lockett* can thus be summarized in two questions. Do the eighth and fourteenth amendments prohibit sentencer consideration of nonstatutory aggravating circumstances? Do those amendments require focusing instructions apprising jurors of the nature of mitigating circumstances and the option of mercy? These questions involve a further query: when will juror reliance on inappropriate factors or deviations from a sentencing scheme be deemed constitutional error? Are deviations at the selection stage as grave as deviations at the defining stage?

C. The Validity of Death Sentences Based on Constitutionally Invalid Aggravating Circumstances

Another major area of controversy surrounds the use of circumstance safeguards in death sentencing schemes. Must a sentence be vacated if one of the statutory aggravating circumstances used in deliberations is later held to be constitutionally invalid? Since such safeguards are classification devices — labels, really — they are subject to the doctrinal limitations of vagueness[55] and equal protec-

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(1984). The result in *Harris* may well have followed from the fact that California has a strictly structured scheme that *requires* the jury to duly consider the statutory aggravating factors throughout the selection stage. *See* CAL. PENAL CODE § 190.3 (West Supp. 1984). As a result, when the sentence is death, it is much more likely that it was based on those circumstances than on nonstatutory factors.

[53] In Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978), a jury instruction that merely told the jury what statutory aggravating circumstances it had to find to impose death was deemed insufficient in light of *Lockett*. The court concluded that the judge must "clearly instruct the jury about mitigating circumstances and the option to recommend against death." *Id.* at 448.

[54] Goodwin v. Balkcom, 684 F.2d 794, 801-02 (11th Cir. 1982) (*Lockett* requires explicit instructions on mitigation and the option of mercy), *cert. denied*, 103 S. Ct. 1798 (1983).

[55] Statutes may be held invalid because of vagueness in defining what conduct constitutes a crime, which persons fall within the scope of the statute, or the punishment that may be imposed. Such statutes violate due process, U.S. CONST. amend. XIV, § 2, for two reasons. First, they do not give "men of common intelligence" fair warning of what behavior is proscribed. Connally v. General Constr. Co., 269 U.S. 385, 391

tion.[56] A law or legal label violates constitutional standards of procedural fairness if it is so vague that there is no rational manner of discerning what activity the law or label encompasses.[57]

The most significant Supreme Court case dealing with vagueness in aggravating circumstances is *Godfrey v. Georgia*,[58] decided in 1980. In *Godfrey*, the Georgia Supreme Court had rejected petitioner's claim that the aggravating circumstance used to death sentence him — "outrageously or wantonly vile" — was vague as applied.[59] The Supreme Court reversed,[60] finding the circumstance so vague that a person of ordinary sensibility could characterize nearly any murder by such criteria.[61] Mindful that "each aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman* itself,"[62] the *Godfrey* Court held that the vague circumstance failed to create any "inherent restraint on the arbitrary infliction of the death sentence."[63]

Because the *Godfrey* jury had based its sentence entirely on the single

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(1926). For example, a crime defined as "behaving improperly before a police officer" would be unconstitutionally vague. No individual could be assured of conforming to the law because the term "properly" does not describe specific behavior. Second, vague statutes allow for arbitrary and discriminatory enforcement, depending upon the "varying impressions of juries" and law enforcement officials rather than upon objective principles. *Id.* at 395. For example, the statute in *Connally* was a criminal prohibition on contractors paying workers less than the "current rate of per diem wages." *Id.* at 388. The term "current" was held unconstitutionally vague. *Id.*

[56] The fourteenth amendment holds that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. For example, if a state's sentencing scheme permitted a court to designate a defendant's race, religion, or political affiliation as an aggravating circumstance, such a designation would violate equal protection because the same law (capital murder) would be applied unequally to similarly situated defendants. *See, e.g.*, McGautha v. California, 402 U.S. 183, 207 n.17 (1971) (consideration of race in sentencing violates equal protection). For extended discussions of equal protection problems with aggravating circumstances, see Black, *Due Process for Death:* Jurek v. Texas *and Companion Cases*, 26 CATH. U.L. REV. 1 (1976); Radin, *supra* note 42. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16 (1973) (outline of equal protection doctrine and standards of scrutiny for testing statutes).

[57] Statutes or statutory labels may be vague or overbroad on their face or vague or overbroad as applied. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 11 (1972).

[58] 446 U.S. 420 (1980).

[59] Godfrey v. State, 243 Ga. 302, 308-09, 253 S.E.2d 710, 717 (1979).

[60] *Godfrey*, 446 U.S. at 433.

[61] *Id.* at 428-29.

[62] *Zant*, 103 S. Ct. at 2742-43 (discussing *Gregg* and *Godfrey*'s standards of clarity for aggravating circumstances).

[63] *Godfrey*, 446 U.S. at 429.

invalid circumstance,[64] the Court did not reach the question of what should happen if a jury based sentence on several aggravating circumstances and only one was later held invalid. Given the clear reliance on at least one valid circumstance to death-qualify the defendant, would the possible influence of a second invalid circumstance make for an error of constitutional significance? This issue reached numerous state appellate courts and resulted in divergent holdings.[65] A second major area of controversy concerning the constitutionality of circumstance safeguards could thus be stated as follows: does the trial court's submission of a statutory aggravating circumstance later found invalid create a constitutionally unacceptable risk that the jury may have rested its death sentence in part on the circumstance?

D. The Question of Judicial Review

Another principal area of uncertainty in death penalty litigation concerns the constitutional status of judicial review. This uncertainty began with the Court's approval of the sentencing schemes analyzed in *Gregg v. Georgia*,[66] *Proffitt v. Florida*,[67] and *Jurek v. Texas*.[68] The schemes approved in *Gregg*[69] and *Proffitt*[70] both provided for judicial

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[64] *Id.* at 426.

[65] In People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980), the California Supreme Court rejected one of the "special circumstances" which constitute a prerequisite for the death penalty. Accordingly, it vacated the sentence on the ground that it could not determine whether the jury relied upon the legally insufficient circumstance for its sentence, or on another legally adequate basis. *Id.* at 69-71, 609 P.2d at 510, 164 Cal. Rptr. at 43. Under similar facts, several other courts have also vacated sentences based partially on an invalid circumstance. *See, e.g.*, Cook v. State, 369 So. 2d 1251, 1255-57 (Ala. 1979) (sentence vacated because no evidence it would have been imposed absent the invalid factor); People v. Brownell, 79 Ill. 2d 508, 535-36, 404 N.E.2d 181, 195 (sentence vacated because of possibility that invalid circumstance "tainted" deliberations), *cert. denied*, 449 U.S. 811 (1980). The Georgia Supreme Court, on the other hand, holds that a death sentence based upon multiple aggravating circumstances will stand if some but not all of its circumstances are later set aside. *See, e.g.*, Burger v. State, 245 Ga. 458, 461, 265 S.E.2d 796, 799, 800 (failure of one circumstance does not taint proceedings if sentence explicitly based on valid circumstances as well), *cert. denied*, 446 U.S. 988 (1980). Arizona has held the same as Georgia. State v. Clark, 126 Ariz. 428, 435-37, 616 P.2d 888, 895-97 (defendant not prejudiced by instruction permitting jury to consider invalid factor as long as written verdict indicates valid factors found), *cert. denied*, 449 U.S. 1067 (1980).

[66] 428 U.S. 153 (1976).

[67] 428 U.S. 242 (1976).

[68] 428 U.S. 262 (1976).

[69] *Gregg*, 428 U.S. at 204.

[70] *Proffitt*, 428 U.S. at 258.

review, but in *Jurek*, the Court approved a scheme that made no explicit provision for judicial review.[71] However, in approving the Texas scheme, the *Jurek* Court noted that "by providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote evenhanded, rational, and consistent application of death sentences under law."[72]

Given the ambiguity in *Jurek*,[73] it is unclear whether the Court in these three cases was merely approving judicial review or constitutionally requiring it. If the latter were the case, it is unclear what kind of judicial review the Court saw as necessary. One type of review, arbitrariness review, requires the trial court to submit written findings to the state supreme court.[74] Usually in the form of a questionnaire, these documents assure the state high court that the jury based its decision on objective factors considered in a meticulous channeling procedure.[75] The more controversial type of appellate safeguard, proportionality review,[76]

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[71] *Jurek*, 428 U.S. at 276.

[72] *Id.*

[73] In *Jurek*, the Court may simply have been commending the Texas court for conducting the review, while realizing that such reviews would not be conducted in all instances. Unlike most schemes that provide for consideration of aggravation, the Texas statute, TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon Supp. 1975-76) (current version at TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981 & Supp. 1983)), simply has three narrowing questions roughly akin to aggravating circumstances. *See supra* note 22. Nevertheless, the Supreme Court may have read the statute as sufficiently channeling jury discretion independently of its review provision, and thus making the added safeguard of judicial review unnecessary. The broadest possible reading of *Jurek* is that the Court was assuming judicial review would be conducted in all instances, slowly becoming established as a common law requirement.

[74] *See* Stephens v. State, 237 Ga. 259, 260-61, 227 S.E.2d 261, 263 (1976) (reading Georgia statute to require appellate review of each death sentence to discern influence of passion, prejudice, or other arbitrary factors), *cert. denied*, 429 U.S. 986 (1977).

