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THE DEATH PENALTY IN GEORGIA: STILL ARBITRARY

URSULA BENTELE*

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* Instructor of Law, Brooklyn Law School. B.A. Swarthmore College, 1965; J.D. University of Chicago Law School, 1969. The author wishes to thank three Brooklyn Law School students who assisted in the preparation of this Article: Deborah Dietsch-Perez, Daniel W. White, and Stephen L. Richards. I would also like to thank Professor Anthony G. Amsterdam, John Charles Boger, Esq., and Patsy Morris, who read the manuscript and made valuable suggestions. Finally, I gratefully acknowledge the support of the Brooklyn Law School Summer Research Stipend Program.

INTRODUCTION

The United States Supreme Court has found death constitutional as a punishment for murder. In *Gregg v. Georgia*,[1] the Court declared that capital punishment is not, by its very nature, cruel and unusual in violation of the eighth amendment.[2] The constitutional debate over the use of the death penalty continues to rage, however, with arguments centering on whether states are capable of imposing the death penalty in a nonarbitrary and nondiscriminatory manner.[3]

In *Gregg*, the United States Supreme Court identified the three main stages in a capital punishment system at which arbitrariness might occur. The Court recognized that, first, the prosecutor has broad discretion to seek the death penalty against any given defendant who has committed a capital crime.[4] Second, arbitrariness can occur at the trial and appeal stage.[5] At the trial level, the judge or jury can impose the death sentence or grant mercy. At the appellate level, the court can affirm or reverse the death sentence. Third, potential arbitrariness can result from the executive's unfettered discretion to reprieve anyone sentenced to death.[6]

This Article focuses on the Georgia capital punishment system. The conclusions to be drawn from examination of the Georgia experience have broad application, however, because the Georgia system is typical of modern American capital punishment schemes. If the Georgia statute cannot avoid arbitrary and discriminatory imposition of death sentences, it is difficult to imagine a statute that could effectively perform that task.

In Part I, this Article examines the *Gregg* Court's assumption that safeguards built into the trial and appeal phase of a capital case insure

1. 428 U.S. 153 (1976).

2. *Id.* at 187. Only Justices Brennan and Marshall find the death penalty a per se violation of the eighth amendment. *Id.* at 230-31.

3. The Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) provides the source for the concern with arbitrary or capricious imposition of the death penalty. In *Furman*, the Court invalidated all death penalty statutes as then applied because they were imposed "discriminatorily," *id.* at 256-57 (Douglas, J., concurring), "freakishly," *id.* at 309-10 (Stewart, J., concurring), and upon only a few defendants, who could not be meaningfully distinguished from those who were spared. *Id.* at 313 (White, J., concurring).

4. 428 U.S. at 199 (opinion of Stewart, Powell, and Stevens, JJ.).

5. *Id.*

6. *Id.*

against arbitrary and capricious application of the death penalty in Georgia. The Court in *Gregg* essentially dismissed the problems inherent in the prosecutor's discretion to charge and the executive's power to grant clemency. The Article will address the issues surrounding those stages in Parts II and III.

Each of the three parts of the Article is both empirical and analytical. Part I examines the eighty-five murder convictions that were decided by the Supreme Court of Georgia in 1981.[7] In addition to analyzing the theoretical limitations of the Georgia death penalty statute, the Article compares the actual cases of the twenty defendants sentenced to death with those of the sixty-five defendants given life imprisonment. Part II reviews statements made by Georgia prosecutors concerning the considerations they took into account when deciding whether to seek a death sentence. Part II attempts to place the prosecutor's statements in the context of generally accepted justifications of prosecutorial discretion. Finally, Part III examines the first five post-*Gregg* clemency applications that the Georgia Board of Pardons and Paroles considered to determine how the decision to commute a death sentence relates to the rest of the capital punishment system.

I. TRIAL AND APPEAL

In 1976, the Supreme Court upheld the Georgia statute, proclaiming it the virtual model of fair and equitable capital punishment legislation.[8] According to the *Gregg* Court, Georgia's revised capital punishment system promised to avoid the random infliction of death sentences that the Supreme Court had held a violation of the eighth amendment in *Furman v. Georgia*.[9] The Court particularly stressed two improvements in the Georgia legislation. First, the legislation purportedly controlled the jury's discretion to impose a death sentence by providing "clear and objective standards so as to produce non-discriminatory application"[10] of the ultimate penalty. Second, the legislation provided that the Supreme Court of Georgia would conduct mandatory appellate review of all death sentences, including a proportionality review to determine "whether the

7. The sample used in this Article consists of 20 mandatory reviews of death sentences and 65 appeals from life sentences. *See infra* Appendix.

8. 428 U.S. at 197-98.

9. 408 U.S. 238 (1972). *See supra* note 3 (discussing the old Georgia statute's constitutional problems).

10. 428 U.S. at 198 (quoting Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)).

sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[11] The following two sections address the central questions raised by Georgia's current capital punishment scheme: (1) whether objective standards can, and must, truly guide jury discretion to impose the death penalty and (2) whether appellate review can ensure evenhanded application of the death penalty.

A. The Illusion of Guided Discretion

In *Gregg*, the Supreme Court gave strongly worded assurances that the guidance provided to the jury by the new Georgia statute would result in fair and rational imposition of the death penalty.[12] The Court promised that "clear and objective standards"[13] would channel a jury's decision to sentence a defendant to death. After ten years' experience with the "guided discretion" statutes[14] so warmly embraced in *Gregg*, the Court seems to have retreated from the requirement that juries must actually be guided in their sentencing decision. Recently in *Zant v. Stephens*[15] and *Barclay v. Florida*,[16] the Court affirmed death sentences arrived at by use of partially unconstitutional[17] and highly subjective[18] "standards." The

11. GA. CODE ANN. § 27-2537(c) (1983) provides that the Supreme Court of Georgia shall review all death sentences to determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether . . . the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . .; and

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

12. 428 U.S. at 207-08.

13. *Id.* at 198 (quoting Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)).

14. The Georgia legislature passed its statute, which is prototypical of the "guided discretion" model, in 1973. Many states adopted this type of statute shortly after the Supreme Court decided *Furman*. Many more states copied the basic scheme after the Supreme Court found the mandatory approach to the death penalty unconstitutional in Woodson v. North Carolina, 428 U.S. 280 (1976).

15. 103 S. Ct. 2733 (1983).

16. 103 S. Ct. 3418 (1983).

17. In *Stephens*, the jury found the defendant guilty of murder and sentenced him to death after finding two aggravating circumstances present. One of the aggravating circumstances was that the defendant had "a substantial history of serious assaultive criminal convictions," GA. CODE ANN. § 27.2534.1(b)(1) (1973), which the Supreme Court of Georgia subsequently held unconstitutionally vague in Arnold v. State, 236 Ga. 534, 539-42, 224 S.E.2d 386, 390-92 (1976).

18. In *Barclay v. Florida*, the trial judge overrode a jury's recommendation that Barclay receive a life sentence, alluding to his personal Army experience during World War II:

I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentra-

Court declared itself satisfied as long as the state's legislature and highest court have appropriately defined the class of defendants who *may* be subjected to capital punishment.[19] The meaning of the term "guidance" thus has changed significantly.

Perhaps the Court's shift was inevitable. In *McGautha v. California*,[20] the Court had declared the task of setting meaningful standards for imposing the death penalty "beyond present human ability."[21] The Court affirmed McGautha's death sentence despite the jury's absolute, unfettered discretion to condemn him to die or to let him live. Justice Harlan, writing for the Court, concluded that the "infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need."[22] Yet one short year later, in *Furman v. Georgia*[23] the Court made a remarkable about-face. Citing the absence of standards and the resulting "freakish" imposition of death sentences on defendants whose crimes could not be rationally distinguished from the crimes of others whose lives were spared, the Court invalidated all capital punishment statutes then in effect.[24]

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tion camps where innocent civilians and children were murdered in a war of racial and religious extermination. . . .

Having set forth my personal experiences above, it is understandable that I am not easily shocked or moved by tragedy—but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel.

103 S. Ct. at 3423 n.6. Counsel for Barclay noted that this judge had made similar references to his own past in each of the five cases in which he imposed a death sentence. In four of those cases he overrode a jury's recommendation of life. Brief for Petitioner at 35, 61, Barclay v. Florida, 103 S. Ct. 3418 (1983); Barclay v. Florida, 103 S. Ct. at 3440 (Marshall, J., dissenting). Nonetheless, the Supreme Court found no constitutional infirmity in this subjective approach, stating that rejecting such personal judgments would transform sentencing into "a rigid and mechanical parsing of statutory aggravating factors." 103 S. Ct. at 3424.

19 *Id.*; Zant v. Stephens, 103 S. Ct. 2733, 2742-43 (1983) (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).

20. 402 U.S. 183 (1971).

21. *Id.* at 204. The Court stated: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." *Id.*

22. *Id.* at 208.

23. 408 U.S. 238 (1972).

24. *Id.* at 256-57 (Douglas, J., concurring). Chief Justice Burger rightly dismissed as "disingenuous" the Court's half-hearted attempt to distinguish *McGautha* on the basis that the Court decided *McGautha* on due process principles, while it decided *Furman* on eighth amendment grounds. *Id.* at 399-400 (Burger, C.J., dissenting).

Justices Brennan and Marshall maintained that capital punishment is a per se violation of the eighth amendment, *id.* at 305 (Brennan, J., concurring); 370-71 (Marshall, J., concurring). Justices

In sum, the Court initially found death sentences imposed without standards constitutional in *McGautha* because standards to guide a jury were unworkable. The Court then retracted its blanket approval of death penalty sentencing discretion a year later in *Furman*. In *Stephens* and *Barclay*, the Court has once again allowed the execution of defendants selected without guidance and in violation of the standards created in response to *Furman*. The Court's recent affirmance of death sentences in *Stephens* and *Barclay* despite gross deviation from any "clear and objective standards" signals an implicit recognition that Justice Harlan was correct when he declared it impossible to define meaningful standards for imposing the death penalty.

The current Supreme Court would no doubt protest that it has not retreated to the pre-*Furman* era of absolute discretion. It has, after all, insisted that legislatures narrow, to some unspecified extent, the category of murder punishable by the death penalty.[25] In Georgia, the legislature performed this narrowing function by providing that the judge or jury must find at least one of ten statutory aggravating circumstances before a death sentence may be imposed.[26] According to the Court, this require-

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Douglas, Stewart, and White found an eighth amendment violation in the way in which the states had applied the death penalty statutes. *See supra* note 3.

25. The *Stephens* Court pointed out that the jury must find at least one valid statutory aggravating circumstance before a defendant can receive a death sentence. The aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." 103 S. Ct. 2733, 2742-43 (1983).

26. The Georgia legislature has defined first degree murder as follows:

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
(b) Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
(c) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
(d) A person convicted of murder shall be punished by death or by imprisonment of life.

GA. CODE ANN. § 26-1101(a-d) (1983).

The Georgia legislature lists the aggravating circumstances that may render a murder punishable by death as follows:

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
  (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;
  (2) The offense of murder, rape, armed robbery, or kidnapping was committed

ment will prevent arbitrary discrimination or freakish application of the extreme penalty.

The Court is wrong. Neither in theory nor in practice does the Georgia scheme ensure evenhanded imposition of capital punishment. The theory suffers from several flaws. First, although the "narrowing" accomplished by the statutory aggravating circumstances does remove some "simple" murders from the death penalty category, it still leaves a broad and varied range of murders as capital crimes. Second, and more critically, however narrowly the legislature defines the class of murders for which death is a *possible* punishment, unless some standards govern the *actual* imposition of a death sentence within that class, the imposition of the penalty will continue to be discriminatory and arbitrary. It is thus not surprising, although it should be disturbing, that the study of the Georgia appeals in 1981 demonstrates empirically that no meaningful way exists to distinguish the few defendants sentenced to death from the

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while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

Id. § 27.2534.1(b) & (c).

many spared.[27]

The Georgia requirement that a judge or jury find at least one statutory aggravating circumstance before a death penalty may be imposed actually excludes very few homicides that would be defined as murder rather than manslaughter. The ten aggravating circumstances listed are broad enough to convert virtually any type of murder into a capital crime. Various characteristics of the offender, circumstances of the homicide, or attributes of the victim can serve to place the murder into the death penalty category.

If the defendant previously has been convicted of a capital crime, which the Georgia Supreme Court has defined to include armed robbery, rape, kidnapping, and other crimes,[28] or if the defendant is in or has escaped from custody, *any* murder the defendant commits can result in a death sentence.[29] If the defendant committed a murder during the course of another capital felony,[30] an aggravated battery, burglary, or arson in the first degree, the murder is punishable by death.[31] If the de-

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27. The Court in *Furman* seemed to require that those *selected* for death be distinguishable, in some rational, objective way, from those convicted but sentenced to prison terms. Justice Stewart stated in his concurrence:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

408 U.S. at 309-10 (Stewart, J., concurring); Justice White added in his concurrence:

> I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases *involving crimes for which death is the authorized penalty.* That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

Id. at 313 (White, J., concurring) (emphasis added). For a cogent discussion of the difference between the definition and selection stages, see Gillers, *Deciding Who Dies,* 129 U. PA. L. REV. 1, 23-38 (1980).

The *McGautha* Court also fully recognized the distinction between guiding discretion and narrowing the class of defendants for whom death is a possible punishment: "As we understand these petitioners' contentions, they seek standards for guiding the sentencing authority's discretion, not a greater strictness in the definition of the class in which the discretion exists." McGautha v. California, 402 U.S. 183, 206 n.16 (1971).

28. The Supreme Court of Georgia has construed "capital felony" for purposes of the aggravating circumstances set forth in section 27-2534.1(b)(2) to include all felonies that were capital crimes at the time the legislature enacted the death penalty. Peek v. State, 239 Ga. 422, 432, 238 S.E.2d 12, 20 (1977).

29. GA. CODE ANN. § 27-2534.1(b)(1) and (9) (1983).

30. *See supra* note 28.

31. GA. CODE ANN. § 27-2534.1(b)(2) (1983).

fendant committed a murder to receive money, as an agent for another, or to avoid or prevent arrest, the homicide is punishable by death.[32] Certain characteristics of the victim will automatically qualify the murderer for a death sentence. If the defendant kills a present or former judicial officer or district attorney during or because of the exercise of his official duties,[33] then the defendant qualifies for a death sentence. The defendant also qualifies for the death penalty if he kills a peace officer, corrections employee, or fireman while these officials are engaged in the performance of their official duties.[34] Finally, the method the defendant uses to accomplish the murder can subject him to the death penalty. If the defendant knowingly created a great risk of death to more than one person in a public place[35] or if his murder is outrageously or wantonly vile, horrible or inhuman because it involved torture, depravity of mind, or an aggravated battery to the victim, then he may be sentenced to death.[36] The "catch-all" aggravating factor found in section (b)(7) of the statute, that a murder is "outrageously or wantonly vile, horrible or inhuman,"[37] increases the probability that a judge or jury will include all murders within at least one of the aggravating circumstances.

At least one of these aggravating circumstances occurs in the great majority of murder cases. Any killing that took place during a robbery is punishable by death. All multiple killings and any assault in which one person is injured and another killed can result in death sentences. A killing that involves kidnapping, defined to include forcing the victim to walk several yards at gunpoint,[38] can be punished by death. Even the killing of a spouse or other relative can call for the death penalty, if a jury determines that the murder was "cruel" or "torturous." Thus very few homicides will fail to meet at least one of the conditions permitting a death sentence. The two most common situations that usually lack aggravating circumstances are the "ordinary" domestic or lovers' triangle murders[39] and the almost random killings of one victim that appear to

32. *Id.* § 27-2534.1(b)(4), (6) & (10).
33. *Id.* § 27-2534.1(b)(5).
34. *Id.* § 27-2534.1(b)(8).
35. *Id.* § 27-2534.1(b)(3).
36. *Id.* § 27-2534.1(b)(7).
37. *Id.* § 27-2534.1(b)(7). This aggravating circumstance is commonly referred to as "(b)(7)."
38. *See, e.g.*, Rivers v. State, 250 Ga. 288, 297, 298 S.E.2d 10, 16 (1982); Waters v. State, 248 Ga. 355, 283 S.E.2d 238, 250 (1981).
39. By far the greatest number of murder convictions appealed during 1981 in which no aggravating circumstances appear to be present involve some form of a domestic killing, killing of a lover, or killing of a romantic rival. *See, e.g.*, Pennamon v. State, 248 Ga. 611, 284 S.E.2d 403 (1981)

arise out of arguments, often involving alcohol abuse.[40]

Once this rather limited category of cases without aggravating circumstances[41] is eliminated, a large and diverse group of cases remains for which the Georgia legislature has decided that death is an appropriate penalty. In determining whether a member of this group should die in the electric chair, the jury has absolute, unfettered, and even unguided discretion just as juries did before the Supreme Court declared such discretion unconstitutional in *Furman v. Georgia*.[42]

The broad range of murders included in the capital category makes the unbridled discretion of juries in deciding whether to sentence a defendant to death particularly dangerous. But even if the Georgia legislature had performed its narrowing function more effectively, due process and eighth amendment concerns of arbitrariness would remain. If the legislature or the judiciary narrowed the class of capital crimes so as to limit the possible reach of the death penalty to two people once every ten years, the Constitution, and justice, would not be satisfied if the state executed one of the two people based upon the flip of a coin.[43] If Georgia convicted fifty people of murder in 1981, and each case involved at least one statutory aggravating circumstance, it would be unconstitutional for the state to execute those twenty who happened to have red hair and

(defendant killed wife during argument about divorce); Daniel v. State, 248 Ga. 271, 282 S.E.2d 314 (1981) (defendant killed ex-wife's boyfriend); Alexander v. State, 247 Ga. 780, 279 S.E.2d 691 (1981) (defendant killed his mistress's husband); Smith v. State, 247 Ga. 571, 277 S.E.2d 53 (1981) (defendant shot wife); Blanchard v. State, 247 Ga. 415, 276 S.E.2d 593 (1981) (defendant killed former father-in-law); Lee v. State, 247 Ga. 411, 276 S.E.2d 590 (1981) (defendant killed wife); Evans v. State, 247 Ga. 204, 275 S.E.2d 65 (1981) (defendant killed former girlfriend's new male friend); Jones v. State, 247 Ga. 268, 275 S.E.2d 67 (1981) (defendant killed former wife); Aldridge v. State, 247 Ga. 142, 274 S.E.2d 525 (1981) (defendant killed his wife after an argument). *See infra* Appendix.

40. *See, e.g.*, Appleby v. State, 247 Ga. 587, 278 S.E.2d 366 (1981) (defendant killed female victim after argument at social gathering); Marable v. State, 247 Ga. 509, 277 S.E.2d 52 (1981) (defendant killed drinking companion); Smith, T. v. State, 247 Ga. 453, 276 S.E.2d 633 (1981) (defendant shot man with whom he had an argument outside a pool hall).

41. As may be apparent, these homicides tend to be borderline murder cases to begin with. An argument between husband and wife that escalates to a fatal outcome might very well constitute manslaughter. *See, e.g.*, Raines v. State, 247 Ga. 504, 277 S.E.2d 47 (1981). An inexplicable, motiveless killing is likely to bring into play an insanity or diminished capacity defense to negate the required element of malice. *See supra* note 26.

42. *See* Zant v. Stephens, 103 S. Ct. 2733, 2760-61 (1983) (Marshall, J., dissenting).