[75] Among the factors state supreme courts look for in their arbitrariness reviews are procedural irregularity, narrowing constructions of aggravating circumstances, and the presence of bias or other arbitrary factors. For case documentation see Goodpaster, *supra* note 10, at 823-25.

[76] For commentary on proportionality review, see Baldus, Pulaski, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980) (advocating a "comparative excessiveness" review and proposing statistical methods for same); Baldus, Pulaski & Woodworth, *Proportionality Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIM. 661 (1983) (favoring proportionality review as an analog to use of case precedent); Dix, *supra* note 10 (appellate review, including proportionality review, has not been used effectively in most southern states); Goodpaster, *supra* note 10 (proportionality review necessary to insure sentencers' decisions based on statutory principles). *See generally* Graneli, *Justice Delayed*, A.B.A. J., Jan. 1984 (overview and

requires the state supreme court to conduct an exhaustive comparison of the defendant's sentence with the sentences of other defendants who committed similar crimes.[77]

The argument for judicial review, particularly proportionality review, is especially strong considering the degree of discretion which was returned to sentencers in the *Lockett* decision.[78] If sentencers are permitted to weigh mitigating factors as heavily as they wish, it is possible that two defendants with identical aggravating and mitigating circumstances could receive different sentences because their juries gave very different weight to the same factor. *Lockett*'s individualization[79] and unlimited mitigation[80] principles permit such a result. But serious questions of arbitrariness would arise if diverse patterns of sentences developed for similarly circumstanced defendants whose only differences were race or social standing. An inference of reliance on inappropriate factors would arise, and the likeliest way of revealing such inappropriate reliance would be a sentence comparison.[81]

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history of the proportionality question); *To Die or Not To Die*, NEWSWEEK, Oct. 17, 1983, at 43-45 (documenting use of proportionality controversy to stay executions); *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6 (Magazine) (discussion of capital sentence disparity in Florida).

[77] The question of the constitutional necessity of proportionality review is particularly troublesome in light of its various types. "Offense" proportionality review requires a court to ascertain whether the death sentence is appropriate for a given offense. The second type of proportionality review requires the appellate tribunal to conduct one of two types of sentence comparisons. In "intracase" review, the defendant's sentence is compared with that of another defendant charged with her who pled guilty to a noncapital offense. If evidence shows equal or greater culpability on the part of the plea bargaining defendant, the disparate sentences are subject to attack as arbitrary. In Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982), the Fifth Circuit held that intracase review is not constitutionally required, allowing Charles Brooks to die by lethal injection while his co-defendant, equally guilty under the evidence, received a prison sentence. *Id.* at 588.

"Intercase" proportionality review involves comparison of the defendant's sentence with those imposed on similarly situated defendants in other cases. In Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976), *cert. denied*, 429 U.S. 986 (1977), the Georgia Supreme Court explained that it "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." *Id.* at 262, 227 S.E.2d at 261. In a recent noncapital case, the United States Supreme Court suggested that state courts use intercase proportionality review in reviewing criminal sentences. Solem v. Helm, 103 S. Ct. 3001, 3010-11 (1983). For an extended discussion of the varieties of proportionality review, see Goodpaster, *supra* note 10, at 826-28.

[78] *See supra* notes 38-45 and accompanying text.

[79] *See supra* note 40 and accompanying text.

[80] *See supra* note 46 and accompanying text.

[81] A supreme court panel conducting an arbitrariness review does look for juror reli-

By mid-1983, the question of the necessity of judicial review reached two federal courts of appeals. The Ninth Circuit read the eighth amendment and the Supreme Court's decisions as requiring judicial review of all death sentences.[82] The Fifth Circuit disagreed.[83]

By the time of the *Zant v. Stephens*[84] and *Barclay v. Florida*[85] cases, in the Supreme Court's spring 1983 Term, the constitutional status of certain capital sentencing safeguards was very uncertain. The central issues in this area could be encapsulated in the following questions:

> (1) Precisely how much sentencer guidance is needed in the selection stage of sentencing for the deliberation process to be nonarbitrary within the meaning of *Furman*? When will structural flaws and sentencer deviations from schemes result in arbitrary sentences? How far should appellate courts probe into sentencing decisions in a search for error?
>
> (a) Does the constitution prohibit death sentencing statutes that allow sentencers to consider nonstatutory aggravating circumstances?
>
> (b) Do *Lockett*'s principles of individualization and unlimited mitigation constitutionally require jury instructions that explain the nature of mitigating circumstances and

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ance on inappropriate factors such as race. *See supra* note 76. However, the trial court judge may be mistaken about her jurors' racial opinions. Jurors may not have been entirely honest during voir dire. They may not have been entirely honest in writing down the basis for the sentence. Comparison of the sentence with inconsistent sentences of similar defendants would give rise to an inference of reliance on inappropriate factors.

[82] Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), *rev'd*, 104 S. Ct. 871 (1984). In *Harris*, the defendant killed two teenage boys after kidnapping them and driving them to a secluded area. *Id.* at 1192. The court of appeals relieved Harris of his death sentence until the California Supreme Court undertook a determination "of whether the [death] penalty in this case is proportionate to other sentences for similar crimes." *Id.* at 1196. The Ninth Circuit criticized the California high court for giving "no indication that any type of proportionality review, as required under *Gregg v. Georgia* and *Proffitt v. Florida*, was undertaken." *Id.*

[83] Brooks v. Estelle, 697 F.2d 586, 589 (5th Cir. 1982). Both defendants in *Brooks* were convicted of murder in the course of a robbery. Though both were equally guilty, one defendant plea bargained to a lesser offense. *Id.* at 588. Charles Brooks was executed by Texas prison authorities in December 1982. The Fifth Circuit had rejected Brooks' call for intercase and intracase proportionality review of his sentence. The court of appeals noted the logistical difficulty of such a process, remarking that it would require "literally endless review unless the state ceased to prosecute and obtain convictions in capital cases." *Id.*

[84] 103 S. Ct. 2733 (1983).

[85] 103 S. Ct. 3418 (1983).

the option of mercy?

(c) Does a trial court's submission to a sentencing jury of a statutory aggravating circumstance later held to be unconstitutional create a constitutionally unacceptable risk that the jury may have rested its sentencing decision in part upon the invalid factor?

(2) Is judicial review a constitutionally necessary element of a death sentencing statute? If so, is any precise type of review—such as proportionality review—required?

II. Sentencer Guidance in the Selection Stage: Consideration of Nonstatutory Factors and Unconstitutionally Vague Factors

A. Zant v. Stephens

The Supreme Court provided answers to the first set of questions in two cases decided during the summer of 1983, *Zant v. Stephens*[86] and *Barclay v. Florida*.[87] The factual background of *Zant* began in the spring of 1974 with Alpha Stephens' execution-style slaying of a homeowner's father who had caught Stephens in the act of burglarizing his son's house.[88] At the sentencing hearing following his murder conviction, the jury was read the same list of death-qualifying circumstances approved by the Court in *Gregg v. Georgia*.[89] The *Zant* jury found two aggravating circumstances: "escape from confinement" and "conviction for a capital felony or a substantial history of serious assaultive criminal convictions."[90]

By the time Stephens' direct appeal reached the Georgia Supreme Court, that court had found the statutory specification "substantial history of serious assaultive criminal convictions" to be unconstitutionally

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[86] 103 S. Ct. 2733 (1983).

[87] 103 S. Ct. 3418 (1983).

[88] *Zant*, 103 S. Ct. at 2736.

[89] 428 U.S. 153 (1976). If the jury found one of 10 aggravating circumstances, it had the option of imposing death. Once an aggravating circumstance was found, the jury could consider all evidence and any aggravating or mitigating circumstances, statutory or nonstatutory, in their final decision. They were not required to write down any mitigating circumstances leading to mercy, but they were required to set down in writing the aggravating circumstances which enabled them to impose death. *See* GA. CODE ANN. § 27-2534.1(b) (1972) (current version at GA. CODE ANN. § 27-2534.1(b) (1983)).

[90] *Zant*, 103 S. Ct. at 2737-38.

vague.[91] The Georgia Supreme Court denied Stephens' motion to vacate, however, noting that the evidence supported the jury's finding of the other statutory circumstances.[92] After the district court upheld the Georgia Supreme Court's judgment,[93] the Fifth Circuit reversed.[94] Relying heavily on a 1931 Supreme Court case, *Stromberg v. California*,[95] and its progeny,[96] the court of appeals noted that the presence of the unconstitutionally vague factor made it "impossible for a reviewing

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[91] Arnold v. State, 236 Ga. 534, 535-42, 224 S.E.2d 386, 391-92 (1976). The defendant in *Arnold* had been sentenced to death by a jury which found no aggravating factors other than the defendant's record. The Georgia high court noted that the statutory language was too vague to be applied evenhandedly by a jury. *Id.* at 540-42, 224 S.E.2d at 391-92.

[92] Stephens v. State, 237 Ga. 259, 262, 227 S.E.2d, 261, 263 (1976), *cert. denied*, 429 U.S. 986 (1977).

[93] Stephens v. Zant, No. 79-30-MAC (M.D. Ga. May 11, 1979) (copy on file at U.C. Davis Law Review office).

[94] Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980).

[95] 283 U.S. 359 (1931). In *Stromberg*, a man was charged with the felonious offense of "display of a red flag" (then § 403a of the California Penal Code). A defendant could be convicted under § 403a if she displayed the flag (i) as a sign, symbol or emblem of opposition to organized government; or (ii) as an invitation or stimulus to anarchistic action; or (iii) as an aid to propaganda that is of a seditious character. 283 U.S. at 361. The jury was instructed that the defendant could be convicted if the flag were displayed for any of the three purposes. There was a general verdict of guilty. *Id.* The first ground was held to be unconstitutional since it could conceivably include peaceful and orderly opposition to government. *Id.* at 365-67. Inasmuch as the case was submitted to the jury as permitting conviction under any or all of the three clauses, and inasmuch as it was impossible to determine from the general verdict upon which of the clauses the conviction rested, the Court concluded that if any of the clauses were constitutionally invalid, the conviction could not be upheld. *Id.* at 368-70.

The first rule that can be derived from *Stromberg* is thus stated as follows: if a verdict is based on one or several grounds that are not enumerated by the jury (a general verdict), and one of those grounds is later ruled unconstitutional, the verdict must be set aside, as there is a chance the verdict was based on the invalid ground.

[96] Street v. New York, 394 U.S. 576 (1969); Thomas v. Collins, 323 U.S. 516 (1945). In these cases the rule of *Stromberg* was extended to situations in which a jury's general determination was explicitly based on both an invalid and a valid ground, but the two grounds were so intertwined in the deliberator's mind that a reviewing court could not possibly say that the invalid ground had no decisive effect on the determination. *Street*, 394 U.S. at 586-90; *Thomas*, 323 U.S. at 528-29. Even though there was no danger that the verdict was based entirely on an invalid ground, the presence of such a ground would confuse or unduly influence the sentencer. *Street*, 394 U.S. at 590; *Thomas*, 323 U.S. at 529. The second *Stromberg* rule can be stated as follows: when a general verdict rests on both a constitutional and an unconstitutional ground, the determination must be set aside because it is impossible to ascertain whether the determination would have been the same absent the presence of the invalid ground.

court to determine satisfactorily that the verdict . . . was not decisively affected by an unconstitutional aggravating circumstance."[97]

In upholding the *Zant* death sentence, Justice Stevens[98] began by stating that the Court could not constitutionally require specific standards to guide jurors in selection stage deliberations[99] without overruling *Gregg v Georgia*.[100] Accepting the 1982 Georgia Supreme Court's construction of the Georgia death statute as one that provides no limiting or balancing instructions in the selection stage,[101] and imputing that understanding of the statute to the *Gregg* Court, the *Zant* majority was thereby able to read *Gregg* as approving death schemes which allow the sentencer unguided discretion during final selection.[102] Since *Gregg* was seen as approving a scheme with no guidance devices at the selection stage, then neither aggravating circumstances nor instructions for their use could play a constitutionally indispensible role in that advanced stage of deliberations.[103] The *Zant* majority illustrated its new rule of wide open selection stage discretion by discussing the constitutionality of a jury's consideration of nonstatutory aggravating circumstances.[104] The Court noted that constitutionally forbidding juries from considering nonstatutory elements in aggravation would inhibit the individualized sentencing necessitated by *Lockett*:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition:

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[97] *Zant*, 631 F.2d at 406.

[98] *Zant* was a seven to two decision. Mr. Justice Stevens was joined by Chief Justice Burger and Justices Blackmun, Powell, and O'Connor. Justices White and Rehnquist filed concurrences that dealt primarily with the *Stromberg* problem. Justice Marshall filed a dissenting opinion in which Justice Brennan joined. Along with Rehnquist, the Justices voting with Stevens in *Zant* now comprise the majority of the Court that generally votes to uphold death sentencing statutes and procedures. *See* Greenhouse, *A New, Angrier Mood on Death Penalty Appeals*, N.Y. Times, Nov. 11, 1983, § 2, at 21 (growing tendency in Court to dismiss appeals challenging death statutes).

[99] The selection stage is the stage in which the jury deliberates over the actual sentence of death after having found the defendant death-eligible with a statutory circumstance. *See supra* notes 29-35 and accompanying text.

[100] 428 U.S. 153 (1976).

[101] *Zant*, 103 S. Ct. at 2739-42.

[102] The *Zant* court held that "[*Gregg*] approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." *Id.* at 2742.

[103] *Id.* This view of the mechanics of aggravating circumstances was deemed the "threshold" theory by Justice Marshall in his dissent. *Id.* at 2757-61 (Marshall, J., dissenting).

[104] *Id.* at 2742-44.

> they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination . . . .[105]

The Court thus limited the necessity of specific standards, formulas, and limiting instructions to the defining stage[106] of sentencing.[107] The Court confined controls on jury discretion, and thus confined appellate review of such discretion in the event of error, to the legislatively set stage of the sentencing mechanism.

The *Zant* Court's specific conclusion — that it is not constitutionally necessary for death statutes to preclude consideration of nonstatutory factors — rests on thin precedent. It is odd that the Court relies on *Lockett* and other cases stressing individualization[108] to allow such consideration, as *Lockett* only permitted unlimited consideration of *mitigating* circumstances.[109] The Court's past concern that jurors might consider inappropriate factors such as race in aggravation[110] also seems to preclude such a grant of discretion to sentencers.

Equally suspect is the *Zant* Court's more general conclusion that no selection stage standards or instructions could be constitutionally necessary because *Gregg* approved a statute that lacked them.[111] There is no indication in *Gregg* that the Court saw the Georgia statute it was approving as one that gave the sentencer unguided discretion at the selection stage. It is not at all clear that aggravating circumstances were not to guide the sentencer in the selection stage as well as the defining stage, and in fact there is language in *Gregg* indicating that such circumstances were to guide the sentencer through the final selection pro-

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[105] *Id.* at 2743-44 (footnote omitted) (emphasis in original).

[106] The defining stage is the initial stage of deliberations in which the sentencer uses statutory aggravating circumstances to determine whether the defendant is among that class of persons the legislature has deemed eligible for execution. *See supra* note 29 and accompanying text.

[107] The Court summarized this section of its analysis by saying that the Georgia scheme "provides for categorical narrowing at the definitional stage, and for individualized determination and appellate review at the selection stage." *Zant*, 103 S. Ct. at 2744.

[108] *Id.* at 2743-44.

[109] 438 U.S. at 604-05; *see* discussion *supra* note 46 and accompanying text.

[110] *See Gregg*, 428 U.S. at 198 (judicial review required to ensure that sentence was not influenced by prejudice); *Furman v. Georgia*, 408 U.S. at 250 (Douglas, J., concurring) (implying many death sentences imposed as result of racial bias).

[111] *Zant*, 103 S. Ct. at 2742.

cess.[112] The *Zant* Court is able to extract a wide open selection stage discretion rule from *Gregg* only by accepting the 1982 Georgia Supreme Court's explanation of the Georgia statute's mechanics.[113] However, the degree of selection stage guidance, if any, established by *Gregg* would best be discerned by a perusal of Supreme Court decisions applying *Gregg* or *Furman*[114] rather than by requesting retroactive readings by an interested state court. The best means of discovering *Gregg*'s constitutional minimum requirements for juror guidance is by understanding the manner in which that Court thought the scheme worked, whether or not the scheme was intended to work in that manner and whether or not it so worked in actuality.[115]

The Court's reading of *Gregg* to preclude the constitutional necessity of any kind of selection stage guidance is particularly disturbing in that it would seem to preclude the necessity of focusing instructions.[116] But a rule that foreclosed the necessity of focusing instructions or channeling devices that might emphasize mitigating factors would conflict with *Lockett*'s second general principle: unlimited opportunity for mitigation and mercy.[117]

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[112] Unless the *Gregg* plurality was assuming that aggravating circumstances will control jury decisionmaking at the selection stage, little sense can be made of the following pronouncement: "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 discretion, decide whether he should live or die." 428 U.S. at 197.

[113] *Zant*, 103 S. Ct. at 2739-42.

[114] *See* discussion *infra* notes 136-43 and accompanying text.

[115] The *Gregg* Court's probable understanding of the mechanics of the Georgia scheme is discussed in detail *infra* notes 127-44 and accompanying text.

[116] These are the instructions which tell a jury what a mitigating circumstance is, that it can be given unlimited weight, and that mercy can be granted as a result of mitigating circumstances. *See supra* notes 53-54 and accompanying text.