43. The New York Commission on Judicial Conduct recently forced a New York City judge to resign from office for using such a method to decide between a twenty and thirty day jail term. *See In re* Friess v. New York State Comm'n on Judicial Conduct, 91 A.D.2d 554, 457 N.Y.S.2d 33 (1982).

spare the others.[44] Similarly, and more realistically, it violates the Constitution to execute black defendants who kill white victims while giving life terms to white defendants who kill black victims.[45]

The facts of *Zant v. Stephens*[46] highlight the inappropriateness of providing standards solely to determine the threshold issue of who is eligible for the death sentence, rather than providing standards to determine who actually deserves a death sentence. Stephens has now been executed even though the judge instructed the jury on an aggravating circumstance that the Georgia Supreme Court declared invalid.[47] The judge instructed the jury that it could consider Stephens' "substantial history of serious assaultive criminal convictions" as an aggravating factor.[48] The Georgia Supreme Court found this factor unconstitutionally vague in *Arnold v. State*.[49] The judge also instructed the jury on three other aggravating circumstances: Stephens had been convicted of a capital felony;[50] the murder was outrageously or wantonly vile;[51] and the murder was committed by an escapee.[52] The jury failed to find the murder particularly vile, but it did find that Stephens was an escapee, that he had a prior conviction for a capital felony, and that he had a substantial history of serious assaultive convictions,[53] and sentenced Stephens to die.

If the "substantial history of serious assaultive criminal convictions" had been the only statutory aggravating circumstance, Stephens' death sentence could not stand.[54] As long as one valid statutory aggravating circumstance was present, however, the jury was free to impose a life or death sentence without giving any specific reason for its decision. It is, therefore, clear that what caused the jury to decide on a death sentence is

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44. I am indebted to Professor Stephen L. Nathanson, Department of Philosophy, Northeastern University, for this analogy.

45. Recent studies have found that killers of white victims in Georgia are more than eight times as likely to receive a death sentence as killers of black victims. N.Y. Times, January 5, 1984, at A18 col. 3. *See also* Bowers & Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

46. 103 S. Ct. 2733 (1983).

47. *See supra* note 17.

48. 103 S. Ct. at 2737.

49. 236 Ga. 534, 539-42, 224 S.E.2d 386, 391-92 (1976).

50. *See* GA. CODE ANN. § 27-2534.1(b)(1) (1983).

51. *See id.* § 27-2534.1(b)(7).

52. *See id.* § 27-2534.1(b)(9).

53. 103 S. Ct. at 2737 n.3.

54. *See* Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976) ("substantial history of serious assaultive criminal convictions" held unconstitutionally vague); *supra* note 17.

purely a matter of speculation.[55] The jury thus might well have decided that Stephens should die based on his prior record of assaultive behavior, rather than because he was a convicted capital felon or because he was an escapee. The United States Supreme Court, in affirming Stephens' sentence, has thus declared that it is constitutionally acceptable for Stephens to die, despite the fact that the jury may have imposed the death sentence solely because of his prior record, a factor the Georgia Supreme Court found unconstitutionally vague. Although a substantial history of assaultive behavior cannot serve as the basis for placing someone in the death penalty category, someone in that category can actually suffer the death penalty, imposed by a jury that considered the impermissible aggravating factor, simply because it is *possible* that the jury relied on permissible aggravating factors.

Serious prior assault convictions might, if more precisely defined, be the type of circumstance that could reasonably lead a jury to decide that the defendant "deserved" to die more than some other murderers. The same is not true of the defendant's race, the victim's race, the political affiliation of the defendant, or the defendant's history of mental illness.[56] Yet any of these factors could persuade a jury, in its unreviewable discretion, to decide to sentence a defendant to death. That decision apparently is acceptable to the Supreme Court, as long as a legitimate statutory aggravating circumstance is also present. If the condemned person fits into one of the categories eligible for capital punishment, *any* reason, or no reason, can serve to place him on death row. It does not matter whether the jury chooses to execute him because he was black, or poor, or psychotic. Although those are not valid reasons to make him *eligible* for the extreme penalty, they apparently are sufficient reasons to make him actually suffer the penalty.[57]

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55. In Georgia, unlike in some other states, the jury is not instructed to weigh aggravating against mitigating circumstances in arriving at its sentence. 103 S. Ct. at 2741.

56. Justice Stevens emphasized the distinction between an aggravating circumstance held invalid because unduly vague and one which would authorize a jury to discriminate based on race, political expression, or religion, or to consider as aggravating a factor that a jury should see as mitigating, such as mental illness. 103 S. Ct. at 2747.

57. Even if all murderers who are eligible for a death sentence in some sense "deserve" to die, those defendants actually chosen to be executed should be so chosen *because* they deserve to die, and not because they were politically unpopular, for example. If juries may exercise their discretion, once they have found an aggravating circumstance, in keeping with their prejudices, then juries put defendants on death row not because they deserve to die, but because they have the misfortune of belonging to the wrong race, political group, or religious denomination. Again I express my gratitude to Professor Nathanson for this insight. *See supra* note 44.

If this result is unjust, then it is imperative that standards governing the imposition of the death penalty apply to more than the definitional stage of capital crimes. It is not enough that the defendants for whom death is a possible punishment all have certain characteristics in common; those actually selected to die must be distinguishable in some objective and meaningful way from those who are spared. This Article's study of the eighty-five appeals of murder convictions that the Georgia Supreme Court decided during 1981 reveals no such objective and measurable difference between the twenty defendants sentenced to death and the sixty-five who, despite the presence of aggravating circumstances in most cases, received life sentences.[58] Neither detailed and specific comparisons of cases involving similar facts nor broader comparisons of aggravating circumstance categories, such as murders during robberies or murders of policemen, explains why some defendants received the ultimate penalty while others received life sentences.

1. Case Comparisons

In 1981 the Georgia Supreme Court decided all of the following cases. I invite the reader to predict which of the defendants were sentenced to life in prison and which were sentenced to death.

Murder by Poison: Vaughn and Tyler

Junior and Helen Vaughn, husband and wife, were convicted of the malice murder of their employer, Ray Oglesby. The Vaughns killed Oglesby by adding arsenic to his beer.[59] The Vaughns lived on Oglesby's farm and were purchasing their house from him when they fell behind in their payments. In Mr. Vaughn's confession, he stated that he killed Oglesby in the belief (which was mistaken) that he would own the house

58. While it is not always possible to determine with certainty which aggravating circumstances were present in the case, the court's opinion on appeal generally provides sufficient information to show that the case involved one or more aggravating factors. Thirty-one cases involved another capital felony, burglary or arson. Twelve cases involved aggravated battery on more than one victim. Five cases involved murders committed for the purpose of receiving money. Twenty-four murders qualified as "outrageously or wantonly vile, horrible, or inhuman in that [they] involved torture, depravity of mind, or an aggravated battery to the victim." Finally, two murders involved police or correction officers. Several cases involved more than one aggravating factor. *See infra* Appendix.

59. The facts are taken from the opinions in Vaughn v. State, 247 Ga. 136, 274 S.E.2d 479 (1981) and Vaughn v. State, 248 Ga. 127, 281 S.E.2d 594 (1981).

free and clear upon Oglesby's death. Oglesby suffered a painful and protracted death; he died forty hours after ingesting the poison.

Shirley Tyler was convicted of murdering her husband by putting parathion, a form of rat poison, in his chili and beans.[60] In her confession, Mrs. Tyler asserted that she had killed him to prevent him from hurting her child. The state presented evidence that poisoning may have caused Mr. Tyler's two previous illnesses. The actual motive for the murder was unclear. The prosecution introduced evidence that Mrs. Tyler was the beneficiary of a $15,000 life insurance policy through her husband's job, but Mrs. Tyler testified that she was unaware of this policy before Mr. Tyler's death and the jury refused to find that Shirley Tyler committed the murder for pecuniary gain. Mr. Tyler also suffered a long, painful death.

Junior and Helen Vaughn received life sentences, while Shirley Tyler received the death penalty. The jury in the Tyler case found that the murder involved "inhuman torture."[61] The prosecution did not seek the death penalty against Helen Vaughn. It did seek the death penalty against Junior Vaughn, but the jury recommended a life sentence.[62]

Murder During Robbery: Cervi and Wilson; Bordon and Cole

Dr. Kenneth Lawrence picked up two hitchhikers, Michael Cervi and Robert Wilson, who were shipmates on unauthorized leave from the Navy.[63] The three traveled together from Columbia, South Carolina, to Augusta, Georgia, at which point Cervi took a rifle out of his seabag and ordered the doctor off the interstate. Cervi and Wilson took $1,000 from Lawrence and forced him into a wooded area. They tied him to a tree with his necktie, and Wilson hit Lawrence in the head with the rifle butt several times. Holding the rifle, Wilson ordered Cervi to kill the doctor,

60. The facts are taken from the opinion in Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, *cert. denied,* 454 U.S. 882 (1981), supplemented by a review of the trial transcript.

61. *Id.* at 124, 274 S.E.2d at 554. The Supreme Court of Georgia rejected appellant's claim that those two words were insufficient to satisfy the requirement that the murder be "outrageously vile, wanton or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." *Id.*

62. The Georgia Supreme Court reversed Junior Vaughn's first conviction on the ground that the police had obtained his written confession in violation of his sixth amendment rights. Vaughn v. State, 247 Ga. 127, 281 S.E.2d 594 (1981). At the second trial the jury convicted him again and sentenced him to life in prison. The Georgia Supreme Court affirmed on appeal. Vaughn v. State, 249 Ga. 803, 294 S.E.2d 504 (1982).

63. The facts are taken from the opinion in Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981), *cert. denied,* 456 U.S. 938 (1982).

whereupon Cervi slashed Lawrence's throat. Wilson and Cervi fled in Lawrence's car, but Lawrence managed to free himself and get to the road to seek help. He died the next day due to injuries to his head and neck.

Marvin Borden and Ellis Cole, Jr., together with two others, robbed a grocery store.[64] Borden hit the manager with his fist, knocked him to the floor, and kicked him in the face several times. After taking the store's money, Borden and Cole decided to kill the manager so he could not identify them. Borden stabbed the victim three to six times in the back, and Cole slashed his throat. He died from extensive loss of blood.

Of the four defendants, only Cervi was sentenced to death. The Supreme Court of Georgia justified Cervi's sentence, in light of the prison sentence imposed on the codefendant Wilson, by noting that Cervi had slashed the victim's throat while Wilson had only hit him in the head with the rifle butt: "[T]he cutting of a human's throat illustrates an absolute intent to take life . . ."[65] The court did not have to distinguish Cole's sentence from Cervi's sentence, because the prosecutor in the Cole case did not seek the death penalty. The court did mention that Cervi's murder was not a "domestic murder";[66] apparently such murders call for a lesser sentence, except for Shirley Tyler.

Murder by Fright: Dupree and Blankenship

Wade Berry Hampton was a 71-year-old double amputee confined to a wheelchair.[67] One night, Silas Dupree and an accomplice entered Hampton's house, which he shared with 70-year-old Essie Mae Hamilton. Ms. Hamilton heard the masked men demand money from Hampton. After the robbers left, she found Hampton lying dead next to his overturned wheelchair with his broken crutch nearby. He had suffered a head injury and a deep cut to his finger. An autopsy revealed the cause of death to be heart failure resulting from the stress and injuries sustained during the robbery.

Roy Blankenship had been drinking in a bar until the early morning hours.[68] He decided to break into the apartment of a 78-year-old woman

64. The facts are taken from the opinion in Borden v. State, 247 Ga. 325, 277 S.E.2d 9 (1981).

65. Cervi v. State, 248 Ga. 325, 333, 282 S.E.2d 629, 637 (1981).

66. *Id.* at 332, 282 S.E.2d at 636.

67. The facts are taken from the opinion in Dupree v. State, 247 Ga. 470, 277 S.E.2d 18 (1981).

68. The facts are taken from the opinion in Blankenship v. State, 247 Ga. 590, 277 S.E.2d 505 (1981).

for whom he had done repair work. He struggled with her until she became unconscious; he then placed her on the bed and raped her. Blankenship also inserted a plastic bottle into her vagina. Forensic evidence showed that she died of heart failure brought on by the trauma.

Both Dupree and Blankenship were convicted of felony murder. The prosecution did not seek the death penalty for Dupree. The jury sentenced Blankenship to die.[69]

Murder of a "Friend" for Money: Myron and Cunningham

James Myron, using an assumed name, made friendly overtures to two wealthy sisters who often wore very expensive jewelry.[70] He lured one of the elderly women to an apartment, where he killed her by stuffing an ether-soaked handkerchief into her mouth. The other sister found the body on the bathroom floor, stripped of all jewelry except for one ring. She had been wearing several valuable necklaces, bracelets, and rings shortly before her murder. A jewelry expert testified that Myron had called him a few days before the murder to ask whether he would want to buy several hundred thousand dollars worth of jewelry for $100,000. Shortly after the murder, Myron visited the jeweler and received $10,000.

James Cunningham tried unsuccessfully to secure a loan.[71] He then went to the home of a man who had previously given him and his family food. With the intent to rob him, Cunningham hit the victim on the head and arms with a large wrench. He took the money from the victim's wallet, and left him lying on the floor.

State psychiatrists found Cunningham mentally competent both times they examined him. The jury sentenced James Cunningham to death.[72] The prosecutor did not seek the death penalty against James Myron.

69. The court vacated Blankenship's death sentence because the trial judge had improperly excluded a prospective juror in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). Blankenship v. State, 247 Ga. 590, 593-94, 277 S.E.2d 505, 511 (1981). At the retrial the jury again sentenced Blankenship to death. The Georgia Supreme Court remanded the case for resentencing, however, because the trial court excluded certain evidence from the sentencing phase. Blankenship v. State, 251 Ga. 621, 308 S.E.2d 369 (1983).

70. The facts are taken from the opinion in Myron v. State, 248 Ga. 120, 281 S.E.2d 600 (1981), *cert. denied,* 455 U.S. 1154 (1982).

71. The facts are taken from the opinion in Cunningham v. State, 248 Ga. 558, 284 S.E.2d 390 (1981), *cert. denied,* 455 U.S. 1038 (1982).

72. *Id.* at 560, 284 S.E.2d at 394. Death Row, U.S.A., published by the NAACP Legal Defense Fund, Inc., June 20, 1983, gives James Cunningham's race as black. *Id.* at 9.

2. *Category Comparisons*

In addition to selecting cases from the 1981 sample with similar fact patterns for a more detailed comparison, the author placed all the cases into broader categories and then tried to determine whether the defendants sentenced to death within each category could be distinguished from those given life sentences. No pattern emerged.[73] For example, of seventeen defendants convicted of killing their victim during a robbery, five were sentenced to die[74] and twelve were not.[75] While some of these death sentences were imposed in cases involving particularly heinous circumstances,[76] some murders that resulted in life sentences appear at least

73. The limited nature of the available sample hampered the author's and the Supreme Court of Georgia's inquiry, *see infra* notes 89-96 and accompanying text. The author considered *appealed* life sentences. According to the most recent study, 30% of murder convictions are not appealed. Unpublished data gathered by David Baldus, University of Iowa College of Law, Iowa City, Iowa 52242. Whether these convictions involved comparable fact situations to the appealed cases is a matter of speculation. It seems plausible to suppose, however, that the killings might be more heinous, leading the defendant to believe he had very little chance of success on appeal. If this assumption is correct, the death sentences would be even harder to distinguish from these nonappealed cases than they were from this study.

A much larger number of cases not included is the negotiated guilty pleas in return for life sentences, which are virtually never appealed. Georgia resolves approximately 52% of all its murder indictments by guilty pleas. Baldus data, *supra*. Here again, reliable information on such cases is difficult to obtain. The prosecutor has virtually unlimited discretion to enter into such negotiations; the factors affecting his decision no doubt vary considerably. *See infra* notes 164-220 and accompanying text.

74. *See* Cunningham v. State, 248 Ga. 558, 284 S.E.2d 390 (1981), *cert. denied,* 455 U.S. 1038 (1982); Thomas v. State, 248 Ga. 247, 282 S.E.2d 316 (1981) (sentence reversed and remanded because of improper questioning); Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981); Justus v. State, 247 Ga. 276, 276 S.E.2d 242 (1981); Hardy v. State, 247 Ga. 235, 275 S.E.2d 319 (1981).

75. *See* Odom v. State, 248 Ga. 434, 283 S.E.2d 885 (1981); Ellis v. State, 248 Ga. 414, 283 S.E.2d 870 (1981); Milton v. State, 248 Ga. 192, 282 S.E.2d 90 (1981); Myron v. State, 248 Ga. 120, 281 S.E.2d 600 (1981); Dupree v. State, 247 Ga. 470, 277 S.E.2d 18 (1981); Lyons v. State, 247 Ga. 465, 277 S.E.2d 244 (1981); Fortner v. State, 248 Ga. 107, 281 S.E.2d 533 (1981) (two codefendants: McCluskey and Riley); Rachel v. State, 247 Ga. 130, 274 S.E.2d 475 (1981) (two codefendants: Robinson and Wright). In addition, Robert Wayne Wilson, the codefendant of Mr. Cervi, received a life sentence. Mr. Cervi was sentenced to death. *See* Cervi v. State, 248 Ga. 325, 333, 282 S.E.2d 629, 637 (1981), *cert. denied,* 456 U.S. 938 (1982). Similarly, Dean Goins, codefendant of Mr. Justus, was sentenced to life imprisonment. *See* Goins v. State, 245 Ga. 62, 262 S.E.2d 818 (1980). These last two cases are not included in this Article's sample because they were not decided by the Georgia Supreme Court in 1981.

76. In Hardy v. State, 247 Ga. 235, 275 S.E.2d 319 (1981), the evidence showed that the defendant beat and undressed the victim, who was known to have a large amount of cash, to find the money. The defendant then cut the victim, poured gasoline on him, and finally shot the victim to death. The defendant burned the body to hide the crime. In Justus v. State, 247 Ga. 276, 276 S.E.2d 242 (1981), *cert. denied,* 454 U.S. 882 (1981), the defendant kidnapped, raped, and stabbed the victim before he killed her by a shot to the head. In Cervi v. State, 248 Ga. 325, 282 S.E.2d 629

equally gruesome.[77] Similarly, among twelve defendants found guilty of murder during the course of a store robbery, the four defendants placed on death row seem no more deserving of death, by any rational and objective measure, than the eight who received sentences of life imprisonment.[78] In cases in which the victims were law enforcement officers, no consistent sentencing pattern emerged. Two defendants who killed police officers were sentenced to death,[79] while a defendant who killed a police chief and one who killed a prison guard were given life sentences.[80] The murder of a peace officer,[81] a statutory aggravating circumstance, was present in all four cases. No meaningful distinguishing features ap-

(1981), the defendant beat the victim with a rifle and cut the victim's throat after having tied the victim to a tree. He died the next day.

77. In Ellis v. State, 248 Ga. 414, 283 S.E.2d 870 (1981), the defendant strangled and bludgeoned the victim, who was 104 years old and confined to a wheelchair, to death. The state did not seek the death penalty. In Fortner v. State, 248 Ga. 107, 281 S.E.2d 533 (1981), three defendants robbed a man at gunpoint and, after he handed over his wallet, shot him in the stomach. The victim died several hours later. The three were sentenced to life imprisonment. Finally, Wilson, the codefendant in Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981), participated in the beating of the victim and, while he held the rifle, ordered Cervi to kill the victim. Yet Wilson received a life sentence.

78. Death sentences were imposed in Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) and Brown v. State, 247 Ga. 298, 275 S.E.2d 52 (1981) (two codefendants: High and Ruffin). The defendants in the following cases were sentenced to life in prison: Borden v. State, 247 Ga. 477, 277 S.E.2d 9 (1981) (codefendant Cole); Walker v. State, 247 Ga. 746, 280 S.E.2d 333 (1981); Kelley v. State, 248 Ga. 133, 281 S.E.2d 589 (codefendant pled guilty); Berry v. State, 240 Ga. 430, 283 S.E.2d 888. In Borden v. State, 247 Ga. 477, 277 S.E.2d 9 (1981), the defendant knocked the victim, a grocery store manager, to the floor and kicked him in the face five times. One defendant stabbed the victim three to six times and the other defendant slashed his throat. He died of extensive bleeding. The defendants decided to kill the victim after taking the store's money, so that he could not identify them. *Id.* at 477, 277 S.E.2d at 10.

79. In Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), *cert. denied,* 103 S. Ct. 3551 (1983), the defendant was sentenced to death for shooting a police officer who stopped him pursuant to a burglary investigation. The defendant sped off after the killing and the police later captured him after a gun battle. No one was hurt in this second episode. *Id.* at 699, 278 S.E.2d at 401. In Wallace v. State, 248 Ga. 255, 282 S.E.2d 325 (1981), *cert. denied,* 455 U.S. 927 (1982), the defendant shot two officers, one fatally with the officer's gun, while being booked for driving while intoxicated. Despite evidence that his blood alcohol content was .11% and that he suffered from schizophrenia, the defendant was sentenced to death. *Id.* at 255-57, 282 S.E.2d at 328-29.

80. In Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981), the jury imposed a life sentence despite a finding of four aggravating circumstances. *Id.* at 33, 276 S.E.2d at 229. The defendant was convicted of murder and mutiny in a penal institution as a result of his participation in a riot at the Georgia State Prison in which two inmates and a guard were killed and another guard was seriously injured. Witnesses identified Jordan as the prisoner who stabbed the two guards. *Id.* at 329, 276 S.E.2d at 227-28. In Foster v. State, 248 Ga. 409, 283 S.E.2d 873 (1981), the defendant received a life sentence upon his conviction for murdering the Chief of Police of Swainsboro, Georgia. Foster shot the Chief of Police when the officer tried to disarm him. *Id.* at 409, 283 S.E.2d at 874.

81. Actually three aggravating circumstances relate to peace and corrections officers:

pear in the opinions to justify the disparate sentencing.[82]

The results of these comparisons are perhaps to be anticipated, given that the decision to sentence a defendant to death is still left largely to the whim of the jury, unchanneled by any ascertainable guidelines.[83] After examining the 1981 cases, it is clear that Georgia's death row population is no more fairly selected now than the one held "freakishly" chosen in *Furman*.[84]

B. The Charade of Appellate Review

In addition to its reliance on guided jury discretion, the United States Supreme Court has continued to emphasize that the provision for proportionality review contained in the Georgia death penalty scheme helps to ensure against arbitrary and capricious results.[85] The *Gregg* Court viewed Georgia's statutory provision requiring the state's highest court to determine whether each sentence of death "is excessive or disporportionate to the penalty imposed in similar cases, considering both the crime and the defendant,"[86] as an important safeguard against errant juries. The Court's confidence, however, was misplaced. Justice Rehnquist's doubts that "a process of comparing the facts of one case in which a death sentence was imposed with the facts of another in which such a

(b)(8). The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;
(b)(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;
(b)(10). The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

GA. CODE ANN. § 27-2534.1(b)(8)-(10) (1983).

82 The Georgia courts' lack of consistency in applying the death penalty is all the more disturbing because a mandatory appellate review of a death sentence is likely to portray the facts as darkly as possible to justify its approval of the death sentence. *See* C. BLACK, CAPITAL PUNISHMENT THE INEVITABILITY OF CAPRICE AND MISTAKE 133 (2d ed. 1981).

83 *See supra* notes 41-58 and accompanying text.

84. Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

85. *See* Zant v. Stephens, 103 S. Ct. 2733, 2749 (1983); Gregg v. Georgia, 428 U.S. 153, 203 (1976). The *Stephens* Court recently stressed the importance of appellate review when it affirmed a death sentence despite the jury's finding of an unconstitutional aggravating circumstance:

> Our decision in this case depends 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 to assure porportionality . . . . As we noted in *Gregg*, . . . we have . . . been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances.

103 S. Ct. at 2749-50.

86. GA. CODE ANN. § 27-2537(c)(3) (1983).

sentence was imposed [would] afford any meaningful protection against whatever arbitrariness results from jury discretion"[87] have proven accurate. The Court's approval of death sentences despite the Georgia Supreme Court's perfunctory review foreshadowed the recent acknowledgement in *Pulley v. Harris*[88] that the eighth amendment does not require state courts to engage in proportionality review.

The limitations inherent in the Georgia Supreme Court's examination of death cases may further obstruct meaningful appellate review. Almost uniformly,[89] appellate proportionality reviews cite only to those cases that also resulted in a death sentence and that were in some sense "similar" to the case on appeal.[90] If the court considers any similar cases in which a life sentence was imposed,[91] it does not list or discuss such cases in its opinions.[92] Even assuming that the court actually does look at

87. Woodson v. North Carolina, 428 U.S. 280, 316 (Rehnquist, J., dissenting).

88. 104 S. Ct. 871 (1984). In *Harris*, the Court stated that there was "no basis" in any previous case for holding that the eighth amendment required proportionality review. *Id.* at 879. Justice White, writing for the Court, admitted that in *Gregg* six Justices had "made much of" the Georgia proportionality review requirement. *Id.* at 877. He concluded, however, that the *Gregg* Court had regarded proportionality review as merely an "additional" safeguard and had not included it among "the components of an adequate capital sentencing scheme." *Id.*

89. In Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), the court did cite to some life sentences imposed on defendants hired to commit murder. *Id.* at 792 n.12, 301 S.E.2d at 250 n.12. It then proceeded to list in the appendix murders for hire in which death sentences were imposed, and affirmed appellant's death sentence.

90. In all the 1981 cases reviewed for this Article, the court invariably listed in its appendix only other death sentence cases. The similarity of the listed cases with the case before the court was often superficial and at times rather strained, if not actually misleading. For example, in Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, *cert. denied,* 454 U.S. 882 (1981), the court cited to six "similar" domestic murder cases. *Furman* rendered unconstitutional the statute under which the death penalty in the first three cases was imposed. Morgan v. State, 231 Ga. 280, 201 S.E.2d 468 (1973); Sirmans v. State, 229 Ga. 743, 194 S.E.2d 476 (1972); Jackson v. State, 229 Ga. 191, 190 S.E.2d 530 (1972), *vacated,* Jackson v. Georgia, 409 U.S. 1122 (1973), *conformed,* 230 Ga. 181, 195 S.E.2d 921 (1973). Two of the other "similar" cases involved the killing of a spouse or former spouse for the purpose of obtaining insurance proceeds, a motive that Tyler's jury had specifically refused to ascribe to her. Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978); Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976). In the sixth comparison case, the defendant had strangled, slashed, and cut his former wife before finally killing her by stabbing her through the heart. Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977).

91. Curtis French, Special Assistant to the Supreme Court of Georgia in charge of the staff authorized to collect cases for the similarity review, see GA. CODE ANN. § 2537(f)-(h) (1983), stated in a June, 1982, telephone interview that the Georgia Supreme Court considers life sentence cases in death penalty proportionality reviews. He noted, however, that preference is given to cases in which the state unsuccessfully sought the death penalty. Because there are relatively few of these cases the court uses for comparison cases in which the state could have charged the defendant with capital murder.

92. Unpublished life-sentence cases used in the similarity review raise many of the problems

some cases in which the defendants received life sentences, its review is severely limited by the fact that only *appealed* life sentences are available for comparison.[93] Thus the Georgia Supreme Court does not have access to the records of the thirty percent[94] of murder convictions resulting in a life sentence. Moreover, few if any defendants appeal a life sentence when they have received the sentence in exchange for a guilty plea.[95] Accordingly, the Georgia Supreme Court rarely reviews any cases in which the prosecutor agreed to forego the death penalty in return for a

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that are encountered in "limited publication" circuits, without entailing any of the savings of judicial resources. (In a limited publication circuit, certain cases, deemed insignificant in terms of law-making, are not published.) First, courts may be less than meticulous if their reasoning is not open to public scrutiny; this is particularly harmful in capital cases. This assessment may seem harsh, but the Georgia Supreme Court *often* disposes of proportionality reviews with the statement "a comparison of cases shows this sentence is not disproportionate." *See infra* note 102 and accompanying text.

Second, the failure to publish life sentence cases makes scholarly evaluation of court review of Georgia death penalty cases difficult. This is particularly disturbing because the constitutionality of capital punishment rests on "*evolving* standards of decency." Trop v. Dulles, 356 U.S. 86, 101 (1958) (emphasis added). Courts must publish their life sentence opinions before this evolving standard in charging, sentencing, and appellate review becomes visible. The Georgia Supreme Court's failure to disclose which cases it uses for comparison effectively obscures developing trends. Scholars could collect the Georgia life sentence cases and evaluate trends themselves, but this would be an enormous duplication of effort and still leave the reviewing process of the court unclear. Finally, even if the court's assessment in any given similarity review is meticulous and accurate, nonpublication shrouds the process of comparison and hence damages the appearance of justice. *See* Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals,* 78 COLUM. L. REV. 1167 (1978) (discussing arguments supporting and opposing limited publication).

93. Confirmed by Curtis French, *see supra* note 91. While Justice White was correct when he asserted that the relevant Georgia statute does not condone the use of only appealed cases, Gregg v. Georgia, 428 U.S. 153, 223 n.11 (1976) (White, J., concurring), the Georgia court admits in its own opinions that it only considers cases appealed to that court. *See, e.g.,* Cunningham v. State, 248 Ga. 558, 565, 284 S.E.2d 390, 397 (1981), *cert. denied,* 455 U.S. 1038 (1982). Such a limitation is obviously convenient—indeed obtaining information on unappealed cases would no doubt be difficult. Moreover, the Georgia Supreme Court in the very case cited by Justice White refused to examine life sentences noted by the defendant. It stated that "this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics." Moore v. State, 233 Ga. 861, 863-64, 213 S.E.2d 829, 832 (1975), *cert. denied,* 428 U.S. 910 (1976).

Petitioners in *Gregg* and Proffitt v. Florida, 428 U.S. 242 (1976), a companion case, raised the argument that proportionality review based only on appealed capital convictions is inadequate. The Court disposed of this contention summarily, without discussion or citation to authority, saying essentially: "we disagree." Gregg v. Georgia, 428 U.S. 153, 204 n.56 (1976); Proffitt v. Florida, 428 U.S. 242, 259 n.16 (1976).

94. Baldus, *supra* note 73.

95. The author has found no such appeal. *But see* Ford v. State, 248 Ga. 241, 282 S.E.2d 208 (1981) (appeal from a denial of habeas corpus on the grounds that joint representation of two codefendants had been improper; codefendants had pleaded guilty in exchange for consecutive life sentences).

guilty plea.[96]

Because the Georgia Supreme Court examines a very select group of murder convictions, its proportionality review is severely flawed. With only a skewed sample before it, the court cannot possibly perform the self-assigned task of ensuring "that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally."[97] At best, Georgia's proportionality review may insure that if a court imposes a death sentence in a case which is in no way similar to other death penalty cases, the supreme court may vacate the sentence. Because, however, the categories of aggravating circumstances are virtually all-inclusive,[98] that situation has never arisen.

An examination of the Georgia Supreme Court's decisions in which it has conducted the statutorily required proportionality review supports the conclusion that its review fails to ensure against arbitrariness. Over the past ten years, the court has set aside as disproportionate only two death sentences for murder. In one case, the defendant had received a life sentence for the same killing at a previous trial.[99] In the other case, a

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96. *See infra* notes 164-220 and accompanying text.

97. Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975), *cert. denied*, 428 U.S. 910 (1976).

98. See the excellent discussion in Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 111-17 (1980). Professor Dix concluded:

> In its attempt to categorize cases and examine the extent to which cases in each category have resulted in death penalties, the court has used extremely broad categories that permit almost any killing to fit within at least one category. Killings of witnesses and victims during robberies can be subsumed in the general category of killings related in any fashion to the commission of a serious felony. If the killing was for monetary gain, death is permissible; if not, an "execution style" killing is sufficient for imposing death. That a killing was related to a domestic dispute is irrelevant if the case can be brought within one of the statutory categories. Thus, almost any killing for which a prosecutor might reasonably seek the death penalty can be placed within an "approved" category and thereby immunized from reversal.

Id. at 115.

99. Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977). The state actually tried the defendant three times. At the first trial, the jury recommended a life sentence but the appellate court reversed the conviction because of an erroneous alibi charge. The second trial ended in a mistrial when the jury was unable to agree upon a verdict. After the third trial the jury imposed a death sentence, finding that the murder was "outrageously or wantonly vile . . ." under (b)(7). The court found that the life sentence imposed in the first trial rendered the later death sentence disproportionate. *Id.* at 208, 236 S.E.2d at 368. Three justices dissented, and would have affirmed the death sentence, relying partly on Stroud v. United States, 251 U.S. 15 (1919), which had approved a death sentence imposed after an original life sentence. *Id.* at 209, 236 S.E.2d at 369. *Stroud* has since been expressly held inapplicable to a death sentence imposed in a bifurcated proceeding, such as the one Georgia incorporated in its capital sentencing statute. Bullington v. Missouri, 451 U.S. 430, 446 (1981).

death sentence had been imposed on the nontriggerman in a felony-murder when the triggerman had only been given a life sentence.[100] The court's reaction to these highly unusual cases, which involved a built-in comparison of the death penalty with a life sentence imposed under nearly identical circumstances,[101] does not foster confidence that proportionality review provides meaningful protection against arbitrariness and discrimination.

The court's opinions in the 1981 death penalty cases demonstrate the perfunctory way in which it conducts proportionality review. The opinions almost invariably end with the boilerplate language:

> Reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or a life sentence was imposed. We find that the following similar cases listed in the appendix support the affirmance of the death penalty. The appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[102]

When the court does elaborate, it is frequently to argue why it should affirm the death sentence even though the murder fell into a category that usually resulted in a life sentence.[103] Such a justification of a death sentence, despite more common imposition of life sentences in similar cases, surely defeats any hope that proportionality review will serve the purpose for which it was designed. If the court concedes, for example, that "lesser sentences than death are frequently imposed in domestic murder cases,"[104] it cannot be true in any meaningful sense that

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100. Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978). During a liquor store robbery in which Hall and Smith participated, Smith fired a shot that killed the store clerk. Both defendants had prior robbery convictions. The court, citing to Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977), found Hall's death sentence disproportionate in view of Smith's sentence to life imprisonment at a subsequent trial. 241 Ga. at 257, 244 S.E.2d at 838. Once again, three justices dissented and would have affirmed the death sentence. *Id.* at 260, 244 S.E.2d at 839 (Jordan, J., dissenting).

101. The Supreme Court of Georgia would have vacated the death sentences in *Hall* and *Ward* under subsequent Supreme Court decisions that do not address proportionality concerns. Under the rule established in Bullington v. Missouri, 451 U.S. 430 (1981), the state could not have sought a death sentence in Ward's second and third trials. *See supra* note 99. The Supreme Court's recent ruling in Enmund v. Florida, 458 U.S. 782 (1982) probably would invalidate Hall's death sentence. In *Enmund*, the Supreme Court held that death is an excessive sentence for one who did not take life, attempt to take life, or intend to take life. *See supra* note 100.

102. Messer v. State, 247 Ga. 316, 325, 276 S.E.2d 15, 24, *cert. denied,* 454 U.S. 882 (1981).

103. *See, e.g.,* Godfrey v. State, 248 Ga. 616, 624, 284 S.E.2d 422, 430 (1981), *cert. denied,* 456 U.S. 919 (1982); Gilreath v. State, 247 Ga. 814, 837, 279 S.E.2d 650, 673 (1981), *cert. denied,* 454 U.S. 984 (1982); Justus v. State, 247 Ga. 276, 279, 276 S.E.2d 242, 245-46, *cert. denied,* 454 U.S. 882 (1981).

104. Tyler v. State, 247 Ga. 119, 125, 274 S.E.2d 549, 555, *cert. denied,* 454 U.S. 882 (1981).

"throughout the state the death penalty has been imposed generally"[105] in domestic murder cases.

Instead of reviewing all similar murder cases to determine whether a particular defendant merits a death sentence, the court appears to see its task as justifying whatever death sentences juries impose, no matter how inconsistent or irrational. The court's ingenuity in finding ways to declare a sentence "proportionate" is at times severely tested. Perhaps *Cervi v. State*[106] provides the most telling example of this phenomenon among the 1981 cases. In *Cervi*, described above, the court affirmed the defendant's death sentence in spite of the fact that his codefendant, Robert Wilson, had been sentenced to life in prison.

The court began its review of Cervi's sentence by stating that no ironclad rule requires that one defendant may not receive a death sentence if the codefendant was sentenced to life.[107] The court then tried to distinguish the degree of culpability attached to the different acts of the two defendants: Wilson smashed the victim's head with a rifle butt, while Cervi cut the victim's throat. The court ignored the fact that the victim died as a result of the combination of these injuries. Moreover, Wilson, while holding the rifle, ordered Cervi to kill the victim. The court found a more definite intent to kill in cutting a man's throat than in bashing his head. It declined to find comparable culpability in Wilson for ordering the killing, because Wilson, according to the evidence, did not actually point the rifle at his accomplice. Finally, the court noted that the gun originally belonged to Cervi.

If the decision were whether to add a year or two to Cervi's prison sentence because of his perceived higher degree of involvement, the review might be acceptable. But because the question is quite literally a matter of life and death, such minute parsings of actions and states of mind fail to provide an adequate basis for distinguishing the sentences.

Georgia's mandatory appellate review of death sentences has thus proven far from effective in assuring evenhanded application of the death penalty. At most, Georgia courts succeed in weeding out the extreme case in which the death sentence should not have been imposed in the first place. At worst, the court approves death sentences when a life sen-

105. Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975), *cert. denied*, 428 U.S. 910 (1976).

106. 248 Ga. 325, 282 S.E.2d 629 (1981), *cert. denied*, 456 U.S. 938 (1982). *See supra* notes 63-66 and accompanying text.

107. *Id.* at 333, 282 S.E.2d at 637.

tence for the same defendants would have been equally reasonable. Certainly the court's decisions do not provide the promised assurance that excessive or disproportionate sentences will be vacated upon careful and thorough review of sentences imposed in similar cases.[108]

C. *Old Problems: The Fallibility of the System and Imperfections of the Process*

Although guided jury discretion and appellate review are critical procedural checks in recent eighth amendment analysis, older concerns about capital punishment persist. Both proponents and opponents of the death penalty recognize the irreparable injustice of executing an innocent person.[109] Moreover, the procedures leading to a death sentence, while perhaps sufficient to ensure equitable imposition of less serious penalties, are unequal to the awesome responsibility of taking a person's life.

1. Mistake

Jerry Banks' ordeal started November 7, 1974.[110] While hunting in Henry County, Georgia, Banks found blood stains in the road. His dog led him into the woods, where he found two dead bodies. He went to the road and flagged down a motorist, who called the police. Approximately a month later, the state charged Jerry Banks with both murders.

At the first trial[111] a detective from the sheriff's office testified that he received a call on November 7, 1974, at 5:45 p.m. from an unidentified male who said that a young black male carrying a shotgun flagged him down on the road and told him to call the police. The detective stated under oath that he did not know the identity of the caller.

The detective went to the location that the caller gave him. Jerry Banks was waiting there and led the detective to the bodies, explaining

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108. *Cf. supra* note 85.

109. Professor Black calls this kind of mistake a "mistake-in-fact," or executing someone in error. There are other and more common forms of mistake. *See infra* notes 130-35 and accompanying text. *See generally* C. BLACK, *supra* note 82, at 22-30, 85-93.