[117] Lockett v. Ohio, 438 U.S. 586, 601-05 (1978). Recognition of the constitutional necessity of focusing instructions involves a close look at *Lockett*'s mandate that sentencers be permitted to consider any factor "as a basis for a sentence less than death." *Id.* at 604. While we might assume that most jurors know what mitigation is without having it defined for them, the rarified due process standard of capital sentencing clearly requires such definition. Equally necessary in instructions, but far less common, is an explanation of the manner in which factors can mitigate. It is difficult to imagine how the sentencer can give mitigating variables independent weight unless she is told of her ability to do so. Furthermore, mitigating aspects of certain factors become obvious to sentencers only after they are instructed to consider whether death will serve any deterrent or retributive purpose in the particular case before them. Two commentators have analyzed the Texas death sentencing statute in this regard. They note that certain factors can have mitigating weight by persuading the jury that leniency is appropriate or by disproving the retributive or deterrent value of a death sentence for the particular individual in question. *See* Hertz & Weisberg, *supra* note 42, at 367. For

Justice Stevens also specifically considered the effect of the constitutionally invalid circumstance on the sentencing decision. The Court saw some merit to Stephens' claim that since his sentence was based both on a constitutional and an unconstitutional ground — a valid and an invalid aggravating circumstance — his sentencer may have intertwined the two grounds in deliberations and convicted on the basis of both.[118] But the Court saw this danger as unlikely in the sentencing context, proposing that an aggravating circumstance plays a more limited role in sen-

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example, that a defendant played only a minor role in a killing can be a mitigating factor which tends to show that the defendant's offense is unlikely to be deterred and that retribution is inappropriate. However, a lay jury may not understand that the mitigating circumstance of minor participation can work in this manner, and thus the trial court should instruct them that it may. *Id.*

The argument for the constitutional necessity of focusing instructions seems even stronger in light of the disparate emphasis on aggravation and mitigation in most schemes and sentencing instructions. The Georgia instructions repeatedly remind the jury that it may consider prosecutorial evidence of 10 crimes or histories of crimes as aggravating circumstances. No similar emphasis obtains for mitigation: the instructions mention neither an itemization of mitigating factors nor an explanation of mitigating effect or influence. *See Zant*, 103 S. Ct. at 2737. *See generally* Hertz & Weisberg, *supra* note 42, at 346-49 (emphasizing the reciprocal right to jury instructions on mitigation).

[118] The necessity of vacating such a sentence is clear from the second rule of Stromberg v. California, 283 U.S. 359 (1931), embodied in Thomas v. Collins, 323 U.S. 516 (1945), and Street v. New York, 394 U.S. 576 (1969). *See supra* notes 95-96 and accompanying text. Justice Harlan, speaking for the majority in *Street*, explained the extension of *Stromberg* to cases in which sentencers specifically relied on valid and invalid grounds in imposing sentence. He took the rationale of *Thomas* to be that when a single-count indictment charges commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which was unprotected, and a guilty verdict ensues without elucidation, there is a danger that the jurors may have regarded the two acts as "intertwined" and rested conviction on both. *Street*, 394 U.S. at 588.

In *Zant*, Justice Stevens noted that it was "a difficult theoretical question" whether the rule of *Thomas* and *Street* applied to the Georgia death penalty scheme:

> The jury's imposition of the death sentence after finding more than one aggravating circumstance is not precisely the same as the jury's verdict of guilty on a single-count indictment after finding that the defendant has engaged in more than one type of conduct encompassed by the same criminal charge, because a wider range of considerations enters into the former determination. On the other hand, it is also not precisely the same as the imposition of a single sentence of imprisonment after guilty verdicts on each of several separate counts in a multiple-count indictment, because the qualitatively different sentence of death is imposed only after a channeled sentencing procedure.

103 S. Ct. at 2746 (footnote omitted).

tencing than in the determination of guilt.[119] In the guilt phase, such a circumstance may be one of the principal theories of culpability in the case, but in the sentencing phase, it is just one "of countless considerations weighed by the jury."[120] Given the limited role of such circumstances in the sentencing decision, the effect of the invalidity of one circumstance would likewise be limited.[121] The Court would thus have it that while verdicts based partly on invalid factors are themselves invalid, sentences so based are not.[122]

The Court went on to say that although the instruction concerning the invalid aggravating circumstance may have focused the jury's attention on Stephens' past criminal history, this unwarranted emphasis in deliberations could not fairly be regarded as a constitutional defect in the sentencing process.[123] The *Zant* Court saw the effect as insignificant both because the underlying evidence of Stephens' crimes was fully admissible,[124] and because the jury instructions gave no explicit directives

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[119] *Zant*, 103 S. Ct. at 2746.

[120] *Id.* at 2755 (Rehnquist, J., concurring).

[121] *Id.*

[122] *Id.* Rehnquist assumed too much in his analysis here. Simply because the death sentencer considers a larger class of evidence than does the guilt-phase juror does not mean that the influence of the state's characterization of that evidence ("history of serious assaultive criminal convictions") is less than it would be otherwise. Such characterizations could influence the sentencer as she peruses other evidence to determine whether it can be denoted as aggravating. To illustrate the influence of characterizations on fact selection, we can examine the three aggravating circumstances found by the *Zant* jury. If the activities comprising Stephens' criminal history were characterized (invalidly) as a "history of serious assaultive criminal convictions," that characterization may have influenced the sentencer's finding of the other two activities — "escape from confinement" and "previous felony conviction." For example, if there had been any doubts or unresolved questions concerning Stephens' absence from the Hamilton jail, the sentencer may have glossed over these and assumed the fact of escape, believing that someone with such a "serious history" was likely to have escaped. As long as a sentencer is in the very process of deciding whether certain activity may be characterized as "escape from confinement," allowing that activity to become a basis for sentence, an existing characterization of previously examined activity may influence her decision. To the extent that the existing characterization is constitutionally invalid, it would seem to perniciously "intertwine" in the sense of the *Street* case. *See* Street v. New York, 394 U.S. 576, 588 (1969).

[123] *Zant*, 103 S. Ct. at 2749.

[124] It is notable that the Court emphasized that the jury probably considered a great deal of validly characterized and admissible evidence, and that mischaracterized evidence is admissible regardless of its mischaracterization. The Court's analysis is in keeping with the first of two basic types of federal harmless error analysis. The "overwhelming evidence" approach holds that if the overwhelming evidence presented to the fact finder indicates to an appellate court that the verdict or sentence was correct on the

evidence as a whole, the determination will stand despite the presence of error. The theory can best be described as one that focuses on the evidence and the defendant rather than on the evidence's psychological effect on the sentencer. This analysis was used in Milton v. Wainwright, 407 U.S. 371, 377-78 (1972) (reviewing court should "not close [its] eyes" to evidence of guilt in record when ascertaining existence of error), and in Bumper v. North Carolina, 391 U.S. 543, 558 (1968) (Black, J., dissenting) (if overwhelming evidence demonstrates defendant's guilt, reviewing court should find no error). Another test for harmless error, the "effect" standard, has been used in most Supreme Court criminal decisions, and is evinced by the *Zant* Court's analysis of the effect of the mischaracterization "history of serious assaultive criminal convictions." *See infra* notes 126-28 and accompanying text. This approach focuses almost entirely on the psychological impact of the questionable evidence, deeming a jury's determination sound if and only if it was not in fact influenced by error. The Court used this standard in Kotteakos v. United States, 328 U.S. 750 (1975), noting that if the appellate court is sure that the error did not influence the jury, the verdict should stand. But if the court is not certain that "the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Id.* at 764-65. In Chapman v. California, 386 U.S. 18 (1967), the Court elaborated this standard, holding that an error cannot be harmless if it "might have contributed" to the conviction or if it "possibly influenced the jury adversely to the litigant." *Id.* at 23-24. Most commentators favor this latter effect standard. *See, e.g.*, Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of Rationale*, 125 U. PA. L. REV. 15 (1976); Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973). The two standards probably developed through case law because Federal Rule of Criminal Procedure 52(a) ambiguously defines as harmless "[a]ny error, defect, irregularity or variance which does not affect substantial rights."

One commentary clarified the distinction between these two standards by noting that the first involved an appellate court's search for the defendant's "guilt in fact," while the second involved a search for "guilt in law":

> The principal reason for defining harmless error in terms of its effect on the jury's decision is often explained by the distinction between "guilt in fact" and "guilt in law." As criminal defendants are entitled to have the state prove its case against them, even if they are plainly guilty in fact, so they are entitled to have guilt determined according to whether it has been proved to the jury's satisfaction rather than according to guilt in fact. Additionally, it is said, an appellate court must determine whether the accused was convicted by proper evidence rather than decide itself whether the evidence suggests that the accused was guilty. Any other posture would invade the province of the jury and, perhaps, thereby present sixth amendment issues.

Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1180 (footnote omitted) [hereafter Teitelbaum].

While the *Zant* Court applied both the overwhelming evidence and effect standards, it seemed to merge them, repeatedly stressing the great volume of admissible and uncharacterized evidence as the reason why the mischaracterized evidence had little or no effect on the sentencer. It is arguable that in death penalty trials the stricter effect standard is more appropriate than, and should be utilized independently of, the over-

for the use of aggravating circumstances in the selection stage.[125] The Court noted that given this lack of specific selection stage instructions, the finding of an aggravating circumstance "does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty."[126] This "threshold"[127] theory of the effect of circumstance safeguards enabled the Court to quickly dismiss the possibility that the invalid circumstance substantially affected deliberations: but it is a disturbing theory for a variety of reasons.[128]

The idea that a statutory characterization such as an aggravating circumstance subsides in influence, or ceases to guide discretion in the selection stage of deliberations, conflicts with most of the high court's previous observations on the purpose and probable effect of such circumstances. *Gregg v. Georgia*,[129] the first opinion to delineate the function of circumstance safeguards, emphasized their role as factors that the state deems particularly relevant to the sentencing decision.[130] In

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whelming evidence approach.

[125] The selection stage of sentencing is that stage the jury enters to select the appropriate sentence, after having found the defendant eligible for death through the use of statutory aggravating circumstances. *See supra* note 30 and accompanying text. Since the Georgia scheme described by the Court contains no directions for the further use of aggravating factors during the selection stage, it is a loosely structured scheme. *See supra* note 32 and accompanying text.

[126] *Zant*, 103 S. Ct. at 2741.

[127] Justice Marshall gave the threshold theory its name in his dissent. *Id.* at 2758 (Marshall, J., dissenting). The rationale for the threshold theory seems to be that since loosely structured schemes eschew the use of circumstances as standards in the final selection stage of sentencing, reducing them to mere descriptions of underlying evidence, the presence of such circumstances in no way imparts value or emphasis to that evidence. The Court's implication is that in loosely structured schemes such circumstances are less likely to influence the weight accorded the evidence they denote than in strictly structured schemes, in which specific directives — balancing or otherwise — hold the circumstances before the mind with greater force.

[128] Several preliminary questions come to mind. If statutory labels serve only to death-qualify the defendant and then become neutral in the selection stage, prosecutors need only ask for a charge on one aggravating circumstance when the evidence supporting such a circumstance is undisputed (in Stephens' case, a previous felony conviction). Since death-qualification could be accomplished by the one circumstance, what purpose would be served by asking the court to instruct on others? Furthermore, if juries are not to give weight to such circumstances during the selection process, why must they return written verdicts designating each circumstance found instead of the one defining circumstance?

[129] 428 U.S. 153 (1976).

[130] *Id.* at 195. The *Gregg* Court noted that aggravating circumstances were useful in making the sentence reviewable because they allowed the reviewing tribunal to see the

Proffitt v. Florida[131] and *Jurek v. Texas*,[132] the Court noted that statutory aggravating circumstances were designed to assure courts that sentencers had used objective principles in all stages of deliberations.[133] In *Gardner v. Florida*,[134] the Court was careful to point out that if "it is important to use [statutory aggravating circumstances] in the sentencing process, we must assume that in some cases it will be decisive in the [jury's] choice between a life sentence and a death sentence."[135] Moreover, the inaccuracy of the *Zant* Court's view that circumstance safeguards play no role in guiding discretion in the selection stage, and its view that the *Gregg* Court so held, is revealed by examination of the first case applications of the *Furman* holding. *Furman*'s principal concurrence established that it was unconstitutional to permit a jury to exercise uncontrolled discretion in selecting, from the entire pool of convicted murderers, those who would live and those who would die.[136] But what this meant precisely was unclear until *Furman* was applied on the same day it was decided. In *Moore v. Illinois*[137] and *Stewart v. Massachusetts*,[138] the Court held that *Furman* precluded imposition of death under statutes which allowed jurors to exercise unguided discre-

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"factors [the sentencer] relied upon in reaching its decision." *Id.*

Surely "decision" here must mean the final determination to impose death and not the threshold determination to make the defendant death-eligible. Otherwise, appellate courts would glean nothing from a jury's enumeration of such factors except the fact that the jury at least death-qualified the defendant. The reviewer would not know what went into the decision, which is precisely what is to be reviewed.

[131] 428 U.S. 242 (1976); *see supra* note 21.

[132] 428 U.S. 262 (1976); *see supra* note 22.

[133] The *Proffitt* Court noted that "the trial judge is . . . directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed." 428 U.S. at 250. The Court went on to note that "[u]nder Florida's capital sentencing procedures, . . . trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty." *Id.* at 253.

In *Jurek*, the Court held that aggravating circumstances force the sentencing authority to "focus on the particularized nature of the crime." 428 U.S. at 271; *see also* Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982) (purpose of statutory circumstances is to direct, confine, and focus sentencer's attention on characteristics of defendant and crime).

[134] 430 U.S. 349 (1977) (emphasizing importance of aggravating and mitigating information to death sentencer).

[135] *Id.* at 359.

[136] *See* Furman v. Georgia, 408 U.S. 238, 314 (1972) (White, J., concurring) (jury must not be allowed to choose, at its own discretion and regardless of the circumstances of the offense, which defendants may be spared).

[137] 408 U.S. 786 (1972).

[138] 408 U.S. 845 (1972).

tion in selecting those who would be executed from a narrowed pool of persons convicted of first degree murder.[139] Along with all death penalty jurisdictions other than Georgia, both Massachusetts and Illinois divided murder into degrees and allowed execution for defendants whose crime fit the category of first degree murder.[140] A finding of first degree murder in these states entailed only (1) a finding of the elements of murder, and (2) a finding of a particular element of the crime, invariably premeditation, that brought it to first degree status.[141]

There is no difference between this procedure held unconstitutional in both *Moore*[142] and *Stewart*[143] and the procedure the *Zant* Court believed was being approved by *Gregg*. If a jury working under *Zant*'s version of the Georgia scheme found (1) the elements of murder, and (2) an aggravating circumstance, and then was left to its unguided discretion, it would have done nothing more or different than a jury in Illinois, Massachusetts, or any other jurisdiction which found (1) the elements of murder, and (2) an additional element that made that murder first degree. That is, it would have done nothing more than perform the process held constitutionally deficient in *Moore* and *Stewart*, and in nearly fifty other cases decided in that period.[144] It is highly unlikely that the *Gregg* Court was approving a scheme it believed worked in a way so clearly foreclosed by precedent. The only logical conclusion is that the *Gregg* Court understood the Georgia scheme's aggravating circumstances to continue guiding the jury once the elements of murder and a further aggravating circumstance were found. In short, the *Zant* Court's belief in the constitutionality of schemes that do not provide such guidance strongly conflicts with its precedent.[145]

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[139] This is the necessary implication of the Court's statement in *Moore*, 408 U.S. at 800, that the Illinois death statute violated *Furman*, since the Illinois statute provided for such a selection procedure. It is also the necessary implication of the *Stewart* Court's statement, 408 U.S. at 845, that the Massachusetts statute was unconstitutional under *Furman*, since that statute worked in an identical fashion.

[140] *See* ILLINOIS ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1983-84) (current version); MASS. GEN. LAWS ANN. ch. 265, § 2 (West 1983-84) (current version).

[141] *See* ILLINOIS ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1983-84) (current version); MASS. GEN. LAWS ANN. ch. 265, § 2 (West 1983-84) (current version).

[142] 408 U.S. at 786.

[143] 408 U.S. at 845.

[144] *See* 408 U.S. 932-41 (1972) (listing cases vacating statutes under *Furman*).

[145] One might also ask whether the threshold theory of the effect of aggravating circumstances squares with most commentary on death sentencing deliberations and jury determinations in general. One group of commentators noted that instructions emphasizing certain characterizations of evidence have several pervasive effects:

> First, the reference enables the jurors to remember more clearly the factors

B. Barclay v. Florida

The Court's view of aggravating circumstances as threshold devices only, and its unwillingness to see constitutional significance in their misapplication in advanced stages of sentencing, was continued and expanded in *Barclay v. Florida*,[146] decided two weeks after *Zant*. In *Barclay*, a black man was convicted of stabbing a young white hitchhiker to death as part of a plan to indiscriminately kill whites and begin a racial

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> described in the instruction. Second, it describes the legal theory of the party that introduced the evidence and explains the way in which the evidence presented supports this theory. Third, the trial judge's explicit reference to the party's legal theory cloaks that theory in the authority and credibility of the judge.

Hertz & Weisberg, *supra* note 42, at 347; *see also* Zant v. Stephens, 456 U.S. 410, 426-27 (1982) (Marshall, J., dissenting), *granting cert. to* 631 F.2d 397 (5th Cir. 1980). The emphasis on aggravating circumstances in the Georgia statute allows the prosecutor to repeatedly draw connections between such statutory characterizations and the evidence they denote. *See* GA. CODE ANN. § 27-2534.1 (1983). One major study on sentencer comprehension indicates that instructions which focus jurors on target legal concepts and issues increase the sentencer's concentration on the evidence underlying such concepts and issues. *See* Severence & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 194-95 (1982) (jurors whose instructions focus them on relevant issues and concepts need less clarification of evidence); *cf.* Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1317 (1979) (instructions which focus jurors on specific issues may increase comprehension of charge); Sales, Elwork & Alfini, *Improving Comprehension for Jury Instructions*, 1 PERSPECTIVES IN LAW & PSYCHOLOGY 33-35 (B. Sales ed. 1977) (frequency proportional to persuasive power of concept). *But cf.* Doob, *Evidence, Procedure, and Psychological Research*, in PSYCHOLOGY AND THE LAW 135-46 (1976) (jurors often disregard instructions concerning specific items of information).

Moreover, it must be remembered that the instructions in *Zant* were written on sheets of paper and given to the jury. 103 S. Ct. at 2737. In addition, the jury was required to write down the circumstances found. *Id.* The obvious conclusion is that written fixation makes factors weigh more heavily in the mind. Professor McCormick saw this cognitive propensity as the source of most modern rules prohibiting written exhibits in deliberations. C. MCCORMICK, EVIDENCE § 540 (2d ed. 1972). State courts and commentators have noted the dangers of this tendency among jurors. *See, e.g.*, Gallagher v. Viking Supply Corp., 3 Ariz. App. 55, 60, 411 P.2d 814, 819 (1966) (noting influence of documentary exhibits in jury room); Cunningham, *Should Instructions Go Into the Jury Room?*, 33 CAL. ST. B.J. 278, 288-89 (1958) (noting that juries might give weight to written instructions); Hertz & Weisberg, *supra* note 42, at 348 (jurors give aggravating factors singular emphasis when taking to jury room written forms containing aggravating but no mitigating circumstances). *But see* Leavitt, *The Jury at Work*, 13 HASTINGS L.J. 415, 420-25 (1962) (comparing case assessments of equivocal effect of written instructions in jury room).