110. Banks v. State, 235 Ga. 121, 218 S.E.2d 851 (1975) (reversing conviction and death sentence and remanding on the basis of newly discovered evidence); Banks v. State, 237 Ga. 325, 227 S.E 2d 380 (affirming conviction and death sentence given in the second trial), *cert. denied,* 430 U.S. 975 (1976); Banks v. Glass, 242 Ga. 518, 250 S.E.2d 431 (affirming denial of habeas corpus relief), *cert. denied,* 440 U.S. 986 (1979); Banks v. State, 246 Ga. 1, 268 S.E.2d 630 (1980) (reversing the conviction and death sentence given in Banks' second trial on the basis of newly discovered evidence). After the last reversal the prosecutor entered a *nolle prosequi* and the charges were dropped.

111. Unless otherwise noted and until text accompanying note 117, all facts are taken from the opinion rendered in Banks' first appeal. Banks v. State, 235 Ga. 121, 218 S.E.2d 851 (1975).

how he had found them. The police began a search of the area that evening and continued it for two hours; apparently no one found any shotgun shells that evening.

The following morning, November 8, the police asked Banks to turn over his gun[112] for testing. Sometime that day shotgun shells were found at the crime scene. That same day the police fired test rounds with Banks' gun.[113] The State Crime Lab determined that the shell casings found at the crime scene came from Banks' gun. When questioned on December 5, Banks said he had not fired the gun in that area. At the trial, however, Banks' brother testified that he had been hunting and had fired the same shotgun in that area about a week before Banks found the bodies.

An autopsy of the two victims showed that they were each shot twice in the back at approximately 2:30 p.m. on November 7. One of Banks' neighbors testified that Banks had been at her home from about 9:30 a.m. until about 5:00 p.m. on November 7.

The shotgun casings constituted the strongest evidence against Banks. The unavailability of the motorist-caller also damaged Banks' defense: it left his story uncorroborated and could have given the impression that Banks had invented the caller to confuse the police. The jury convicted Banks and sentenced him to death on January 31, 1975.[114]

After the conviction, the mysterious "motorist-caller" was found. As

112. The gun was actually owned by his brother. *Id.* at 123, 218 S.E.2d at 853.

113. Newspaper reports allege that experts fired the test rounds at the murder site and that the shells found on the 8th were left after the test. N.Y. Times, Dec. 24, 1980, at 31 col. 1. An assistant district attorney for the circuit in which Banks was tried pointed out, however, that the allegations have never been proven and noted that it is nearly impossible to determine where a person was on a given day, five or six years later. (telephone conversation with Mr. Floyd, Asst. District Attorney for Flint Circuit, June, 1982). If test shots *were* fired at the murder site on the 8th, it would explain why shells were found on the afternoon of the November 8 but not, even after extensive searching, on November 7, after Banks discovered the bodies.

114. The jury found Banks' offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE ANN. § 27-2534.1(b)(7) (1983). In Godfrey v. Georgia, 446 U.S. 420 (1980), the United States Supreme Court vacated a death sentence based on a similarly unconstitutionally broad and vague reading of (b)(7). *Id.* at 428-33. It is interesting that the Georgia Supreme Court affirmed Banks' second conviction, Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976), and Godfrey's conviction, Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979), despite the Supreme Court's warning in *Gregg*: "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language [(b)(7)] need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." Gregg v. Georgia, 428 U.S. 153, 201 (1976).

a result, Banks' attorney filed a motion for a new trial, which the trial court denied. The Supreme Court of Georgia reversed and remanded the case for a new trial. What remains a mystery is how the caller was ever "lost." In an affidavit submitted in support of Banks' motion for a new trial, the motorist, Mr. Eberhardt, corroborated Banks' statement to the police and further stated that he had given his name to the police when he called. Further, Mr. Eberhardt stated that he had called the police and identified himself prior to the preliminary hearing and grand jury presentation. The police told him they would notify him if he was needed. Mr. Eberhardt also stated that after the trial he went to both the presiding judge and the sheriff, who took a statement from him. In reversing the trial court's denial of the motion for a new trial, the Supreme Court of Georgia noted that at the trial all the investigating officers, including the sheriff, denied having any knowledge of the identity of the caller. The court further stated that the testimony of Eberhardt "would tend to establish the fact, though contradicted, that the sheriff and other investigating officers knew of his identity all along and that such information was either intentionally or inadvertently kept from the defendant and his counsel."[115]

At the second trial, Banks' attorney, who has since been disbarred, called Mr. Eberhardt as a witness.[116] He failed, however, to call Banks' brother, his neighbor, or Banks himself.[117] The jury again convicted Banks and sentenced him to death.

After this second death sentence, Banks' two new attorneys, although working on a long cold trail, discovered an extraordinary amount of new evidence.[118] The new attorneys found witnesses to testify that a rapid fire rifle killed the victims, not a gun like Banks'.[119] The attorneys gathered

115. Banks v. State, 235 Ga. 121, 124, 218 S.E.2d 851, 854 (1975).

116. Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976), *cert. denied,* 430 U.S. 975 (1977).

117. Mr. Myers, Banks' attorney for his first and second trials, also failed to object to the introduction of certain of Banks' statements on the ground that Banks made them involuntarily or that the police elicited them without forewarning Banks of his constitutional rights. Banks v. Glass, 242 Ga 518, 519, 250 S.E.2d 431, 432 (1978). Furthermore, Mr. Myers failed to challenge the array of grand and traverse jurors on the ground that the state systematically excluded blacks, young people, and women. *Id.* at 520, 250 S.E.2d at 433. Nevertheless, the Supreme Court of Georgia affirmed the conviction and sentence, Banks v. State, 237 Ga. 518, 227 S.E.2d 380 (1976), *cert. denied,* 430 U.S. 975 (1977), and affirmed the denial of a writ of habeas corpus, Banks v. Glass, 242 Ga. 518, 250 S.E.2d 431 (1978), *cert. denied.* 440 U.S. 986 (1979).

118. Unless otherwise noted, the following facts are taken from Banks v. State, 246 Ga. 1, 268 S.E 2d 630 (1980).

119. *Id.* at 2, 268 S.E.2d at 631. Four people in a house near the murder site heard several rapid

evidence of other suspects[120] and rifle shells[121] present at the scene of the crime.

The Supreme Court of Georgia reversed the trial court's denial of a new trial based on this evidence and stated that "there is so much new evidence that real doubt is created that Banks had heretofore received a fair trial."[122] On remand, the district attorney's office entered a *nolle prosequi*[123] and on December 22, 1981, the state dismissed all charges against Jerry Banks.[124]

The difficulties encountered in uncovering the mistake in Jerry Banks' case strongly suggest that his plight is not unique.[125] Indeed, it was not.

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fire shots at about 2:30 p.m. on November 7, 1974. They reported this to a detective the next day. The detective wrote up a report, which was lost. Banks' single-shot shotgun was not an automatic and, therefore, could not have fired the shots heard by the people in the house. A farmer also heard the rapid fire shots in the area. The farmer, passing near the murder site a few minutes later, saw a white man holding what looked like a Browning automatic shotgun. The farmer called the sheriff the next day. The sheriff did not recall the phone call. Two other witnesses, both policemen, recalled hearing rapid fire shots and stated that they called the sheriff's department. The sheriff's office did not remember this call either.

120. Another man, at about noon on November 7, 1974, saw two white men and a woman in a car like the victims' about a half-mile from the murder site. He testified that the two men were arguing. The witness went to the sheriff's office, and an officer made a memo of his statement. *Id.*

121. The mayor and Chief of Police of Stockbridge visited the site of the murder two days after the killing and found two green shotgun shells in the area. They turned the shells over to the sheriff's office, which eventually lost the shells. Green shotgun shells are characteristic of a particular brand of shotgun ammunition that could not be used in Banks' gun. *Id.* at 2-3, 268 S.E.2d at 631.

122. Banks v. State, 246 Ga. 1, 268 S.E.2d 630, 631 (1980).

123. A *nolle prosequi* is a formal entry on the record by the district attorney that the defendant will no longer be prosecuted on a particular charge.

124. There is not, however, a happy ending to this story. While Jerry Banks was waiting on death row, his wife filed for divorce and custody of their three children. On March 29, 1982, Jerry Banks shot and wounded his wife and then killed himself. *Lifelines*, a newsletter of the National Coalition Against the Death Penalty, quoted Murphy Davis of the Southern Prison Ministry, who had visited Banks and worked for his release: "It was something set into motion—a very powerful death machine—that just couldn't be stopped. You take six years of a person's life you tell them they are going to die. You tell his wife and kids that you set a tragedy in motion. At the end of six years you don't go back and say it was all a mistake . . ." *Lifelines*, Spring 1981, at 12, col. 3 (copies can be obtained from NCADP, 132 West 43rd Street, New York, N.Y. 10036).

125. Several factors combine to make discovery of mistake difficult. Law enforcement officials are satisfied that the case is closed once a court enters a verdict. Investigators are faced with loss of physical evidence and lapsing memories of witnesses. Furthermore, once someone has been executed for a crime it becomes more difficult to discover a mistake because the potential damage to reputations, embarrassment, and guilt or shame of the officials involved tend to discourage investigation. In addition, the interest and help of outsiders is less likely to be a factor after an execution, because the goal of freeing an innocent person can no longer be achieved. *See* H. BEDAU, THE DEATH PENALTY IN AMERICA 234-41 (3d ed. 1982); Pollack, *The Errors of Justice*, in CAPITAL PUNISHMENT, 207 (T. Sellin ed. 1967).

Earl Patrick Charles spent three and one-half years in a Georgia jail under sentence of death before the district attorney's office accepted his alibi and released him.[126] Charles was convicted and sentenced to die for the murders of the owners of a Savannah furniture store during an armed robbery. He presented evidence through several witnesses that he was working in Tampa, Florida, 360 miles away, at the time of the killings. Only at the insistence of defense counsel did the district attorney's office later reinvestigate and verify the alibi through a Florida police officer.[127] These murders occurred about a month before the murders for which Banks stood trial. The mistake in Charles' case demonstrates that Banks' experience was not isolated. In Georgia, during a very short time span, two men who were in fact entirely innocent were convicted of murder and sentenced to death.[128]

Thus, imposing a death sentence on an innocent person may not be as rare an occurrence as is commonly believed. The old concern about executing an innocent person remains real and inescapable.[129] This concern is magnified when the category of mistake is expanded from the "wrong man" to what Professor Amsterdam has described as "wrong *mens*" errors.[130] The "wrong *mens*" errors occur in those cases in which the jury has attributed to the defendant a state of mind, required by the statutory definition of capital murder, that he did not in fact have. In this highly complex area of psychological facts, which includes the controversial definitions and varying applications of the insanity defense, Professor Black

126 Charles was arrested in Florida in November, 1974, and convicted and sentenced to death in May, 1975. He remained in custody until July 5, 1978. John Charles Boger, Esq., Legal Defense Fund, 99 Hudson Street, New York, N.Y. 10013, supplied information about Mr. Charles' case. The records consist of motions for a new trial with supporting affidavits, the district attorney's statement of intent to place the case on the dead docket with supporting investigative reports, and contemporary news accounts. All these materials are on file with the author.

127 All witnesses who testified at trial, including Charles' employer at the Tampa gas station where he worked the day of the murders, were black. The policeman, who helped the gas station manager by checking up on new employees such as Charles, were white.

128. *See also infra* note 159 (discussing the case of Jack House, the first person sentenced to die under Georgia's new statute, who may represent another case of mistake).

129. Hugo Adam Bedau identified 74 cases in which persons were wrongfully accused of homicide. In 71 cases the defendants were convicted. H. BEDAU, THE DEATH PENALTY IN AMERICA 436-52 (1964). In eight cases an innocent person was executed. *Id.* at 438. Together with Professor Michael L. Radelet, Department of Sociology, University of Florida, Mr. Bedau has since uncovered evidence that at least 300 other cases involved innocent persons convicted of homicide. (Letter to author from Mr. Radelet, March 2, 1984).

130. Amsterdam, *Capital Punishment* in H. BEDAU, *supra* note 125, at 350; Letter to author (Feb. 27, 1984).

is surely right in saying that a jury may easily make a mistake.[131]

"Mistakes of law" widen the category of mistake even further. Courts and legislatures continually alter the definitions of capital crimes,[132] the meaning of "cruel and unusual punishment,"[133] and the scope of procedural rights. These changes can affect the fact-finding process and, if given retroactive effect, the changes may render an execution that has already taken place a "mistake."[134] Several recent executions would undoubtedly fit in this category of mistake.[135]

The possibility exists, therefore, of executing an innocent person, a person who did not have the requisite intent, or a person whom the jury would not have convicted or sentenced to die but for improper application of the Constitution or other relevant statutes. Such mistaken executions are all the more disturbing now when the primary justification[136] for the death penalty is its retributive, rather than its deterrent,[137]

131. *See* C. BLACK, *supra* note 82, at 57.

132. The most dramatic example is the crime of rape. In Coker v. Georgia, 433 U.S. 584 (1977), the Supreme Court held that death is an unconstitutional punishment for rape. This holding benefits future defendants and those who had been able to stay in the appellate process long enough to be still alive when the Court rendered *Coker*. It does nothing for the 455 men executed for rape from 1930 to 1964. 405 of these men were black. U.S. Dep't of Justice, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 582 (1982).

133. "Simple" homicide, without any aggravating circumstances, seems no longer to suffice to support a death sentence. *See supra* note 26 and accompanying text. Nor can the state execute a person for a felony murder unless that person personally "took life, attempted to take life, [or] intended to take life." Enmund v. Florida, 458 U.S. 782, 787 (1982).

134. Professor Amsterdam cites two examples that affect numerous cases. First, death sentences imposed before the decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), in which the Court held that to exclude from capital juries all veniremen with conscientious objections to capital punishment violated due process; second, death sentences imposed after trials in which the judge instructed juries that the defendant has the burden of proving provocation to reduce murder to manslaughter. The Court found that this instruction violated due process in Mullaney v. Wilbur, 421 U.S. 684 (1975). *See* Amsterdam, *Capital Punishment*, in H. BEDAU, *supra* note 125, at 350.

135. The clearest case is that of John Evans. Alabama executed Evans in 1983 upon a conviction under a death penalty statute that the Eleventh Circuit later held unconstitutional in the case against his codefendant. *See* Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984).

136. The Supreme Court has acknowledged two goals as sufficient justification for capital punishment: deterrence and retribution. Gregg v. Georgia, 428 U.S. 153, 184 (1976). Because the evidence does not support the notion that the death penalty deters more effectively than life imprisonment, retribution must be the primary goal of the death penalty. *Id.* at 184-85. *See infra* note 138.

137. Retribution is the moral goal of giving a criminal his "just deserts." Most modern retributive theories have their roots in the writings of Emmanuel Kant, a 19th century German philosopher. "Juridical punishment can never be administered merely as a means for promoting another good, either with regard to the criminal or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*." Kant, *Justice and Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 103 (G. Ezorsky ed. 1972). For a good

value.[138] Society's willingness to justify executing some of its members solely because they "deserve" this most extreme, irreversible penalty is severely undermined by the reality that "[m]istakes will be made . . . ."[139]

2. *Due Process*

Unlike Jerry Banks, who had no involvement with the murder that kept him on death row for six years, David Peek may in fact have participated in the violent brawl that resulted in the death of his brother and

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summary of modern retributive theory, see Ellis, *Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for its Justification,* 34 OKLA. L. REV. 567 (1981).

138. Deterrence is the principal utilitarian goal of capital punishment:

> The immediate principal end of punishment is to control action. This action is either that of the offender, or of others: . . . [T]hat of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of *example* . . . . Example is the most important end of all . . . .

Bentham, *Punishment and Utility,* in PUNISHMENT AND REHABILITATION 64 (J. Murphy ed. 1973). Execution clearly incapacitates a criminal. Deterrence of others, however, is much more questionable. As the Supreme Court concluded: "Statistical attempts to evaluate the worth of the death penalty as a deterrent. . . simply have been inconclusive." Gregg v. Georgia, 428 U.S. 153, 184-85 (1976).

Many have argued that, as an additional utilitarian goal, capital punishment prevents people from taking the law into their own hands: "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." Gregg v. Georgia, 428 U.S. 153, 183 (1976). Justices Brennan and Marshall are right, however, in asserting that no evidence supports this conclusion, *id.* at 238 (Marshall, J., dissenting); Furman v. Georgia, 408 U.S. 238, 303 (1972) (Brennan, J., concurring). A comparison of lynching statistics with execution statistics belies the argument that capital punishment prevents vigilantism. Increased executions correlate with *more* lynchings, not fewer. W. BOWERS, EXECUTIONS IN AMERICA 40 (1974). Studies finding that executions have a brutalizing effect also support the notion that executions, particularly publicized ones, would increase lynching. Bowers & Pierce, *Deterrence or Brutalization: What Is the Effect of Executions,* 26 CRIME & DELINQ. 453, 458-9 (1980).

Another utilitarian argument that supports the death penalty is that it is cheaper to execute people than to provide lifetime imprisonment. *See* Myers, *The Death Penalty,* 6 CRIM. JUST. REV. 48, 49 (1981) (noted but not espoused). Even if this argument were theoretically viable, it now appears that the expenses of capital trials and appeals are in fact greater than the cost of imprisoning such defendants for life. Nakell, *The Cost of the Death Penalty,* 14 CRIM. L. BULL. 69 (1978).

139. Gregg v. Georgia, 428 U.S. 153, 226 (1976) (White, J., concurring). Justices White, Burger, and Rehnquist rather cavalierly dismissed the concern about possible mistakes:

> Petitioner has argued in effect that no matter how effective the death penalty may be as a punishment, government, created and run as it is by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is an awesome responsibility for any system of justice and those who participate in it. *Mistakes will be made and discrimination will occur which will be difficult to explain.*

Id. at 226 (White, J., concurring) (emphasis added).

cousin. Peek's case is disturbing for a different reason: whether or not Peek was factually guilty of homicide,[140] whether or not he had the mental state required for a murder conviction,[141] and whether or not mitigating circumstances existed that would militate against a capital sentence in his case,[142] the judicial procedures that culminated in his death sentence were so hurriedly and carelessly carried out that, even if in some sense he "deserved" to die, a society committed to due process of law should not administer the death penalty.

Peek's trial for two counts of murder and one count of kidnapping began less than three days after his indictment. His appointed attorney waived the requirement of three days' notice before arraignment, citing "grumblings of the Traverse [petit] Jury that it would be detrimental for me not to go on trial on this."[143] On the morning of July 28, 1976, the parties selected a jury and two alternates. The court delivered preliminary instructions, including a promise to "move [the case] along as quickly as we can."[144] Counsel presented all the evidence in the case,

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140. Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), *cert. denied,* 439 U.S. 882 (1978). The court's summary of the evidence is incomplete, and the following facts are taken from the trial transcript, which can be obtained from the author. At his trial, Peek testified that Paul Ward, his sister's boyfriend, committed the murders (T. 188-190). Numerals preceded by "T" refer to pages of the trial transcript.)

141. When the prosecutor first questioned Peek, he admitted to hitting the victims in self defense, saying that the victims had beaten Peek up earlier in the day and threatened him again that night (T. 109). One of the victims, Peek's brother, had a bad reputation in the community (Trial judge questionnaire, Question 20). If the victims' serious provocation caused Peek to kill them, he would be guilty, under Georgia law, of voluntary manslaughter. GA. CODE ANN. § 26-1102 (1983). Voluntary manslaughter carries a penalty of from one to twenty years' imprisonment. *Id.*

142. The Supreme Court in *Gregg* applauded Georgia's requirement that the jury consider mitigating circumstances. The Court gave the following examples of mitigating circumstances: the defendant's youth, the extent of his cooperation with the police, and his emotional state at the time of the crime. Gregg v. Georgia, 428 U.S. 153, 197-98 (1976). Peek was only 19 years old at the time of the offenses. He was sent to Central State Hospital for psychiatric evaluation immediately after his arrest (Psychiatric report). The main prosecution witness, 15-year-old Pearlie Mae Lawrence, stated that Peek and the victims spent the evening at a club that served alcoholic beverages. (T. 41-42.) Thus, both age and mental condition may well have been the mitigating factors, in addition to the family aspect of the case. Moreover, Peek arranged to alert the police of the crime.