[146] 103 S. Ct. 3418 (1983) (plurality opinion).

war.[147] At his sentencing hearing, the jury was read the same aggravating circumstances approved by the Court in *Proffitt v. Florida*.[148] Unlike the Georgia scheme, the Florida statute requires the jury to impose death if it finds that aggravating circumstances outweigh mitigating circumstances.[149] Though the jury advises a sentence, the trial judge is the actual sentencer.[150] The jury recommended life imprisonment for Bar-

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[147] *Id.*

[148] *Id.* at 3421. The Florida statute's aggravating circumstances, listed in Proffitt v. Florida, 428 U.S. 242, 248 n.6 (1976) are:

> (a) The capital felony was committed by a person under sentence of imprisonment.
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
> (c) The defendant knowingly created a great risk of death to many persons.
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> (f) The capital felony was committed for pecuniary gain.
> (g)The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
> (h) The capital felony was especially heinous, atrocious, or cruel.

FLA. STAT. ANN. § 921.141(5) (West Supp. 1976-77) (current version at FLA. STAT. ANN. § 921.141(5) (West Supp. 1983)). The mitigating circumstances are:

> (a) The defendant has no significant history of prior criminal activity.
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (c) The victim was a participant in the defendant's conduct or consented to the act.
> (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
> (g) The age of the defendant at the time of the crime.

FLA. STAT. ANN. § 921.141(6) (West Supp. 1976-77) (current version at FLA. STAT. ANN. § 921.141(6) (West Supp. 1983)).

[149] The scheme was thus strictly structured. *See supra* note 33-35 and accompanying text.

[150] *Barclay*, 103 S. Ct. at 3425 (quoting Proffitt v. Florida, 428 U.S. 242, 248-51 (1976)).

clay, but the judge decided on death after finding various statutory aggravating circumstances and after deciding that the defendant's prior criminal record was an aggravating circumstance weighing in favor of death.[151] Florida law, however, plainly provides that a defendant's prior criminal record is not to be considered an aggravating circumstance under the statute.[152]

Despite the clear misapplication of state law, Justice Rehnquist[153] noted that since the nonstatutory aggravating circumstance was not (like *Zant*'s) judged constitutionally impermissible, the sentencer's reliance upon it could not amount to constitutional error.[154] As in *Zant*, the *Barclay* Court supported the validity of the sentence by noting that the underlying evidence mischaracterized as "aggravating" was properly before the sentencer anyway and that no amount of mislabeling was likely to increase emphasis on such evidence.[155] The Court's opinion reflected concern that dilatory appeals were being based on idiosyncratic attacks on circumstance safeguards, and it noted that its decisions "never suggested that the United States Constitution requires that the sentencing process be transformed into a rigid and mechanistic parsing

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[151] Barclay v. State, 343 So. 2d 1266, 1267-69 (Fla. 1977), *cert. denied*, 439 U.S. 892 (1978), *vacated and remanded*, 362 So. 2d 657 (1978) (for consideration in light of Gardner v. Florida, 430 U.S. 349 (1977)), *aff'd on rehearing*, 411 So. 2d 1310 (1981), *aff'd*, 103 S. Ct. 3418 (1983).

[152] Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1978).

[153] Joining Justice Rehnquist were Chief Justice Burger, Justices White and O'Connor. Justices Stevens and Powell concurred in the judgment. Justices Brennan, Marshall, and Blackmun dissented. *Barclay*, 103 S. Ct. at 3418.

[154] *Id.* at 3428. The Court pointed to *Proffitt* as authority that reliance on nonstatutory factors in the final decision to impose death did not amount to constitutional error so long as one statutory factor was found to death-qualify the defendant. In *Proffitt*, one of the four aggravating circumstances found — that the defendant had the propensity to commit murder — was not on the statutory list. *Proffitt*, 428 U.S. at 246. The *Barclay* Court seemed to see *Proffitt* as suggesting that a sentence based entirely on nonstatutory aggravating circumstances might be vacated. *Barclay*, 103 S. Ct. at 3428.

In holding that the misapplication of state law did not constitute constitutional error, the Court was using "constitutional" in an extremely technical sense. True, constitutional error results from use at trial of evidence or argument prohibited by constitutional rules or from denying the accused a constitutionally protected opportunity to present evidence. In general, errors resulting from misapplication of state or federal evidentiary or procedural rules not grounded in a constitution are not constitutional errors. *See* Teitelbaum, *supra* note 124, at 1179 n.67. But it is arguable that any misapplication of a state death sentencing statute is more likely to have constitutional significance than misapplication of most state evidentiary rules. Reliance on rigid distinctions between constitutional and nonconstitutional is inappropriate in a context in which errors and misapplications generally have a magnified significance.

[155] *Barclay*, 103 S. Ct. at 3428.

of statutory aggravating circumstances."[156]

In *Zant* and *Barclay*, the Court's approval of guided discretion schemes allowing consideration of nonstatutory factors and its desire to overlook or define away errors in the use of such factors signals a fundamental shift in its attempts to balance discretion control and scheme practicability.[157] A majority of the Court in *Barclay* reflected the opinion that too many appeals could find a basis in the claim that sentencers considered nonstatutory factors or misapplied circumstance safeguards in some manner. The Court was faced with the choice of either strictly structuring all schemes[158] and closely tracking the decision process through rigorous appellate review, or simply refusing to give constitutional gravity to errors occurring late in the selection process. The Court has taken the latter course. Total reliance on a single circumstance that is constitutionally invalid,[159] or use of instructions that require the jury to draw adverse inferences from constitutionally protected activity,[160] will rise to the level of constitutional error. But mere departure from the statutory scheme that constitutionally validates the death sentencing process is not ipso facto an event of constitutional significance.

This approach is entirely at odds with the spirit of *Gregg* and its progeny.[161] Those cases, establishing as they did that death could not be imposed absent "specific and detailed guidance,"[162] seemed to indicate

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[156] *Id.* at 3424.

[157] Eddings v. Oklahoma, 455 U.S. 104, 111 (1982) (discussing attempts to balance due process requirements and scheme practicality).

[158] The Court could have required strict structuring of schemes in the sense of increasing juror guidance by any one of the means described above. *See* notes 33-35 and accompanying text.

[159] By emphasizing the fact that valid aggravating circumstances were also found to death-qualify the defendant, *Zant* implied that a sentence based on only one unconstitutional aggravating circumstance must be vacated. 103 S. Ct. at 2744-46. Indeed, this was precisely the reason the death sentence was vacated in Godfrey v. Georgia, 446 U.S. 420 (1980).

[160] The *Zant* Court saw this evil as underlying the opinions in Stromberg v. California, 283 U.S. 359 (1931), Thomas v. Collins, 323 U.S. 516 (1945), and Street v. New York, 394 U.S. 576 (1969), which it read as establishing that juror confusion or reliance on invalid statutory labels could not be tolerated when the activity forming the basis for the crime involved first amendment interests. In finally rejecting Stephens' effort to establish a *Stromberg* error in his sentence, the *Zant* majority emphasized that there was no suggestion that any of the aggravating circumstances charged at Stephens' trial involved conduct protected by the first amendment. *Zant*, 103 S. Ct. at 2746.

[161] Eddings v. Oklahoma, 455 U.S. 104 (1982); Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976).

[162] Proffitt v. Florida, 428 U.S. 242, 253 (1976).

that *any* departure from a guided discretion scheme was of constitutional significance. By departing from the scheme, the sentencer had departed from the order and form of consideration that the legislature had considered constitutionally necessary under *Furman*. In the early years after *Gregg*, the Court read the eighth amendment as requiring such strict systems and strict tracking of error that any lapse of guidance — at late as well as at early stages — was defined as arbitrary. Its exasperation with what it sees as abuse of the appellate process has led the Court to swing perilously in the other direction, attempting to put the issue of arbitrariness behind it. In *Zant* and *Barclay* the Court has come full circle and said not only that few departures from a constitutionally mandated scheme are constitutional errors, but that federal appellate courts have no business conducting searches for such errors.

III. The Question of Judicial Review

A. Pulley v. Harris

Despite *Zant* and *Barclay*'s disheartening positions on circumstance safeguards, a death penalty critic could find hope in the ambiguous words that ended the *Zant* opinion. Justice Stevens said that the approval of the Georgia scheme and the refusal to require greater safeguards depended "in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and assure proportionality."[163] These words could be taken to suggest the constitutional necessity of judicial review, and of proportionality review in particular.

Additional strength was lent to this interpretation last Term by *Solem v. Helm*,[164] in which a sharply divided court[165] held that a life sentence imposed under a recidivist statute on a man convicted of seven felonies was disproportionate to the crimes involved.[166] Justice Powell

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[163] *Zant*, 103 S. Ct. at 2749. *Zant*'s apparent reliance on such review has been criticized as unwarranted in the absence of any support for its effectiveness. *See The Supreme Court, 1982 Term*, 97 Harv. L. Rev. 70, 126 n.51 (1983).