143. Transcript of hearing on motions, July 27, 1976, p. 23. The court countered:

> THE COURT: Well, now, that statement bothers me a little bit. What are you talking about the rumbling of the Traverse Jury? I don't want you to be forced into trial by anything if you can freely and voluntarily make the decision and consent to waive the three days yourself,—

Id.

144. T. 26. The court hastened to add:

> So, we're hoping that we can move this case along, we do not want in any sense for the Defendant's sake to look like this case is being pushed or being sped up for any reason. All

consisting of nine witnesses for the prosecution and Peek's testimony in his own behalf, between noon and 8:30 p.m. that same day, with two hour-long breaks for lunch and dinner.[145]

The court reporter did not transcribe the opening statements and closing arguments of counsel because Georgia law does not require transcription unless the defendant can afford to pay for it.[146] The stenographer noted, however, that the jury heard summations at the guilt phase between 8:35 and 9:10 p.m. that evening.[147] The jurors heard the court's charge on the law from 9:20 to 10:27 p.m., and then retired to deliberate.[148] At midnight, the court inquired about their progress and gave them the option to stay overnight. The foreman asked for fifteen more minutes. At 12:35 a.m., the foreman entered the courtroom to report that one of the jurors was "nervous" and wished to be excused.[149] Both

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I want us to do is to not just unusually waste time, but we will move it along as quickly as we can and certainly we'll excuse you as soon as we can.

Id.

145. T. 68, 183-84, 213.

146. *See* GA. CODE ANN. §§ 6-805 & 27-2401 (1983). The Supreme Court of Georgia has refused to hold that the failure to transcribe argument of counsel in a capital case is reversible error, despite its acknowledgement that the court "should" transcribe closing arguments in a death case. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, *cert. denied,* 439 U.S. 991 (1978). The same court has on several occasions set aside death sentences because of improper arguments by the prosecutor (where the transcript happened to be available), even when the trial counsel did not object. *See, e.g.,* Hawes v State, 240 Ga. 327, 240 S.E.2d 833 (1977); Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975). Moreover, mandatory death sentence review requires the Supreme Court of Georgia to determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, GA. CODE ANN. § 27-2537(c) (1983), a task that would appear impossible without reviewing the arguments of the prosecutor at the penalty phase.

147. T. 213.

148. *Id.* at 213, 230.

149. The entire colloquy was recorded as follows:

THE COURT: All right. Let the record show that the Foreman has come out and indicated that Mr. Chester Geesling, he feels, is definitely extremely nervous and almost at the breaking point and that they have been trying to do what they could to placate him and to keep something from happening and that Mr. Geesling has requested that he would like to be excused and Mr. Briley, I believe, you said that you will stipulate—

MR. BRILEY: The State will stipulate that he may be excused.

MR. ASHLEY (defense counsel): Under the circumstances, the Defense will stipulate that he may be excused.

THE COURT: All right, sir.

MR. BRILEY: Let's substitute the first alternate, is that—

THE COURT: Well, I think we ought to have the Foreman to advise the, after Mr. Geesling leaves, to advise the panel that we are not going to just, you know, start excusing at random, because, but I think they are all aware as I understand it from what you say of the situation—

MR. FOREMAN: Everybody else is just fine, but I mean, it is just that fellow.

THE COURT: Yes, sir. Okay. Well, we'll then, let him go. Let him come on out then.

MR. FOREMAN: You just want me to tell him he can leave?

counsel agreed, without any inquiry of the juror himself and without obtaining the defendant's personal consent, to allowing the juror to leave.[150] The court substituted the first alternate[151] for this juror at 12:42 a.m. Precisely three minutes later the newly constituted jury returned with its verdict finding Peek guilty on all three counts.[152]

Immediately after the finding of guilt, at 12:45 in the morning, the court proceeded to the sentencing phase. Neither side presented any evidence in aggravation or mitigation. Again, the court reporter did not transcribe the prosecuting attorney's argument to the jury in favor of the death penalty, which the jury heard from 12:55 to 1:15 a.m. The reporter did not transcribe the defense counsel's ten minute speech, either.[153] The charge of the court consisted largely of reading the relevant statutes. The court gave a detailed explanation only of the single statutory aggravating circumstance that the state submitted, which was that the defendant committed each capital felony in the course of another capital felony. The court did not mention any possibly mitigating factors.[154]

The jury retired at 1:45 a.m. to deliberate on whether the defendant should live or die. The jury returned at 2:07 a.m. with a finding that the state had proven the aggravating circumstances and recommended that

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THE COURT: Yes, sir.

MR. FOREMAN: Because he doesn't want to make a big to do about it.

THE COURT: Right. Well, I haven't got a back door for him to go out. Mr. Weinstein?

MR. WEINSTEIN: Yes sir.

MR. FOREMAN: Can I just tell him the gist of what we've been talking about?

THE COURT: All right. We have just excused a Juror by agreement of both Counsel and by the Court on word that has come out of the Jury Room here, so we need to ask you to go in and take his place, please sir.

MR. WEINSTEIN: All right, sir.

Id. at 231-32.

150. *Id.* at 231.

151. The court had not sequestered this juror with the other jurors, as required by Georgia law in capital cases, GA. CODE ANN. § 59-718-1 (1983). The court permitted this juror to go home for his meals, "due to his diet" (T. 68), and he was absent from the courtroom during testimony for some unspecified period. T. 176.

152. T. 232-33.

153. *Id.* at 234.

154. The United States Court of Appeals for the Eleventh Circuit has recently reaffirmed that "jury instructions must 'describe the nature and function of mitigating circumstances' and 'communicate to the jury that the law recognizes the existence of facts or circumstances which, though not justifying or excusing the offense, may properly be considered in determining whether to impose the death sentence.' " Westbrook v. Zant, 704 F.2d 1487, 1503 (11th Cir. 1983) (quoting Spivey v. Zant, 661 F.2d 464, 472 (11th Cir. 1981)).

the court sentence the defendant to death.[155] During the 22 minutes in which the jurors made their decision to impose the death penalty, they first had to decide whether the state had proven the statutory aggravating circumstance that the defendant committed each murder during the course of another capital felony. As to each murder, the jury had to decide whether the defendant committed it during a kidnapping or another murder; the jury's muddled conclusions on these matters[156] give some indication of the less than clear analysis that took place at 2 a.m.[157]

The proceedings that led to Peek's death sentence are not unusual. The practice of holding the penalty phase immediately after the finding of guilt appears to be the norm, rather than the exception, even when the jury reaches that verdict late in the evening.[158]

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155. T. 241-42.

156. The sequence of events as described by the prosecution witness, Pearlie Mae Lawrence, began with Peek killing his brother Grady in an argument over Ms. Lawrence, who was his brother's 15-year-old girlfriend. Peek then allegedly raped Pearlie Mae in Grady's car. When Peek's cousin, James Jones, came out of the house, Peek killed him as well. Then he drove the two bodies and Ms. Lawrence (whom he had placed in the trunk) a short distance and left to report the events to the police. Peek v. State, 239 Ga. 422, 426, 238 S.E.2d 12, 15 (1977); T. 42-51. The jury found that Peek committed the kidnapping of Pearlie Mae (also considered a capital crime) while he was engaged in committing murder. The jury also found that Peek committed the murder of James Jones while he was engaged in the kidnapping, and finally, that Peek murdered Grady while he was engaged in committing the murder of James Jones. T. 272.

157. The Supreme Court of Georgia affirmed Peek's conviction and death sentence on direct appeal Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), *cert. denied,* 439 U.S. 882 (1978). Peek's application for a state writ of habeas corpus was denied, after a hearing during which the excused juror, whose name was Greeson, not Geesling, testified that he felt compelled to leave the deliberations because he was the only juror voting for acquittal. Peek v. Kemp, 746 F.2d 672 (11th Cir. 1984). A federal district court also denied relief, *id.* at 676, but the Court of Appeals for the Eleventh Circuit recently reversed Peek's conviction and sentence, finding the substitution of the alternate improper. *Id.* at 683.

A very similar substitution of a juror during capital sentencing deliberations was upheld a few months earlier by a different panel of the Eleventh Circuit in Green v. Zant, 738 F.2d 1529 (11th Cir. 1984). Judge Vance, who wrote the opinion for the court in *Green* and dissented in *Peek*, certainly saw no distinguishing features between the two cases. Peek v. Kemp, 746 F.2d 672, 695 (Vance, J., dissenting and concurring in part). In addition to showing a lack of adherence to due process in capital cases, this pair of decisions demonstrates graphically yet another way in which a death sentencing decision may be arrived at arbitrarily. Depending on which judges are sitting on a given day, the defendant will live or die. Roosevelt Green was executed on January 9, 1985 after the Supreme Court tied four to four and refused to grant a stay. 53 U.S.L.W. 3482 (U.S. Jan. 7, 1985); *see also* N.Y. Times, Jan. 9, 1985 at A17, col. 1.

158. *See, e.g.,* Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978), *cert. denied,* 441 U.S. 916 (1979), Legare v. State, 243 Ga. 744, 257 S.E.2d 247, *cert. denied,* 444 U.S. 984 (1979). In *Finney* the sentencing hearing began at 10 p.m. and continued until after midnight on a Friday evening, after two long days of trial. During the trial the prosecution introduced the victim's skull into evidence, causing one of the jurors to become physically ill (Transcript of trial, p. 523). The Elev-

Furthermore, the fairness of proceedings that lead to death sentences often is fatally undermined by defense attorneys who do not possess the experience or ability to investigate possible defenses,[159] make viable attacks on the prosecution's case,[160] or present mitigating evidence in the penalty phase.[161] In addition, prosecutors who frequently cross the

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enth Circuit reversed Finney's death sentence on the grounds that the jury had been inadequately charged on mitigating circumstances. The appellate court appeared to frown on the hurried proceedings. Finney v. Zant, 709 F.2d 643, 647 (11th Cir. 1983). In *Legare*, the jury arrived at the death sentence on Thanksgiving night at 1 a.m. Conversation with Patsy Morris, ACLU of Georgia, January, 1984. The United States Supreme Court vacated Legare's death sentence for a murder he committed when he was 17 in light of Eddings v. Oklahoma, 455 U.S. 104 (1982). Legare v. Zant, 455 U.S. 914 (1982). On remand, Legare was again sentenced to death. The Supreme Court of Georgia vacated that sentence because the court gave the jury an erroneous *Allen* charge. (An "*Allen* charge," derived from Allen v. United States, 164 U.S. 492 (1896), urges those in the minority in the jury room carefully to reconsider the reasonableness of their vote). Legare v. State, 250 Ga. 875, 302 S.E.2d 351 (1983). Legare has recently again been sentenced to death after a third sentencing proceeding. Conversation with George Kendall, ACLU of Georgia, December, 1984.

159. Jack Carlton House was convicted in July, 1973 of the sodomy and murder of two seven-year-old boys. An attorney who had never read the new Georgia capital punishment statute under which House was tried represented House at trial. The attorney never spoke to any prosecution witnesses, never visited the scene of the crimes, learned for the first time from the witness stand that a blood stain on House's pants would be used in evidence, left the courtroom during the direct testimony of a police officer whom he then proceeded to cross-examine, and became aware of the provision for a separate sentencing stage only when he was in the middle of the sentencing stage. House v. Balkcom, 725 F.2d 608, 612-13 (11th Cir. 1984). The attorney failed to find out that the blood stain on House's pants was the same blood type as House's wife's, who was menstruating on the day House was arrested. *Id.* at 614. When two neighbors came forward after the trial to state that they saw the two boys alive hours after House had supposedly killed them and at a time when House was at home in bed, the attorney failed to bring this information to the attention of the court in his boilerplate motion for a new trial. *Id.* at 613. The testimony of the two neighbors, presented in a later hearing on House's petition for a writ of habeas corpus, caused a federal magistrate to announce: "[T]his is probably the only case that I have had in twelve or fourteen years of being in the criminal justice system when I really thought the convicted accused was innocent of his crime." House v. Balkcom, No. C78-1471A, p. 21, transcript of proceedings before Hon. J. Owens Forrester, U.S. Magistrate, July 27, 1981. Despite this assessment, the district court reversed only the death sentence. House v. Balkcom, 562 F. Supp. 1111 (N.D. Ga. 1983). The circuit court reversed the conviction on the ground that defense counsel's "level of representation was far below acceptable levels at all phases of the case." House v. Balkcom, 725 F.2d 608 (11th Cir. 1984).

160. Charlie Young's attorney, like House's, was unaware of Georgia's bifurcated procedure in capital cases. Young v. Zant, 677 F.2d 792 (11th Cir. 1982). In a case that presented extremely weak evidence of a premeditated murder, the attorney failed to put the prosecution to its proof. Instead, the attorney argued at the guilt-innocence phase that the jury should extend mercy to Young. *Id.* at 797. Even though the testimony indicated that the killing had occurred at the end of a heated argument and struggle between Young and the victim, the lawyer never argued that Young might be guilty of manslaughter rather than murder. *Id.*

161. Having conceded at trial that Young was guilty of malice murder, his attorney failed to present any of the available mitigating evidence to the jury at the penalty phase. The jury thus never learned that Young, college-educated and articulate, had not been in any prior trouble with the law

bounds of fairness and propriety by giving inflammatory closing arguments undermine the jury's ability to consider the imposition of the death penalty objectively.[162] Thus, defendants regularly receive death sentences after proceedings marred in one way or another, dramatic or more subtle, that render the decision an affront to any concept of due process of law. In fact, between 1976 and 1983, federal courts of appeal decided seventy percent of the capital cases in which a district court had denied a writ of habeas corpus in favor of petitioners on the federal constitutional claims.[163]

The new Georgia capital punishment statute thus has neither resulted in significantly less arbitrary imposition of death sentences nor solved the problems of mistake and defective procedures. These problems are inherent in any criminal justice system, but they create much more serious concerns in the death penalty context. The trial and appeal stage of a capital case still presents ample opportunity for the injection of caprice and discrimination into the decision whether a given defendant will live or die. The remainder of this Article demonstrates that Georgia's capital punishment process vests even more uncontrolled discretion in prosecutors and in the clemency authority.

II. PROSECUTORIAL DISCRETION

The petitioners in *Gregg* argued that no matter how guided the sentencing discretion might be at trial,[164] or how carefully an appellate court reviews the sentence,[165] arbitrariness in the imposition of the death penalty would persist because prosecutors possess unfettered discretion to

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and had a favorable employment recommendation from the Sheriff of Greene County, where the killing took place. *Id.* The lawyer also failed to challenge the state's proof of the aggravating circumstances that Young committed the killing during an armed robbery and for pecuniary gain, despite what a district court later found to be undisputed evidence that Young formed no intent to rob the victim before his death. *Id.* at 794. In reversing Young's conviction, the court of appeals held that his attorney "did not accord Young even a modicum of professional assistance at any time." *Id.* at 794-95.

162 *See, e.g.*, Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984); Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983), *reh'g granted*, 728 F.2d 1358 (11th Cir. 1984); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), *cert. denied*, 103 S. Ct. 3544 (1983).

163 Barefoot v. Estelle, 103 S. Ct. 3383, 3405 (1983) (Marshall, J., dissenting). This percentage demonstrates the extent to which death sentence proceedings diverge from basic due process requirements.

164. *But see supra* notes 12-84 and accompanying text (discussing failure to create effective guidance for jury discretion).

165. *But see supra* notes 85-108 and accompanying text (discussing problems with appellate review under Georgia's death penalty scheme).

decide whether to seek a death sentence against any given capital offender.[166] The Supreme Court dismissed this claim. Some Justices rejected petitioners' argument that *Furman* prohibited total discretion in all decisions, not just the sentencing decision, in capital cases.[167] Other Justices disagreed with petitioners that, as a matter of actual experience, prosecutorial discretion posed problems of constitutional dimension.[168] Part IIA of this Article examines the Court's treatment of the issue of prosecutorial discretion. In Part IIB, the Article summarizes findings concerning the manner in which Georgia prosecutors actually exercise their discretion to seek a death sentence.[169]

A. Analysis

Of the seven Justices who voted to uphold the Georgia statute in *Gregg*,[170] six addressed the issue of prosecutorial discretion.[171] In an opinion announcing the judgment of the Court, Justices Stewart, Powell, and Stevens insisted that no constitutional problem arose from unbridled prosecutorial discretion to seek the death penalty in capital cases.[172] Justice White, whose opinion Chief Justice Burger and Justice Rehnquist joined, admitted that such discretion theoretically could create constitutionally suspect arbitrariness, but maintained that, in fact, prosecutors make their capital charging decisions in such a way as to avoid arbitrariness.[173] Neither analysis nor experience supports either view.

The plurality dismissed the problem of prosecutorial discretion by using two questionable definitional devices. First, it limited the concept of

166. *See* Gregg v. Georgia, 428 U.S. 153, 199 (1976). Prosecuting attorneys make the decisions to prosecute, to prosecute for a capital crime, to accept or reject a plea to a lesser charge, to seek or not to seek a death sentence, without any legislative guidance. Some district attorney's offices have promulgated informal guidelines, but the sanctions for varying from such guidelines are nonexistent. Conversation with Fulton Co. Assistant District Attorney Wendy Schoob, July, 1982.

167. *See infra* notes 174-77 and accompanying text.

168. *See infra* notes 183-88 and accompanying text.

169. During the summer of 1982, a research assistant conducted telephone interviews with approximately 25 prosecutors, representing more than half the Georgia judicial circuits. Notes of these conversations are on file with the author.

170. Only Justices Marshall and Brennan dissented, expressing their view that the death penalty is per se cruel and unusual punishment. 428 U.S. at 227 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

171. Justice Blackmun concurred in the judgment, citing to the dissenting opinions in *Furman*. *Id.* at 227 (Blackmun, J., concurring).

172. *Id.* at 198-99 (opinion of Stewart, Powell, and Stevens, JJ.). For the sake of convenience, this opinion is referred to as the plurality opinion.

173. *Id.* at 224-26 (White, J., concurring in the judgment).

arbitrariness for eighth amendment purposes, so as to exclude variation resulting from nonsentencing discretion.[174] The plurality insisted only that there be some degree of uniformity among those eventually selected for execution.[175] For example, if all the murderers on death row had committed murder during the course of a robbery, it would not matter that the vast majority of such offenders had received life sentences. The concurring Justices in *Furman*, including to some extent members of the *Gregg* plurality, had suggested no such narrow view of the eighth amendment.[176] If the eighth amendment forbids the infliction of capital punishment in an arbitrary and capricious manner, the source of the arbitrariness, or the point at which it appears, cannot be determinative.[177]

Second, the plurality focused on defendants whom the legislature has *removed* from the capital murder category rather than on defendants selected for death. In response to petitioners' argument that arbitrary infliction of the death penalty would occur as long as prosecutors had the exclusive power to seek or not to seek the death penalty, the plurality argued: "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."[178] This rephrasing of the issue, so as virtually to guarantee agreement, suffers from several flaws.

The first flaw is the failure, or refusal, to recognize the implications of a decision to give mercy. Professor Kenneth Culp Davis, in his book *Discretionary Justice*, pointed out one shortcoming of the plurality's reasoning:

> The discretionary power to be lenient has a deceptive quality that is dangerous to justice. A fundamental fact about the discretionary power to be leni-

174 *Id.* at 199. Webster's Dictionary, however, offers no such refinement of the term: "arbitrary . . . depending on choice or discretion." WEBSTER'S NEW COLLEGIATE DICTIONARY 57 (1981).

175 A majority of the Supreme Court recently has adopted a shift in the definition of arbitrariness that narrows the impact of eighth amendment requirements. *See supra* notes 42-57 and accompanying text.

176. Justice White specifically found an eighth amendment violation because "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972). *See also supra* note 27 (discussing differing approaches in *Furman*).

177 As Professor Black has put it: "I would be surprised if anyone were willing to espouse, in clear terms, the view that uncontrolled discretion in a jury, when it comes to selecting a death sentence, is wrong, while uncontrolled discretion at all the other strategically located stations on the way to the electric chair is right." Black, *supra* note 82 at 127.

178. 428 U.S. at 199.

> ent is extremely simple and entirely clear and yet is usually overlooked: The discretionary power to be lenient is an impossibility without the concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is specially frequent; the power to be lenient is the power to discriminate.[179]

A decision to reprieve one defendant is merely the converse of the decision to send another to the death chamber.

The plurality's focus on the decision to grant an "individual" defendant mercy is misleading in another related way. Although the prosecutor's charging and pleading decisions deal with particular defendants, the removal of certain defendants from the pool of potential capital defendants creates the group of defendants from which those ultimately executed will be chosen. Charging and pleading decisions about individual defendants inevitably add up to decisions that define the class of capital defendants. Logically, individual decisions to grant mercy also determine the ultimate makeup of death row.

In addition to the logical implications of prosecutorial "grants of mercy," charging decisions may, under certain circumstances, have legal consequences as well. If, as some empirical studies have suggested,[180] prosecutors make capital charging decisions on the basis of race or sex of the defendant, then a defendant charged with a capital crime may have a viable selective enforcement claim based on the favored treatment of the group not charged with a capital offense.[181] At present, a defendant claiming selective enforcement must show that "the government's discriminatory selection of him for prosecution has been invidious or in bad faith or based on such impermissible considerations as race, religion or the desire to prevent his exercise of constitutional rights."[182] Even under this stringent standard, death row inmates may be able to establish that prosecutors systematically and disproportionately seek the death penalty against, for example, killers of white victims.

While the plurality found no constitutional problems arising from

179. K. DAVIS, DISCRETIONARY JUSTICE 170 (1969).

180. *See, e.g.*, Foley & Powell, *The Discretion of Prosecutors, Judges, and Juries in Capital Cases*, 7 CRIM. JUST. REV. 16 (1982) (concluding that all three participants are influenced by the sex of the offenders, and that judges (but not juries) are influenced by the race of the victims); Zeisel, *supra* note 45, at 466-68 (asserting that differences in the likelihood of receiving a death sentence based on race of the defendant and race of the victim are largely caused by charging decisions).

181. A successful selective enforcement claim bars prosecution of the defendant. A defendant who attacks selective enforcement of capital punishment wants to bar the charge of *capital* murder against himself.

182. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

prosecutional discretion in capital cases, Justice White correctly saw the *potential* for arbitrariness in the unbridled discretion of prosecutors to seek death sentences whenever they choose.[183] Justice White recognized that prosecutorial arbitrariness would violate the eighth amendment as construed in *Furman*. In addition, Justice White recognized that the discretion *not* to charge a defendant with a capital offense is hidden from review, and, therefore, the Georgia Supreme Court cannot correct arbitrary exercises of discretion.[184] Justice White rejected petitioners' argument not because of the theoretical absence of a constitutional infirmity, but because of his perceptions about how prosecutors actually exercise their discretion.[185] His impressions about the behavior of prosecutors do not, however, withstand close scrutiny.

Justice White made three basic assertions. First, he argued that prosecutors charge capital crimes if, and only if, the case is strong enough to warrant such a charge and the jury is likely to impose a death sentence.[186] Second, these two standards constitute acceptable criteria for the imposition of capital punishment.[187] Finally, because prosecutors charge capital crimes only when the evidence warrants such a charge and when the jury is likely to impose a death sentence, the Georgia Supreme Court will review all cases properly falling into the "capital crime" category.[188] All three assertions are subject to challenge.

While the strength of the case and likelihood of a death sentence are

183. Justice White's concession is apparent from the way in which he rebutted petitioners' argument on prosecutorial discretion. He did not, as did the plurality, insist that courts need not scrutinize charging decisions; rather he asserted that as a matter of *fact* prosecutors exercise their discretion in an acceptable fashion. 428 U.S. at 224-26 (White, J., concurring in the judgment).

184. *Id.* at 225.

185. *Id.* at 225-26.

186. Justice White stated: "Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." *Id.* at 225.

187. Justice White stated his approval of this standard as follows:

> Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt.

Id.

188. On this point, Justice White asserted that "the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly 'similar.' If the cases really were 'similar' in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary." *Id.*

indeed factors Georgia prosecutors consider, they are by no means the only factors considered when prosecutors make their charging decisions. As this Article will discuss in more detail below,[189] not only do prosecutors hold varying opinions about what constitutes a "strong" case in the capital context, but they also take into consideration economic and other factors when deciding whether to seek the death penalty.

Furthermore, the criteria Justice White identifies may pose constitutional difficulties. The strength of the case against a defendant has no logical bearing on the sentence he should receive. Any criminal case must be strong enough to convince a jury of the defendant's guilt beyond a reasonable doubt. If the proof not only convinces the jury beyond a reasonable doubt, but also satisfies all possible doubt as to the defendant's guilt, then that fact, while insuring that the conviction is proper,[190] should not increase the severity of the sentence. The notion that the "strength of the case" should decide who dies and who does not produces disturbing results that would seem to conflict with eighth amendment principles. The charged crimes may be similar, equally heinous, and, therefore, the defendants may be equally deserving of similar punishment. The prosecutor, however, will charge one defendant with capital murder and not the other, depending upon the amount or quality of evidence. For example, in *Ellis v. State*,[191] the defendant robbed and killed a 104-year-old wheelchair-bound man. The defendant strangled and bludgeoned the victim to death. In *Thomas v. State*,[192] the defendant beat and strangled to death a nine-year-old victim. Mr. Thomas received a death sentence. The prosecution did not charge Mr. Ellis with capital murder and he was given a life sentence. The prosecution's case against Mr. Ellis was weak.[193] Because it is the overall strength of the case and

189. *See infra* notes 203-18 and accompanying text.

190. Using the strength of the evidence does operate to reduce the chance of convicting and executing someone who may in fact be innocent. While this consideration is of valid concern, as noted in Part IC of this Article, a jury should not impose a life sentence based on questionable evidence, either.

191. 248 Ga. 414, 283 S.E.2d 870 (1981).

192. 247 Ga. 233, 275 S.E.2d 318 (1981).

193. Telephone conversation with the Richmond County District Attorney's Office, June, 1982. *See also* Milton v. State, 284 Ga. 192, 282 S.E.2d 90 (1981). In *Milton*, the defendant tried to rob the victim, but when the victim resisted Milton hit the victim over the head, poured gasoline on him, and set him on fire. In Hardy v. State, 247 Ga. 235, 275 S.E.2d 319 (1981), the defendant beat and partially disrobed the victim to search for money. The defendant then poured gasoline over the victim and then shot him. Mr. Hardy received a sentence of death. Mr. Milton was convicted of arson and murder. The prosecutor never charged Milton with capital murder due to the weakness of

not the strength of the evidence as to aggravating circumstances that affects charging decisions,[194] the extreme penalty is meted out to those sloppy or unlucky defendants who leave more traces of their crime than their fellow criminals.

The second charging criterion that Justice White acknowledges and approves is the "likelihood that the jury would impose the death penalty."[195] The difficulty with this criterion resembles the difficulty with Georgia's statutory aggravating circumstance, (b)(7).[196] Both run a very fine line between being a legitimate standard and a catch-all category. The criteria upon which a jury would be likely to impose the death penalty could quite easily cover criteria the Court has already declared impermissible.[197] For example, a district attorney might decide not to seek the death penalty because a jury is less likely to impose the death penalty on women or less likely to impose the death penalty on a white defendant who killed a black man.[198]

Finally, Justice White is simply wrong in relying on the Georgia Supreme Court's proportionality review to compare all "similar" cases. The Georgia Supreme Court, by its own admission, considers only *appealed convictions* of capital crimes that resulted in sentences of death or life imprisonment, and does not consider all cases in which prosecutors

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the case against him. The Georgia Supreme Court reversed Milton's life sentence because the prosecution did not corroborate the accomplice's testimony. 248 Ga. at 197, 282 S.E.2d at 95.

194. An argument might be made that if the evidence of the presence of an aggravating circumstance is particularly persuasive, then that fact might properly affect the prosecutor's decision to seek a death sentence. This argument is undercut considerably, however, by the all-inclusive nature of the aggravating circumstances in general and the vague and necessarily subjective character of the (b)(7) aggravating circumstance in particular. *See supra* notes 28-38 and accompanying text.

195. 428 U.S. at 225.

196. "The offense of murder . . . was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE ANN. § 27-2534.1(b)(7) (1983). In *Gregg*, the Court warned the Georgia Supreme Court that it would consider the provision unconstitutional if construed broadly. 428 U.S. at 201. In *Godfrey*, the Supreme Court held that the Georgia court had used an impermissibly broad construction of the statute, and reversed the petitioner's sentence. Godfrey v. Georgia, 446 U.S. 420 (1980). *See also* Note, *The Death Penalty in Georgia: An Aggravating Circumstance*, 30 AM. U.L. REV. 835 (1981) (maintaining that (b)(7) is per se unconstitutional or at least that courts continue to apply it unconstitutionally).

197. *See, e.g.*, United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976) (ethnic origin criteria impermissible); United States v. Falk, 479 F.2d 616, 623-24 (7th Cir. 1973) (political activity impermissible criterion); United States v. Alleyne, 454 F. Supp. 1164, 1174 (S.D.N.Y. 1978) (racial criteria impermissible); *supra* notes 44 & 45 and accompanying text.

198. Recent studies confirm that the race of the victim is a decisive factor in Georgia. *See supra* note 45.

brought a capital charge.[199]

B. Experience

Justice White boldly asserted that prosecutors base their decisions to charge defendants with capital crimes solely on the strength of the case against the defendant and the likelihood that a jury will impose a death sentence. Justice White qualified this assertion, however, by referring to the absence of facts supporting a contrary hypothesis.[200] Interviews with numerous prosecutors in Georgia demonstrate that Justice White's qualification was more sound than his assumption. Prosecutors in the different Georgia judicial circuits articulated vastly different charging standards. The prosecutors' differing perceptions concerning when it is appropriate to charge a capital crime may well account for the significantly different rates of death penalty imposition among the circuits.[201]

Prosecutors in Georgia judicial circuits[202] that have high rates of imposing the death penalty generally charge a defendant with capital murder any time they can make out a prima facie case for an aggravating circumstance.[203] To the extent that this charging policy constitutes a

199. *See supra* notes 89-96 and accompanying text.

200. 428 U.S. at 225. Justice White's discussion of this issue is interlaced with the following:

> Petitioner's argument . . . is unsupported by any facts. . . . [It is] unlikely that prosecutors would . . . and I am unwilling to assume to the contrary, ... I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

Id. at 225-26.

201. Differences are most strikingly correlated with the race of the victim, but are also evident by region. *See* Bowers & Pierce, *supra* note 45, at 603 (Table 4).

202. The State of Georgia is divided into 159 counties, which in turn were grouped at the time of this study into 42 judicial circuits. This Article adopts the regional groupings of these circuits used by Bowers & Pierce, *supra* note 45: north (Lookout Mountain, Conasauga, Blue Ridge, Mountain, Northeastern, Rome, Cherokee), central (Tallapoosa, Douglas, Cobb, Coweta, Griffin, Clayton, Stone Mountain, Rockvale, Gwinnett, Alcovy, Piedmont, Western, Ocmulgee, Northern, Toombs, Flint), Fulton County (Atlanta), southwest (Chattahoochee, Macon, Houston, Southwestern, Pataula, Cordege, Tifton, Dougherty, South Georgia, Southern, Alapaha), southeast (Augusta, Middle, Dublin, Ogeechee, Oconce, Atlantic, Eastern, Waycross, Brunswick).

203. These circuits include but are not limited to (not all circuits responded): Toombs Judicial Circuit (telephone conversation with Chip Wallace (August 23, 1982)); Ocmulgee Judicial Circuit (telephone conversation with Joseph Briley, District Attorney for Ocmulgee Judicial Circuit (June 8, 1982)); Rome Judicial Circuit (telephone conversation with Larry Salmon, District Attorney for Rome Judicial Circuit (June 1982); (Atlantic Judicial Circuit (telephone conversation with Dupont K. Cheney, District Attorney for Atlantic Judicial Circuit (July 1982)), Alapaha Judicial Circuit (telephone conversation with Robert Ellis, Assistant District Attorney for Alapaha Judicial Circuit (August 23, 1982)). An assistant district attorney in the Alapaha Judicial Circuit at first said "we

mandatory standard, it differs from the policy of other prosecutors. This policy may also pose constitutional problems[204] because it does not allow the prosecutor to take into account adequately the individual circumstances of each offense.[205] Moreover, a policy that dictates the filing of a capital charge whenever an aggravating circumstance arguably is present may constitute an abuse of prosecutorial discretion.[206]

Prosecutors in other circuits use a variety of standards to charge capital crimes. Often prosecutors make an effort to avoid capital trials, for two reasons. The first is economic. Capital trials are time-consuming and defendants are likely to appeal the verdict, thus making capital trials expensive at a time when judicial resources are limited and calendars are crowded.[207] The second reason follows from the first. Considering the

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don't charge the death penalty all the time," but later explained that they did charge capital murder whenever they could make out a good case for an aggravating circumstance. The examples he gave as instances when they would not charge a defendant with capital murder were cases in which they would have to stretch the death penalty statute to find aggravating circumstances.

204. In *Gregg*, the plurality indicated that such a mandatory charging system would be unconstitutional. 428 U.S. at 199 n.50.

205. *See* Roberts v. Louisiana, 428 U.S. 325 (1976) (mandatory death penalty statute violates eighth and fourteenth amendments); Woodson v. North Carolina, 428 U.S. 280 (1976) (same).

206. The Supreme Court of Washington held that the mandatory policy of the District Attorney's office of filing habitual criminal complaints against all defendants with three or more prior felonies constituted an abuse of prosecutorial discretion. State v. Pettitt, 93 Wash. 2d 288, 295-96, 609 P.2d 1364, 1368 (1980) (petitioner's three felonies were basically joyriding charges). The petitioner's specific arguments were that (1) "a policy which prevents the prosecutor from considering mitigating factors is a failure to exercise discretion, which may, as in this case, result in an unfair and arbitrary result . . . [and (2)] the [mandatory] policy did not afford minimum procedural due process guarantees." *Id.* at 294, 609 P.2d at 1367. The court, quoting a Supreme Court case as authority, asserted:

> [The] decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest. Prosecutors often need more information than proof of a suspect's guilt, therefore, before deciding whether to seek an indictment.

Id. at 295, 609 P.2d at 1367 (quoting United States v. Lovasco, 431 U.S. 783, 794 (1977)).

207. Several circuits expressed economic concerns over capital trials. Robert Wilson, District Attorney for the Stone Mountain Judicial Circuit, stated that "we have to think long and hard about trying to build a capital case; they [capital cases] are expensive and tie up a lot of people." (Telephone conversation with Robert Wilson, District Attorney for Stone Mountain Judicial Circuit (June 1982)). Wendy Schoob, an Assistant District Attorney for the Atlanta Judicial Circuit, stated "we have an incredible case-load; . . . capital cases take much more time [than other cases]." (Telephone conversation with Wendy Schoob, Assistant District Attorney for Atlanta Judicial Circuit (July 8, 1982)). Tom Charron, the District Attorney for the Cobb Judicial Circuit, stated "capital cases put us under an enormous resources strain." (Telephone conversation with Tom Charron, District Attorney for Cobb Judicial Circuit (July 8, 1982)). These three circuits are the largest in Georgia. It is, therefore, not surprising that they expressed economic concerns over capital trials.

expense of a capital trial, some district attorneys expressed frustration about the number of defendants on death row, particularly because Georgia did not execute anyone between 1964 and 1983.[208] Thus, prosecutors could view them as a futile and expensive use of precious resources.[209]

In describing how they made the decision whether to seek a death sentence in a given case, prosecutors alluded to a whole range of factors

208. The recent resumption of executions in Georgia, beginning with John Eldon Smith on December 15, 1983, might therefore encourage prosecutors to seek more death sentences. *See infra* note 307.

209. Tom Charron, District Attorney for the Cobb Judicial Circuit, stated that "it's [the backlog on death row] very frustrating; you begin to wonder if it [capital punishment] really means anything; the state should impose sentences or get rid of it [capital punishment]." *See supra* note 207. In addition, Mr. Floyd, Assistant District Attorney for the Flint Judicial Circuit, concluded: "It [the lack of executions] makes the law mean less; . . . people won't believe in it [the law]; . . . the legislature ought to fix it [see that executions take place] or abolish it." (telephone conversation with Mr. Floyd, Assistant District Attorney for Flint Judicial Circuit (July 1982)).

The disturbing aspect of these views is that the jury is equally aware that no executions took place in Georgia between 1964 and December, 1983. It is, therefore, conceivable that jurors will decide that the defendant will not be executed and impose a death sentence to keep a defendant off the streets for a longer time. A defendant serving a life sentence in Georgia is eligible for parole after seven years. GA. CODE ANN. § 77-525(b) (1983).

The jury's view of the likelihood of execution has added significance because arguments to a jury that tend to diminish the jury's sense of responsibility constitute reversible error. For example, when jurors were told: "The Supreme Court of Georgia review[s] the entire proceedings . . . and the State executes only guilty persons after they've been tried and convicted and appealed and everything exhausted," the Supreme Court of Georgia vacated the death sentence. Hawes v. State, 240 Ga. 327, 335, 240 S.E.2d 833, 839 (1977). Similarly, when the jury was told that the trial judge and the Supreme Court of Georgia will review any death sentence and that either could set aside any death sentence, the Supreme Court of Georgia vacated the death sentence. Fleming v. State, 240 Ga. 142, 146, 240 S.E.2d 37, 40 (1977), *cert. denied,* 444 U.S. 885 (1979). Again, when the jury was told of the right of the trial court to impose a life sentence, even if the jury recommends death, and that the appellate courts could set aside the sentence, the Supreme Court of Georgia vacated the death sentence. Prevatte v. State, 233 Ga. 929, 931, 214 S.E.2d 365, 367 (1975).

The underlying reason for these decisions is that such comments had the "inevitable effect of encouraging the jury to attach diminished consequences to their verdict and to take less than full responsibility for their awesome task of determining life or death for the prisoners before them." *Id.* at 931, 214 S.E.2d at 367. Cases in which courts held similar comments not to be reversible error are distinguishable because the judge cautioned the jury and reminded it strongly of its responsibility. Corn v. Hopper, 244 Ga. 28, 31, 257 S.E.2d 533, 536 (1979); Coker v. State, 234 Ga. 555, 572-73, 216 S.E.2d 782, 796 (1975), *rev'd on other grounds,* 433 U.S. 584 (1977). *But cf.* Tamplin v. State, 235 Ga. 20, 24, 218 S.E.2d 779, 783 (1975), *vacated in part,* 235 Ga. 774, 775, 221 S.E.2d 435, 446 (1975) (prosecutor's argument that if the jury gave the defendant a life sentence he could escape held not to be reversible error; court admitted the argument "approaches the border of violating the spirit of the law").