[164] 103 S. Ct. 3001 (1983).

[165] Justice Powell delivered the opinion of the Court, joined by Justices Stevens, Blackmun, Marshall, and Brennan. Chief Justice Burger dissented and filed an opinion in which Justice White, Justice Rehnquist, and Justice O'Connor joined.

[166] *Solem*, 103 S. Ct. at 3016. *Solem* was the latest in a series of noncapital cases dealing with sentencing proportionality. In Rummel v. Estelle, 445 U.S. 263 (1980), the Court decided that a life sentence imposed after only a third nonviolent felony conviction did not constitute cruel and unusual punishment under the eighth amendment. The *Rummel* majority constituted much of the *Solem* dissent. Although *Solem* did

traced proportionality jurisprudence from the Magna Charta[167] to modern constitutional cases,[168] concluding that the eighth amendment ban on disproportionate punishments was applicable to prison sentences as well as barbaric punishments and death penalties.[169] Citing the Court's own proportionality reviews in past death penalty cases,[170] Justice Powell suggested a tripartite system of proportionality analysis appropriate

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not purport to overrule *Rummel*, noting that the *Rummel* defendant faced a more flexible parole system and thus had chances for freedom unavailable to the defendant in *Solem*, it rejected the principles underlying *Rummel*. *Rummel* had granted that certain very extreme sentences might be disproportionate for relatively innocuous criminal violations, but noted that outside the death penalty context it would be logistically impossible to judicially grade degrees of offenses and effect other measures of sentencing proportionality. *Solem*, 103 S. Ct. at 3019-20.

In Hutto v. Davis, 454 U.S. 370 (1982) (per curiam), the Court announced that "*Rummel* stands for the proposition that federal courts should be 'reluctant to review legislatively mandated terms of imprisonment,' and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.' " *Id.* at 374 (quoting *Rummel*, 445 U.S. at 274). Yet the *Hutto* Court also refused to foreclose the possibility that a court could find a sentence or sentencing pattern unconstitutionally disproportionate for a certain offense. *Id.* Like *Rummel*, *Hutto* offered no explicit principles for proportionality review in the extreme cases in which it is warranted.

Commentators largely disagreed with the *Rummel* majority's attempt to limit proportionality review to death penalty cases and unusual punishments. *See, e.g.*, Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After* Rummel v. Estelle, 1980 DUKE L.J. 1103, 1118-19 (death penalty proportionality analysis can be expanded to noncapital cases); *The Supreme Court, 1982 Term*, *supra* note 163, at 127-35 (proposing flexible reading of the eighth amendment gauging the unusualness of punishments by modern standards of decency and justice and precluding disproportionate sentences in many noncapital cases); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 94-95 (1980) (elucidating rationale for expanding proportionality review beyond death penalty); Note, *Salvaging Proportionate Prison Sentencing: A Reply to* Rummel v. Estelle, 15 U. MICH. J.L. REF. 285, 293-94 (1982) (arguing that noncapital and capital cases are largely indistinguishable for purposes of proportionality review, and that such review should be extended to noncapital area).

[167] The *Solem* Court cited chapter 20 of the Magna Charta, which states that amercements (comparable to modern day fines) must fit " 'the manner of the fault, and for a great crime according to the heiniousness of it'." *Solem*, 103 S. Ct. at 3006 n.9 (quoting 1 S.D. CODIFIED LAWS ANN. p. 4 (1978) (translation of Magna Charta)).

[168] Weems v. United States, 217 U.S. 349, 367 (1910) ("it is a precept of justice that punishment for crime should be graduated and proportioned to offense"); O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (eighth amendment "directed . . . against all punishments which by their excessive length or severity are greatly disproportioned" to the offenses charged) (Field, J., dissenting).

[169] *Solem*, 103 S. Ct. at 3008-09.

[170] Enmund v. Florida, 458 U.S. 782, 795-801 (1982); Coker v. Georgia, 433 U.S. 584, 598 (1977).

for any sentence review.[171] The first step would be one of offense[172] proportionality review, i.e., comparing the harshness of the punishment to the gravity of the offense.[173] The Court went on to note that two types of "intercase"[174] proportionality review might also be appropriate: comparison of the defendant's sentence with sentences imposed on other criminals in the same jurisdiction, and comparison with the sentences of similar criminals in other jurisdictions.[175] The *Solem* Court did not say that such a proportionality review system was constitutionally necessary even in death sentence review. But given its emphasis on capital cases,[176] *Solem* could be read broadly to say that if the suggested review system should be used by courts reviewing prison sentences, then by implication that system — or a similar one — *must* be used in death sentence review.

Arguments for the necessity of arbitrariness and proportionality review of death sentences were sharply undercut by the Court's decision in *Pulley v. Harris*,[177] handed down on January 23, 1984. In a seven to two decision,[178] Justice White concluded for the majority that none of the Court's death penalty or proportionality cases could be read to establish proportionality review as a constitutional requirement.[179] Granting that both the *Gregg v. Georgia*[180] and *Proffitt v. Florida*[181] decisions had made much of comparative proportionality review, Justice White remarked that neither opinion declared such review so critical that without it the statute in question would not have passed constitutional muster.[182] Relying heavily on *Jurek v. Texas*,[183] in which a scheme with no review provision was approved, the *Harris* Court read *Jurek*'s approval[184] of judicial review as dicta commending the Texas court for its

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[171] *Solem*, 103 S. Ct. at 3012-15.

[172] *See supra* note 77 and accompanying text.

[173] *Solem*, 103 S. Ct. at 3010.

[174] *See supra* note 77 and accompanying text.

[175] *Solem*, 103 S. Ct. at 3010-11.

[176] The *Solem* Court repeatedly noted the appropriateness of proportionality review in death sentencing. *Id.* at 3008.

[177] 104 S. Ct. 871 (1984).

[178] Justice White was joined by the Chief Justice, and Justices Powell, Blackmun, Rehnquist, and O'Connor. Justice Stevens filed a concurrence, and Justices Brennan and Marshall dissented.

[179] 104 S. Ct. at 876.

[180] 428 U.S. 153 (1976).

[181] 428 U.S. 242 (1976).

[182] 104 S. Ct. at 877.

[183] 428 U.S. 262 (1976).

[184] *See* Goodpaster, *supra* note 10, at 806-08. The Court in *Jurek* noted that though

diligence, or at the most suggesting that some sort of review — not necessarily proportionality — was required.[185] As for the *Zant* Court's suggestions[186] that its holding relied heavily on the existence of proportionality review, Justice White stated that *Zant* rested almost entirely on approval of the self-correcting threshold nature of Georgia's circumstance safeguards.[187] Though *Zant* had considered proportionality an additional safeguard against arbitrarily imposed death sentences, Justice White noted that *Zant* "certainly did not hold that comparative review was constitutionally required."[188]

In his concurrence, Justice Stevens noted that while *Gregg*, *Jurek*, *Proffitt*, and *Zant* could not be taken to establish the constitutional necessity of proportionality review in every case, they did establish that "appellate review plays an essential role in eliminating . . . arbitrariness . . . and hence . . . that some form of meaningful appellate review is constitutionally required."[189] Relying heavily on *Zant*, Stevens noted its majority's observation:

> [T]he appellate review of every death penalty proceeding 'to determine whether the sentence was arbitrary or disproportionate' was one of the two primary features upon which the *Gregg* plurality's approval of the Georgia scheme rested. While the [*Zant*] Court did not focus on the comparative review element of the scheme in reaffirming the constitutionality of the Georgia statute, appellate review of the sentencing decision was deemed essential to upholding its constitutionality.[190]

It is notable that the *Harris* majority tailored its words to preclude the constitutional necessity only of proportionality review. This leaves open the concurrence's suggestion: some form of judicial review might still be necessary. In addition, *Harris*' preclusion of proportionality re-

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neither the sentencing statute nor case law required judicial review of any sort, the Texas courts had nevertheless conducted a review that promoted "evenhanded, rational and consistent application of death sentences under state law." *Jurek*, 428 U.S. at 274.

[185] *Harris*, 104 S. Ct. at 878-80.

[186] Zant v. Stephens, 103 S. Ct. 2733, 2749-50 (1983).

[187] 104 S. Ct. at 879.

[188] *Id.*

[189] *Id.* at 881-82 (Stevens, J., concurring).

[190] *Id.* at 884 (quoting *Zant*, 103 S. Ct. at 2742). In their dissent, Justices Brennan and Marshall echoed their past concern that death sentences would be imposed irrationally no matter what safeguards were used. *Id.* at 884-91 (Brennan & Marshall, JJ., dissenting). Both dissenters seemed to fear a lack of objectivity in the capital sentencer, noting that the emotions generated by capital crimes may cause juries, trial judges, and appellate courts to be affected by impermissible considerations. *Id.* at 887. Nevertheless, since proportionality review might eliminate some, if only a small part, of sentencer irrationality, the dissenters saw it as constitutionally necessary. *Id.* at 891.

view "in every case"[191] can be read narrowly to hold only that sophisticated proportionality review systems — extensive sentence comparisons in every case — are not required. Proportionality review of some sort may still be constitutionally necessary in certain cases. Indeed, when read in light of *Solem*'s consistent emphasis on proportionality in the individual case,[192] *Harris* could be saying that if an appellate judge suspected the sentencer of delivering a disproportionate death sentence in the case before her, she might be constitutionally compelled to apply the three-part *Solem* test.[193]

But how else would judges recognize disproportionality except through a fairly exhaustive system of sentence comparison? The failure to answer this question is the great shortcoming of the *Harris* opinion. If it is to conform to the evenhanded and consistent application of other safeguards, a *Solem*-type comparison should be a mandatory investigative device bringing errors to the judge's attention, not a back-up applied only when a judge has independent grounds to believe a sentence is disproportionate. Its purpose is to ferret out unfairness and not to test a judge's hunch. Proportionality review must operate in every case and as a system[194] precisely because it is designed to uncover sentence inconsistency that is not readily apparent. Only the systemization of proportionality review will reveal arbitrariness in the wider sense: sentences that result from good faith, rational application of statutes, but that nevertheless form a pattern deviating from past application.[195]

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[191] The *Harris* majority concluded:

> There is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Indeed, to so hold would effectively overrule *Jurek* and would substantially depart from the sense of *Gregg* and *Proffitt*.

Id. at 879.

[192] *Solem*, 103 S. Ct. at 3010-15.

[193] *See* discussion *supra* notes 171-76 and accompanying text.

[194] *Jurek* approved the Texas trial court's judicial review of the defendant's death sentence in the following words:

> By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because *this system* serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution.

Jurek, 428 U.S. at 276 (emphasis added).

[195] A jury's decision must be nonarbitrary both in the sense that it was based on objective, rational principles and in the sense that it did not markedly depart from past sentences for similarly situated defendants. This double significance of "arbitrary" is obvious from *Gregg*'s approval of both procedures for guiding the jury and procedures

The necessity of systematic and reasonably complete sentence comparisons seems especially obvious in light of the Court's own use of such comparisons in many landmark death penalty cases.[196] *Harris* not

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for reviewing the jury's decision. *Gregg*, 428 U.S. at 206-07. Since proportionality review is a *post hoc* analysis of what the jury decided, the procedure cannot guard against arbitrariness in the reasoning process that results in a sentence. But only a systematic sentence comparison can spot sentences arbitrary in the sense of being different from sentences given to similar defendants. For example, imagine a sentencer is given an instruction under the California death sentencing statute, CAL. PENAL CODE §§ 190.1 to .6 (West Supp. 1984). This is a strictly structured statute in that death must be imposed if one or more aggravating circumstances but no mitigating circumstances are found. Assume that in a good faith application of the instruction the jury finds an aggravating circumstance and no mitigating circumstances. A sentence of death is imposed. Assume the defendant was diagnosed by both prosecutor's and defendant's psychiatrists not as insane, but as having a certain type of mental disorder tending to violence and attributable to a period of combat experience. Assume that the defendant was black. In all previous cases, white defendants with identical or similar disorders were given life sentences. The black defendant's sentence is not automatically arbitrary solely by being inconsistent with sentences of similar defendants, because *Lockett*'s individualization principle enables the jury to rely on details of the defendant's life in subjectively assessing his worthiness to live. But if a slight pattern were to develop in which blacks with such disorders were consistently death sentenced while their white counterparts were spared, the sentences would be arbitrary in our wider sense. Though the statute and its instructions were meticulously structured and carefully followed by juries, the pattern would reveal reliance — at least subconscious reliance — on the inappropriate factor of race. The only conceivable way of discovering such disparity is through a sentence comparison.

[196] In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court explored the implications of an unconstitutionally vague aggravating circumstance by conducting an extensive judicial review of sentences in similar cases in which instructions had contained the same circumstance. *See id.* at 429-33. Justice Stewart noted that a state high court must not affirm a judgment of death "until [the court] has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance." *Id.* at 429. Because the *Godfrey* Court did not mention proportionality review, these remarks could be read as a call for a general arbitrariness review only. However, it is notable that in arriving at its judgment that death was an unusual sentence for the defendant's crime, the Court itself conducted an exhaustive proportionality review of Georgia capital cases. Justice Stewart listed facts and sentences of over 13 Georgia cases, concluding that death was imposed only in cases involving torture or aggravated battery to the victim. *Id.* at 428-33. The implication of the Court's review methods here is not only that state courts should conduct such sentence comparisons in their independent assessment of the evidence, but that such comparisons are necessary to ascertain whether sentencers' findings of aggravating circumstances are justified.

In Coker v. Georgia, 433 U.S. 584 (1977), the Court decided that execution was disproportionate punishment for the rape of an adult woman. *Id.* at 596. In Enmund v. Florida, 458 U.S. 782 (1982), a plurality of the Court read the eighth amendment as precluding death for robbery or felony murder when the defendant did not herself in-

only failed to mention the Court's own past reliance on proportionality review, but also gave few reasons why systematized proportionality review should not be necessary other than that *Jurek* did not require it. The Court cites neither administrative inconvenience, statistical unreliability, nor abuse of this safeguard as its reason for refusing to constitutionalize it. In addition to arguably conflicting with the Court's remarks on the importance of the device in its 1976 cases, *Harris* quite obviously conflicts with what the Court itself has done with proportionality review, and with its policy of giving cogent reasons for rejecting well-argued and well-documented proposals for death statute modifications.

CONCLUSION

The Supreme Court's major death penalty opinions have read the eighth and fourteenth amendments as requiring a death sentence that is both substantively fair (proportional and penologically justified) and procedurally just (individualized and nonarbitrary).[197] For the capital defendant, these twin jurisprudential strands are woven into the circumstance and review safeguards of guided discretion schemes. In *Zant*, *Barclay*, and *Harris*, the Court faced the difficult problem of insuring the constitutional compliance of a scheme without impairing its practicality.

Zant and *Barclay* laid to rest lower court speculation concerning the permissibility of nonstatutory factors in the selection stage of sentencing. By implication, these cases also foreclosed the constitutional necessity of any specific balancing or weighing instructions in the selection

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tend to kill. *Id.* at 3374, 3379. While *Enmund* and *Coker* were deciding a question of offense proportionality, they conducted extensive intercase proportionality reviews. *Enmund*, 458 U.S. at 786-80; *Coker*, 433 U.S. at 594-96. Indeed, much of the *Enmund* opinion is devoted to a statistical analysis of sentences for robbery and felony murder in Florida and other death penalty states. Noting that the jury is a significant and reliable objective index of contemporary values, the Court based its decision that death was excessive punishment for these crimes partly on jury decisions. *Enmund*, 458 U.S. at 794.

[197] *See* discussion *supra* note 4. While the Court seems to agree on these two principles, commentators continue to debate the precise contours of the eighth amendment in the death penalty context. For a good summary, see Liebman & Shepard, *Guiding Capital Sentencing Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 767-77 (1978) (elucidating doctrinal branches of eighth amendment in death penalty literature); *see also* Radin, *supra* note 42 (documenting utilitarian and retributivist attempts to reconcile death sentencing with eighth amendment doctrines).

stage, including those that remind sentencers of the defendant's *Lockett* right to unlimited mitigation and independent weighing of mitigating factors. The constitutionality of sentences based partly on an invalid aggravating circumstance is assured in loosely structured schemes[198] so long as one valid circumstance is found. Capital defendants in states with loosely structured schemes will continue to face the possibility of sentences based on constitutionally infirm factors.[199]

After *Harris*, it is clear that a systematized case comparison of every death sentence is not constitutionally required. But the *Solem* test for offense and intercase proportionality review[200] cannot be ignored, and appellate judges may often be compelled to use it in testing a death sentence. However, limiting the *Solem* test to the occasional, most obvious case makes for a slipshod and ineffectual guarantee of proportionality. It is astonishing that such an effective and yet simple testing system cannot be mandatory for a punishment the Court has deemed deserving of every possible eighth amendment and due process safeguard. Equally disturbing is the *Harris* Court's failure to establish the constitutional necessity of some form of judicial review.

In its last two Terms, the United States Supreme Court has cast a fearful shadow across the courtrooms of America. It has told capital defendants that their juries may select them for death using only the most general legislative classifications, and that most deviations from additional mechanisms or instructions will be ignored by reviewing tribunals. By limiting the notion of guidance to the initial, rudimentary stages of sentencing, and by limiting the notion of constitutional error to mistakes at that stage of sentencing, the Court has strayed from the progressive tradition of *Furman*, *Gregg*, and *Lockett*. Future decisions may reverse this trend. We should hope for such change before more inmates walk to the death chamber.

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[198] *Zant* expressly reserved judgment on the effect of such invalidity in strictly structured schemes in which the supposed effect of statutory characterizations is heightened by detailed instructions. *Zant*, 103 S. Ct. at 2750.

[199] After *Zant*, the courts of states with such schemes should articulate clear constructions of aggravating circumstances. Schemes should be changed to require juries to impart the weight — if any — the jury gave to statutory labels during deliberations. This practice would make otherwise opaque sentencing decisions at least minimally reviewable.

[200] 103 S. Ct. 3001, 3010-11 (1983).