The general knowledge that Georgia had not executed anyone since 1964 can not be countered because it is not usually revealed to the jury in the course of a capital trial. It instead might rest in the back of a juror's mind and subtly lessen his or her sense of ultimate responsibility.

beyond the presence or absence of statutory aggravating circumstances. Some stressed the extent to which the defendant premeditated or clearly intended the crime.[210] Others considered whether the murderer displayed a "total disregard for human life."[211] Still others paid heed to the reaction of the public to the crime[212] or the standing of the victim in the community. For example, in *Wells v. State*,[213] the defendant, during an attempted robbery, shot the victim, who had been preparing to locate drugs for him. The victim died from bleeding some time later. In *Jackson v. State*,[214] the defendant assaulted and then killed the victim. The battery constituted an aggravating circumstance under (b)(7). The victim had several young boys visiting at the time and police suspected him of being a homosexual. The low standing of these victims in the community contributed to the decision not to seek death sentences in these two cases.[215]

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210. The Flint, Atlanta, and Middle Judicial Circuits' District Attorneys' Offices expressed this general concern. (telephone conversation with Wendy Schoob, Assistant District Attorney for the Atlanta Judicial Circuit (June, 1982)); (telephone conversation with Mr. Floyd, Assistant District Attorney for the Flint Judicial Circuit (July, 1982)); (telephone conversation with Rick Malone, Assistant District Attorney for the Middle Judicial Circuit (July, 1982)).

Wally Speed, Assistant District Attorney for the Atlanta Circuit, referred to Lyons v. State, 247 Ga. 465, 277 S.E.2d 244 (1981), in which the defendant robbed and killed a man at a dice game. Mr. Speed stated that because the robbery was basically an afterthought, it was not a real "murder for money," GA. CODE ANN. § 27-2534.1(b)(4) (1983), and, therefore, he did not charge the defendant with capital murder (telephone conversation with Wally Speed, District Attorney for the Atlanta Circuit (July, 1982)). Mike Whaley, another Atlanta Assistant District Attorney, referred to the cases of Rachel v. State, Robinson v. State and Wright v. State (codefendants), 247 Ga. 130, 274 S.E.2d 475 (1981), where the three defendants robbed and murdered a housing authority employee. Mr. Whaley said he did not charge the defendants with capital murder because the "whole thing was spontaneous." (telephone conversation with Mike Whaley, Assistant District Attorney for Atlanta Circuit (July, 1982)). Mr. Finlayson of the Houston Judicial Circuit referred to Anderson v. State, 248 Ga. 682, 285 S.E.2d 533 (1982), in which the female defendant killed her boyfriend by stabbing him repeatedly with a paring knife. Mr. Finlayson did not charge capital murder because the crime was not premeditated; "she didn't really mean to kill him." (telephone conversation with Mr. Finlayson of the Houston Judicial Circuit (July, 1982)).

211. District attorneys from Atlanta, *supra* note 207, Middle, *supra* note 210, Oconee (telephone conversation with James Wiggins, District Attorney for the Oconee Judicial Circuit (July, 1982)) and Augusta (telephone conversation with Sam Sibley, District Attorney for Augusta Judicial Circuit (July, 1982)).

212. District attorneys from two circuits stated that public pressure could make one feel compelled to "go for it," but added that no amount of public pressure would affect his or her decision if a charge of capital murder was clearly inappropriate. Atlanta and Cobb, *supra* note 207.

213. 247 Ga. 792, 279 S.E.2d 213 (1981).

214. 248 Ga. 480, 284 S.E.2d 267 (1981).

215. Telephone conversation with Harvey Moskowitz, Assistant District Attorney for Atlanta Judicial Circuit (July, 1982).

Some prosecutors took into account what might be considered mitigating circumstances,[216] while others hesitated to seek a death sentence if a codefendant whom they perceived to be more culpable had not been sentenced to death.[217] One prosecutor even acknowledged that he charges capital murder specifically to obtain a more conviction-prone jury through the *Witherspoon* qualification.[218]

Empirical evidence thus demonstrates that prosecutors take into account a variety of factors when deciding whether to seek a death sentence. Some of these factors may be proper considerations for making a capital charging decision; others, such as the desire to obtain a conviction-prone jury, clearly are not. Whether the considerations are entirely proper, improper, or somewhere in between is not, however, the critical point. What is critical for the purposes of the eighth amendment is that prosecutors are not evenhandedly charging defendants with capital crimes. Even within a single state, the possibility that a prosecutor will charge a defendant with a capital crime *for the very same type of offense* varies greatly according to the views of the particular district attorney in office in a given judicial circuit.[219] Such disparities may be acceptable in

216. In Holt v. State, 247 Ga. 648, 278 S.E.2d 390 (1981), the prosecutor did not charge the defendant with capital murder for beating and killing his 23-month-old nephew because of his extreme remorse. (Telephone conversation with Wally Speed, Assistant District Attorney for Atlanta Judicial Circuit (July, 1982)). In Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981), the prosecutor did not charge the defendant with capital murder because he had been found not guilty by reason of insanity in a previous murder case.

217. Berry was one of three defendants who robbed a liquor store and killed the clerk. Berry waited in the car while his codefendants went into the store. The prosecution did not seek the death penalty against Berry because the jury could not decide on the appropriate sentence for one of the more culpable codefendants. Berry v. State, 248 Ga. 430, 283 S.E.2d 888 (1981) (telephone conversation with John Caldwell, District Attorney for Griffin Judicial Circuit (July, 1982)). In Sinns v. State, 248 Ga. 385, 283 S.E.2d 479 (1981), the defendant was one of two men who beat and murdered a dancer. The state did not seek the death penalty because the codefendant seemed much more culpable. (Telephone conversation with Andy Weathers, Assistant District Attorney for Atlanta Judicial Circuit (July, 1982)).

218. Telephone conversation with Bob Wilson, District Attorney for Stone Mountain Judicial Circuit (July, 1982). In his opinion, if not in the view of the Supreme Court, jury qualification under Witherspoon v. Illinois, 391 U.S. 510 (1968) *does* produce a jury more likely to find a defendant guilty. *Id.* at 517. Recent cases support his opinion. *See, e.g.*, Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983).

219. Of course, the chances that a prosecutor will charge a defendant with a capital crime are even more drastically different among the states. The southern states and California impose by far the greatest number of death sentences. Death Row, U.S.A., NAACP Legal Defense and Educational Fund, Inc. at 4-17 (June, 1983).

other contexts;[220] they raise serious questions when a life is at stake.

III. EXECUTIVE CLEMENCY

A. The Theories Behind Clemency

Capital clemency, the modification of a death sentence to a lesser punishment,[221] has a curious role in a constitutional system that allows for the death penalty. According to the United States Supreme Court, clemency is essential to any capital punishment system.[222] Unlike the judicial proceedings that lead up to a death sentence, capital clemency is not subject to due process[223] or to any ascertainable rules.[224] As the Supreme Court recently observed: "Commutation . . . is an *ad hoc* exercise of executive clemency. A governor may commute a sentence at any time

220. For a discussion of sentencing disparities, see Note, *Disproportionality in Sentences of Imprisonment,* 79 COLUM. L. REV. 1119, 1131-36 (1979).

221 Clemency encompasses a variety of executive acts, including pardon, commutation, and reprieve. Georgia courts have defined pardon as follows: "An act of mercy flowing from the fountain of bounty and grace." Randall v. State, 73 Ga. App. 354, 376, 36 S.E.2d 450, 463 (1945), *cert. denied,* 329 U.S. 749 (1946). Courts have defined commutation as "[t]he executive act reducing the terms of a sentence already imposed, substituting lesser for greater punishment." Hagelberger v. United States, 445 F.2d 279, 280 (5th Cir. 1971), *cert. denied,* 405 U.S. 925 (1972). "A reprieve by the executive is nothing but a temporary suspension for the period named in the respite for the execution of the sentence imposed by the court." Gore v. Humphries, 163 Ga. 106, 114, 135 S.E. 481, 485 (1926). This section will refer interchangeably to clemency and commutation to describe the reduction of a death sentence to life imprisonment or to a term of years.

222. Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). *See also* Note, *A Matter of Life And Death: Due Process Protection in Capital Clemency Proceedings,* 90 YALE L.J. 889 (1981) ("Each state whose capital punishment law has been approved by the Supreme Court since *Furman v. Georgia* has a clemency provision.").

223. In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979), the court of appeals rejected a claim that the due process clause of the fourteenth amendment applies to capital clemency decisions. *Id.* at 617-619. The Supreme Court has not addressed capital commutation since *Gregg,* except peripherally in California v. Ramos, 103 S. Ct. 3446 (1983) (mandatory instruction in capital sentencing trial that governor could modify sentence of life without parole did not inject irrelevant consideration into sentencing decision). With regard to noncapital commutation, the Court has ruled that when the clemency authority has complete discretion and no explicit standards, no due process duty requires it to supply an applicant with reasons for the denial of clemency. The Court has held broadly that "the power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on [applicants] . . . beyond the right to seek commutation." Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 467 (1981). *See also* Note *supra* note 222, at 890 n.5.

224. Note, *Executive Clemency in Capital Cases,* 39 N.Y.U. L. REV. 136, 143 (1964) (empirical study of capital clemency procedures made just before the virtual cessation of executions in the United States).

for any reason without reference to any standards."[225] While the concept of ad hoc executive decisions is familiar, recent eighth amendment analysis suggests that total discretion may not satisfy the Constitution when the decision is to take or spare a life.[226]

Capital clemency is final in two respects. First, clemency is immune from judicial review.[227] Executive clemency is deliberately "extrajudicial in nature,"[228] in part because its function is to afford "relief from undue harshness or evident mistake in the operation or enforcement of the criminal law."[229] In recognition of the fallibility of the judicial system, the legislature not only gave the executive the power to commute or pardon, but also authorized the executive to exercise this power with "full discretion" in order to maximize its potential effectiveness.[230] The second way in which capital commutation is final is more immediate. Commutation is traditionally the last decision made as to whether the state will actually execute a defendant facing a sentence of death.[231]

The possibility of executive clemency thus presents another vehicle by which arbitrariness and caprice may, even under post-*Furman* statutes, continue to infect the capital sentencing process. Faced with a challenge that the highly discretionary executive clemency stage undermined the attempted evenhandedness of the new Georgia death penalty statute, the plurality in *Gregg* responded: "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."[232] The plurality indicated that a system of capital punishment without clemency would not only be "totally alien to our notions of crim-

225. Solem v. Helm, 103 S. Ct. 3001, 3015 (1983). This observation on noncapital commutation summarizes the nature of the capital commutation process as well.

226. In Woodson v. North Carolina, 428 U.S. 280 (1976), the Court set aside North Carolina's mandatory death sentence statute. In doing so the Court noted that special due process concerns arise when a defendant's life hangs in the balance.

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305.

227. Solesbee v. Balkcom, 339 U.S. 9, 12 (1950) ("Seldom, if ever, has this power of executive clemency been subjected to review by the courts.").

228. Note, *supra* note 224, at 152.

229. *Ex parte* Grossman, 267 U.S. 87, 120 (1925).

230. *Id.* at 120-21.

231. *See* Solesbee v. Balkcom, 339 U.S. 9, 13 (1950) ("the last word that spells life or death").

232. Gregg v. Georgia, 428 U.S. 153, 199 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). *But see supra* notes 179-82 and accompanying text (removing certain people from the class of those subject to the death penalty leaves those who remain arbitrarily selected).

inal justice,"[233] but would be unconstitutional as well.[234]

It is ironic that discretion, which the Supreme Court has limited under the eighth amendment elsewhere in the capital sentencing process, is the central characteristic of clemency. Courts have defended the unlimited discretion associated with clemency in various ways. Constitutional protections in the trial and sentencing stage are seen to justify the lack of due process protections and substantive standards in capital clemency decisionmaking.[235] The Supreme Court justifies the lack of constitutional standards in the clemency decision with the executive's concern for the individual. The Supreme Court observed that "individual acts of clemency inherently call for discriminating choices because no two cases are the same."[236]

If the experience of pre-*Furman* capital punishment is any indication, the Court should regard unlimited executive discretion warily. Studies of the exercise of capital clemency in several states revealed that, more often than not, executives made "discriminating choices" in favor of white death row inmates.[237] It is too early to tell, however, whether the pattern of discrimination that is evident in the pre-*Furman* clemency processes will continue. In fact, it is difficult to discern *any* kind of a pattern, because while there are over a hundred people on death row in Georgia,[238] only seven have applied for commutation since 1976.[239] This hiatus may soon be over.

As more and more death row inmates exhaust direct and collateral

233. 428 U.S. at 199 n.50.

234. *Id.*

235. In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979), the court reasoned that once the Florida Supreme Court affirmed Spinkellink's death sentence, the state could then constitutionally carry out the sentence. *Id.* at 618-19. The decision by the state's executive to consider commutation was not covered by due process protections; instead it was a process that is "not the business of federal judges." *Id.* at 619.

236. Schick v. Reed, 419 U.S. 256, 268 (1974).

237. Bowers & Pierce, *supra* note 45, at 577-79. "In 1940, Charles Magnum reported that . . . clemency disproportionately favored white as opposed to black offenders sentenced to death." *Id.* at 579. Examining capital commutation decisions in the 1920's and 1930's for nine southern states (not including Georgia), "Magnum showed that in every state commutations were more likely for whites than for blacks on death row." *Id.* While these studies did not include Georgia, they do illustrate, in her neighboring states, the nexus between racial discrimination and the decision to grant mercy.

238. *Death Row, U.S.A.*, NAACP Legal Defense and Education Fund, Inc., at 9 (June 20, 1983).

239 Telephone conversations with L. Silas Moore, Deputy Director, Central Operations, State Board of Pardons and Paroles (September and December, 1983), with John Charles Boger, NAACP Legal Defense Fund, Inc. (December, 1984), and with George Kendall, ACLU of Georgia (January, 1985).

attacks on their sentences, a process that the Court now seems determined to hasten,[240] more applications for capital clemency probably will arise. This potential increase in clemency applications will, therefore, force the public and the courts to focus on what has been a largely dormant clemency process. No matter how diligently, conscientiously, and fairly the executives exercise clemency authority, there are limits to what it can achieve. If capital sentencing discretion, which statutory classifications and appellate review attempt to monitor, produces such arbitrary results, clemency discretion, without any statutory guidelines or judicial review and governed solely by the good intentions of the executives, is unlikely to result in less arbitrary imposition of the death penalty.

B. The Clemency Structure in Georgia

In Georgia the state constitution vests the State Board of Pardons and Paroles with "the power of executive clemency, including the powers to grant reprieves, pardons and paroles, [and] to commute penalties."[241]

240. In Barefoot v. Estelle, 103 S. Ct. 3383 (1983), the Court approved of expedited appellate procedures for a death row inmate first federal habeas petition. *Id.* at 3394. The Court warned that a stay of execution was not automatic in federal habeas proceedings; the district court should not automatically issue a certificate of probable cause. *Id.* at 3393-94. If the district court does issue a certificate of probable cause, the appeals court "should" grant a stay. *Id.* at 3394. Finally, the Court stated that "stays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the Court of Appeals that has denied a writ of habeas corpus." *Id.* at 3395. One recent example of the Court's commitment to haste was in the denial of an initial application for a stay made by Gene Autry, a Texas death row inmate, made days before his scheduled execution, even though Texas did not oppose the stay. A second application was granted at nearly the last possible moment. Autry v. Estelle, 104 S. Ct. 24 (1983).

241. GA. CONST. art. IV, § II, para. I and II(a) (1943, amended 1982); GA. CODE ANN. §§ 2-1701 & 1702(a) (1983).

Initially, the Georgia Governor alone held clemency authority. GA. CONST. art. V, para. XII (1877, amended 1943). A 1943 constitutional amendment, 1943 Ga. Laws 43 (ratified Aug. 4, 1943), created the Board, giving it clemency power, GA. CONST. art. V, para. XII (1943, amended 1982), subject only to the governor's refusal to stay an execution, GA. CONST. art. V, para. XII (1877, amended 1943). Thus, in effect, the governor retained power to veto the Board's decision to grant clemency. This odd sharing of the capital clemency decision reflected either the legislature's unease with vesting complete power in the Board, or its inability to take all of the clemency power from the governor. This arrangement may have been less draconian in practice than it appears to be on paper, because the Board, after receiving an application, would apparently ask the governor for a reprieve, rather than leaving that request up to the individual. Parole Board Basics, State Board of Pardons and Paroles at 4 (June, 1980) (copy on file with the author). The Constitution of 1982 eliminated this provision, and the Board now has full discretion to stay an execution or to consider capital commutation. GA. CONST. 1982, art. IV, § II, para. II (1982); GA. CODE ANN. § 2-1702 (1983). The Board "did not seek the provision . . ." eliminating the governor's power. Biennial Report, State Board of Pardons and Paroles, 1 (Fiscal Years 1981 and 1982) (copy on file with the author).

Only the Board's discretion guides its ultimate decision whether to commute a death sentence.[242]

The Board's clemency application process is also characterized by unreviewable discretion. Days or hours before a scheduled execution, the Board may receive an application for capital commutation.[243] The application must be in writing, and must state grounds for requesting clemency.[244] Persons other than the condemned can apply for commutation.[245] If no one applies, the Board may still consider commu-

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Under either arrangement, the decision whether to consider an application is without standards or review and is final. Under the present arrangement, the discretion is consolidated in the Board.

In practice, the Board has not always had the autonomy it had in theory; it was very much a creature of the political process. The Board consists of five members, appointed by the governor and confirmed by the senate, who serve staggered seven-year terms. GA. CONST. art. V, para. XII (1877, amended 1943). Gubernatorial displeasure with uninterrupted seven-year terms for board members gave rise to a great deal of conflict that eventually erupted into a lawsuit. In Partain v. Maddox, 227 Ga. 623, 182 S.E.2d 450 (1971), the Georgia Supreme Court held that the governor's extraction of undated letters of resignation and other acts designed to pressure board members violated the Georgia constitution. *Id.* at 630, 182 S.E.2d at 456. Partain was the chairman of the Board of Pardons and Paroles; Maddox was a member of the Board whom the governor had appointed. The governor's name was also Maddox. *Id.* at 624, 182 S.E.2d at 451. Governor Maddox's practice of requiring appointees to give him an undated letter of resignation before taking office prompted an investigation by the Georgia legislature. *Id.* After (or perhaps before) Board member Maddox's testimony on January 7, 1971, before a committee investigating this practice, the governor sent Maddox a telegram accepting his resignation, *id.* at 453, and Partain ordered the locks changed in the Board offices. *Id.* Two executive orders from the new governor, Jimmy Carter, followed this lockout. One accepted Maddox's resignation because he was unfit to serve; the other filled the vacancy with a new Board member. The Georgia Supreme Court declared Member Maddox's resignation ineffective and declared him to be the incumbent board member. *Id.*

242. GA. CODE ANN. § 77-534 (1983). Georgia courts have consistently held that the Board's exercise of its clemency powers is discretionary. *See, e.g.*, State v. Hanson, 249 Ga. 739, 745, 295 S.E.2d 297, 302 (1982); Davis v. Caldwell, 229 Ga. 605, 605-06, 193 S.E.2d 617, 618 (1972).

243. Telephone conversations with L. Silas Moore, *supra* note 239. There are several reasons for this close timing. First, the Board requires an inmate to exhaust state and federal judicial remedies before it will decide whether to consider clemency. GA. CODE ANN. § 27-2518 (1983); Rules of the State Board of Pardons and Paroles, Ch. 475-3.10(2)9(b) (amended October 17, 1983) [hereinafter cited as Amended Rules; copy on file with the author]. There typically is not much time between the exhaustion of judicial relief, resulting in the end of a stay and a remand to the Superior Court, and the execution date. Time spent seeking judicial relief at a higher federal level may well reduce this interval further. The result is that clemency starts out as a last-minute, last hope.

244. Amended Rules, *supra* note 243.

245. Parole Board Basics, *supra* note 241, at 4. In one of the seven capital commutation applications since *Gregg*, the Board considered an application made on behalf of an inmate by the director of the Georgia Indigent Defense Fund. State Board of Pardons and Paroles, Commutation Proceeding 1, Jack Howard Potts (May 1, 1980) [hereinafter cited as Potts Clemency Opinion; copy on file with the author]. Other states are less flexible. For example, the execution of Steven Judy in 1981 was preceded by the refusal of the Indiana clemency commission to accept a third-party application for clemency "for reasons of standing." Note, *supra* note 222, at 890-91, n.7.

tation.[246] Consideration is by no means, however, automatic.[247]

The Board's current rules provide that it will not make a decision whether to consider commutation until the defendant has exhausted or abandoned all his available appeals.[248] The Board does conduct an investigation on death row inmates as soon as the Supreme Court of Georgia has affirmed their death sentences.[249] If the Board decides to consider a capital clemency application, but there is insufficient time before the execution to "conduct a complete and fair review of the case," the Board may stay the execution for no longer than 90 days.[250] Under the new rules, however, the investigation should be complete well before a death row inmate files application for clemency.[251] If that is the case, the Board's initial decision whether to consider an application in fact becomes the decision whether to grant clemency.[252] The Board apparently has complete discretion to refuse even to consider a grant of clemency.[253]

The investigation is thus the most critical stage in the clemency process.[254] The investigation consists of an examination of the "detailed circumstances of the offense, the offender's background, the conduct of the trial, [and] the appellate record."[255] The Board also conducts "extensive interviews with persons whose knowledge may shed additional light on

246. Telephone conversation with L. Silas Moore, *supra* note 239; Parole Board Basics, *supra* note 241, at 4.

247. Amended Rules, *supra* note 243. The Georgia Supreme Court has stated that a death row inmate has a right to submit an initial application to the Board and that further applications are discretionary. McLendon v. Everett, 205 Ga. 713, 718, 55 S.E.2d 919, 123 (1949). When the court decided *McLendon*, the governor's unreviewable power to refuse to stay an execution, preventing the Board from considering an application for commutation, tempered this right. Because the current Board's rules make even the decision to consider an application discretionary, it appears that Georgia inmates have the right to apply for commutation, but no right to have that application considered. *See* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465-67 (1981).

248. Amended Rules, *supra* note 243.

249. Georgia State Board of Pardons and Paroles, Board Policy Statement, June 21, 1983, para. 1 & para. 2. [Hereinafter cited as Board Policy Statement; copy on file with the author].

250. *Id.* at para. 1. In the absence of the chairman any designated member of the Board can issue a stay order. *Id.* at para. 3. Successive applications for a stay require a majority vote. *Id.* at para. 5.

251. Amended Rules, *supra* note 243, positively state this goal. The current practice of completing the investigation before the application is made eliminates one of the main reasons for, and the likelihood of, issuance of a stay. Formerly, the stay provided time to conduct the investigation that is now generally complete before the Board receives the application.

252. *See infra* notes 304-24 and accompanying text.

253. *See supra* note 247.

254. Note, *supra* note 224, at 148 ("its importance cannot be overestimated").

255. Parole Board Basics, *supra* note 241, at 4.

the case."[256] In addition, the Board routinely solicits the opinions of the trial judge and the prosecuting attorney.[257] The Board will interview jurors and codefendants.[258] Georgia law requires the Board to obtain certain types of information for all clemency applications.[259] The chief parole officer of the circuit of conviction conducts the investigation and compiles a report, which the Board places in its central files until an application arrives.[260]

The investigation provides "the state's last opportunity to gather information about the prisoner and his conduct, and to formulate an official response."[261] The investigation is critically important because no law or standard governs clemency and because the clemency authority will exercise its discretion based upon the facts the state uncovers in the investigation. In Georgia, the information the Board obtains is classified as a state secret.[262] Although the Board undertakes a thorough investigation, a risk exists of incomplete or erroneous information. Because these investigations are secret, an inmate will not be able to discover any erroneous information.[263] This is a risk that the clemency applicant must take.[264]

The Board's full consideration of a clemency application "may or may not include a hearing."[265] If the Board holds a hearing, the inmate usually is not present, although the inmate's attorney may be.[266] The Board

256. *Id.*

257. Telephone conversations with L. Silas Moore, *supra* note 239.

258. *See, e.g., infra* notes 288-89 and accompanying text.

259. GA. CODE ANN. §§ 77-511, 512 & 516 (1983). Among other things the statute requires the Board to investigate the circumstances of the crime, any social, physical, mental or criminal record of the inmate, and the inmate's behavior while in prison. *Id.*

260. Telephone conversations with L. Silas Moore, *supra* note 239.

261. Note, *supra* note 222, at 898.

262. GA. CODE ANN. §§ 77-533 & 77-512(b) (1983).

263. The price of having the Board gather most of this nonpublic information is that the defendant does not have an opportunity to examine it. Several other problems inhere in the Board's assumption of the investigatory burden:

> Institutional factors may prevent some information from being obtained. The applicant may not trust the state's investigator and may decline to reveal information that otherwise might be helpful to him. Witnesses for the applicant may be intimidated by the state interviewer. Moreover, the state investigator's role is distinct from that of an advocate for the applicant . . .

Note, *supra* note 222, at 900 n.60.

264. In Gardner v. Florida, 430 U.S. 349, 359-60 (1977), the Supreme Court found a similar risk unacceptable in the sentencing phase of capital trials.

265. Amended Rules, *see supra* note 243.

266. In three of the seven recent clemency applications, the Board held a public hearing. Counsel represented two applicants at the hearing. *See infra* notes 282-303 and accompanying text. (telephone conversations with L. Silas Moore, *supra* note 239).

serves notice and a copy of the application on the district attorney of the circuit of conviction prior to the hearing.[267] The Board allows the attorney for the applicant and the prosecuting attorney to present witnesses, introduce evidence, and argue.[268] The hearings can be quite lengthy.[269]

After the Board completes the investigation, it decides whether to grant capital clemency. An affirmative vote by a majority of the Board is necessary for a decision in favor of clemency.[270] The Board then issues a signed opinion.[271] For the Board to grant capital clemency, there must be "substantial evidence of sufficiently mitigating facts."[272] Apparently, the Board considers sentencing disparity a sufficiently mitigating fact.[273]

The Board's decision is the heart of the clemency process; here the Board's unlimited discretion has its greatest effect. In the past, the Board has not been reluctant to exercise its discretion in favor of life. When the Board actively practiced capital clemency, it commuted 41 death sentences, and declined to commute 146.[274] No empirical study of those decisions has been conducted to ascertain whether the Board exercised its discretion rationally or arbitrarily.[275] Although the five recent clemency decisions discussed in the next section represent too small a sampling to disclose a trend, they illuminate the Board's conduct and provide some insight into the process that culminates in "the last word that spells life or death."[276]

C. *Post-*Gregg *Clemency Applications*

The Georgia Board of Pardons and Paroles has received seven clemency applications since 1976. The Board summarily denied the four most recent applications without a hearing.[277] In addition, the Board de-

267. Parole Board Basics, *supra* note 241, at 4.

268. Telephone conversations with L. Silas Moore, *supra* note 239.

269. *Id.*

270. GA. CODE ANN. § 42-9-20 (1983).

271. *Id.* § 42-9-42(b).

272. Parole Board Basics, *supra* note 241, at 4. This standard is also enunciated in three of the seven clemency opinions rendered after *Gregg*. *See infra* notes 281-303 and accompanying text.

273. Parole Board Basics, *supra* note 241, at 4.

274. *See* Note, *supra* note 224, at 191 (the period 1946 to 1963). Before the December, 1983, execution of John Eldon Smith, the last Georgia execution had taken place in 1964. W. BOWERS, EXECUTIONS IN AMERICA 261 (1967).

275. *But see supra* note 237.

276. Solesbee v. Balkcom, 339 U.S. 9, 13 (1950).

277. Applications of John Eldon Smith, Alpha Otis Stephens, Ivon Ray Stanley and Roosevelt Green. For a discussion of the Smith and Stephens applications, *see infra* notes 304-24 and accom-

nied two other applications after hearings, but collateral attacks on the sentences in the courts have prevented the executions from going forward.[278] Finally, the Board granted one application after a hearing.[279] Because the Board has revised its procedures during this period to require that defendants make their collateral attacks on the sentence before the Board considers their applications for clemency,[280] it seems likely that summary dispositions will become the norm. The granting of clemency may become even more exceptional.

Charles Harris Hill was the first condemned inmate to apply for clemency after *Gregg*.[281] The Board commuted his sentence.[282] In *Hill v. State*,[283] three men participated in the robbery and murder of the victim in his home. The evidence indicated that the prosecutor believed that Gary Watts killed the victim by slitting his throat. The prosecutor allowed Watts to plead guilty to robbery and murder, in return for a sentence of life and twenty years. The prosecutor allowed James Brown, Jr., who had tried to protect the victim, to plead guilty to voluntary manslaughter, in return for a ten year sentence. Hill planned the robbery, beat the victim, tried to kill him, and told the others that the victim should die. He pleaded not guilty and presented an alibi defense. The jury found him guilty and recommended a death sentence, which it based upon a finding of two aggravating circumstances.[284]

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panying text. Mr. Stanley was executed on July 12, 1984. N.Y. Times, Dec. 13, 1984 at A18, cols. 4-5. He was not granted a hearing before the Board. (conversation with John Charles Boger, *supra* note 239). Mr. Green was executed on January 9, 1985. *See supra* note 157. The Board, somewhat troubled by his case, requested an informal conference with his attorney. It then denied the application without a hearing hours before the execution. (conversation with George Kendall, ACLU of Georgia (January 28, 1985)).

278 Applications of Horace William Dix and Jack Howard Potts. *See infra* notes 291-303.

279. Application of Charles Harris Hill. *See infra* notes 285-90 and accompanying text.

280. *See supra* notes 248-51 and accompanying text. Almost all death row prisoners pursue, usually with the aid of volunteer counsel, collateral proceedings in both state and federal court after their direct appeals are denied. (conversation with John C. Boger, NAACP Legal Defense Fund, Inc., 99 Hudson Street, N.Y., N.Y. 10013 (January, 1984)).

281. Telephone conversations with L. Silas Moore, *supra* note 239.

282. Hill Clemency Opinion, p. 3.

283. 237 Ga. 794, 229 S.E.2d 737 (1976).

284. The Supreme Court of Georgia disregarded the (b)(1) finding, which involved the "substantial history of serious assaultive criminal convictions," because the language was unconstitutionally vague Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976). Because the court found this case to lie "at the core" of the (b)(7) aggravating circumstance, however, it upheld the death sentence on that basis.

A divided court affirmed Hill's death sentence.[285] The majority was careful not to hold that Hill had actually done the killing. Instead, the court justified his death sentence by first explaining why the particularly heinous circumstances of the murder warranted a death sentence for *someone*, based on (b)(7). Second, the court described Hill as the "prime mover," from the initial entry into the victim's home to his "signalling for the victim's death" in this "execution-style" murder. Justice Ingram dissented,[286] urging the court to modify the sentence to life imprisonment. Justice Ingram was particularly concerned because the prosecutor had allowed Watts, the actual killer, to plead guilty in return for a life sentence. Justice Ingram was unable to conclude that Hill's death sentence, when compared to the life sentence Watts received for the same crime, was "neither excessive nor disproportionate."[287]

After the Georgia Supreme Court denied a rehearing on October 26, 1976, Hill did not petition the United States Supreme Court for certiorari, nor did he take any other legal action to overturn his sentence.[288] His attorney applied for clemency on June 29, 1977. On July 5, the Board asked the Governor to stay the execution so that it could consider the application. On July 7, the appointed day of Hill's execution, the Governor granted a 90 day stay. In the course of its investigation, which included a public hearing on Hill's application, the Board arranged to have Hill, his codefendants, members of the jury, and officials of the court interviewed. In its opinion, the Board revealed that an unusual array of those who had been involved in the trial now urged commutation. The trial judge recommended commutation, as did the assistant district attorney who had prosecuted the case. Jurors, the Board stated, did not know that Watts had received life imprisonment when they recommended the death penalty for Hill. As a result of its investigation, the Board determined that Watts had in fact killed the victim.

In view of this determination, the Board reached the same conclusion

285. Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976). Justice Ingram wrote a dissenting opinion. Justice Gunther also dissented, but wrote no opinion. *Id.* at 802, 229 S.E.2d at 743.

286. *Id.* at 802, 229 S.E.2d at 743.

287. The court's affirmance of Hill's death sentence is difficult to reconcile with its opinion in Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981), see *supra* notes 106 & 107 and accompanying text, in which the court justified a death sentence for Cervi, who had cut the victim's throat, despite the fact that Wilson, a codefendant, who had ordered the killing and hit the victim, received a life sentence.

288. Unless otherwise noted, the following facts are taken from Hill's Clemency Opinion (Sept. 28, 1977).

as Justice Ingram had earlier, that because Hill received a death sentence and Watts received life, "equal justice had not prevailed." The Board commuted Hill's death sentence to a term of 99 years.[289]

It is not remarkable that the Board commuted Hill's sentence; what is remarkable is that the Georgia Supreme Court earlier had affirmed it. The similarity in the opinions of the dissenting judge and the Board suggests that the Board's extensive investigation was not necessary to determine that Hill had received an excessive sentence. At least one Georgia Supreme Court justice had already determined from the record before the court that Hill's sentence was excessive.[290]

In the next two applications for clemency, those of Horace William Dix and Jack Howard Potts, neither the prosecutors who had argued in favor of death nor the judges who had imposed the sentence recommended commutation. The Board denied both applications for clemency.[291]

Dix brutally murdered his former wife; he also kidnapped her mother, sister, and niece.[292] Dix initially evaded arrest, but surrendered two weeks later at the sheriff's office. The savagery of the murder lent credibility to Dix's defense of lack of mental responsibility. The jury found him guilty of murder and three counts of kidnapping, and recommended the death penalty based upon a finding of a section (b)(7) aggravating circumstance. The Georgia Supreme Court affirmed the verdict and sentence on January 4, 1977. The court's sentence review did not address the possibly mitigating factor of Dix's mental state at the time of the crime.

After the state trial court denied Dix's petition for a writ of habeas

289. The Board's modification of Hill's sentence to a term of years probably reflected its judgment that Hill should be eligible for parole in less than twenty-five years. Had the Board commuted the sentence to life imprisonment, Hill would have had to serve twenty-five years, GA. CONST., art. IV, § II, para. II(e) (1982), while Watts, serving a life plus 20 years sentence, would be eligible for parole after seven years. GA. CODE ANN. § 42-9-45(b) (1983).

290 Hill's case presented several factors that frequently motivate clemency authorities to commute death sentences. The fact that the codefendant, who was almost certainly more culpable, received a life sentence supports commutation "almost as a matter of course." Note, *supra* note 224, at 164. The fact that two justices of the Georgia Supreme Court dissented from the court's opinion affirming the sentence would also weigh heavily in favor of commutation. *Id.* at 170. The fact that the prosecuting attorney recommended clemency is ordinarily sufficient to commute a death sentence; the fact that the trial judge agreed made the case even stronger. *Id.* at 171.

291. Dix and Potts Clemency Opinions. Georgia did not execute Dix and Potts after the Board's decision because they pursued further attacks on their sentences in court.

292 Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977).

corpus, the state rescheduled Dix's execution for February 22, 1978.[293] On February 15, 1978, Dix's attorney submitted a clemency application to the Board. At the Board's request, the Governor granted a 90 day stay on February 21, 1978.

The Board conducted an investigation, held a public hearing, and denied clemency. In support of its conclusion that "substantial evidence of sufficiently mitigating factors was not present," the Board described the details of the murder, Dix's attempt to conceal the crime, and the kidnapping of the victim's relatives. The Board rejected Dix's claim that he was not mentally responsible at the time of the crime. After the denial of his application for clemency, Dix avoided execution by simultaneously pursuing direct and collateral relief.[294]

Two different juries sentenced Jack Howard Potts to death.[295] Potts did not seek clemency,[296] but several interested attorneys filed petitions on Potts' behalf, which the Board denied.[297] In Cobb County, in May, 1975, Potts shot and wounded Eugene Snyder after an argument. Potts then robbed Snyder, left him for dead, and kidnapped Michael Priest.[298] In Forsyth County, Potts marched Priest into a field and shot and killed him. The police captured Potts after a gunfight in which the police wounded Potts. Potts was indicted, tried, and sentenced to death in both Cobb and Forsyth counties. In his second trial, Potts unsuccessfully raised an insanity defense. The Georgia Supreme Court affirmed the

293. Unless otherwise noted, the following facts are taken from the Dix Clemency Opinion (May 18, 1978).

294. *See* Dix v. State, 244 Ga. 464, 260 S.E.2d 863 (1979) (affirming denial of extraordinary motion for new trial), *cert. denied,* 445 U.S. 946 (1980). For a description of Dix's state and federal habeas efforts, see Dix v. Zant, 249 Ga. 527, 294 S.E.2d 527 (1982). The degree of judicial review in direct and collateral attacks to a death sentence underscores the limitations of the clemency process in assessing the procedural fairness of an applicant's trial. The Pardons Board can perceive and respond to gross errors, as it did in Hill, but it is neither equipped nor intended to assure compliance with the more subtle aspects of capital due process.

295. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978).

296. Potts v. Zant, 638 F.2d 727, 730 (5th Cir.), *cert. denied,* 454 U.S. 877 (1981).

297. Potts Clemency Application, p. 3.

298. Many of the facts in Potts' case came to light only in the federal habeas proceedings that followed the Board's denial of clemency. Federal habeas proceedings resulted in the following opinions: Davis v. Austin, 492 F. Supp. 273 (N.D. Ga. 1980); Daniels v. Zant, 494 F. Supp. 720 (M.D.Ga. 1980); Potts v. Austin, 492 F. Supp. 326 (N.D. Ga. 1980); Potts v. Zant, 638 F.2d 727 (5th Cir.), *cert. denied,* 454 U.S. 877 (1981); Potts v. Zant, 734 F.2d 526 (11th Cir. 1984) (reversing the Cobb County conviction and both death sentences). A coherent narrative of these legal actions can be found in Potts v. Zant, 638 F.2d 727, 730-36 (5th Cir.) *cert. denied,* 454 U.S. 877 (1981). The following facts are taken from that opinion and the original opinion by the Georgia Supreme Court on direct appeal. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978).

convictions and death sentences on March 16, 1978. As a federal judge later observed, "[f]or reasons that are not entirely clear, [Potts'] attorneys did not petition . . . for certiorari" to the United States Supreme Court.[299]

Potts appealed the denial of a state habeas writ. Finally, Potts' attorneys informed him that further appeals would be futile and that all he could hope for was to delay execution long enough for the legislature to abolish the death penalty. The evidence is unclear whether this devastating advice precipitated or affirmed Potts' decision to withdraw his appeal with the courts. Potts decided to abandon all efforts to overturn his conviction and sentence, and he consistently adhered to that decision until well after the Board denied his clemency application. Despite Potts' written requests, the Georgia Supreme Court refused to allow him to withdraw his appeal. At the same time, however, the court allowed him to discharge his attorneys and denied his appeal. On February 1, 1980, both the Cobb and Forsyth courts rescheduled Potts' execution for February 15, 1980.

Consistent with his earlier decision, Potts did not seek clemency. On February 5, 1980, the director of the Georgia Indigent Defense Council applied to the Board for commutation of Potts' sentence.[300] Two days before the execution, the governor granted the Board's request for a stay.

The Board then undertook the problematic task of deciding whether to spare the life of one who sought his own execution.[301] A Pardons Board executive officer interviewed Potts. Although this officer described Potts as rational during that interview, the Board asked two psychologists to examine Potts.[302] The Board held a public hearing, at which Potts was

299. Potts v. Austin, 492 F. Supp. 326 (N.D. Ga. 1980).

300. Potts Clemency Opinion (May 1, 1980).

301. Two death-sentenced inmates, Gary Gilmore and Jesse Bishop, had witnesses testify on their behalf in clemency proceedings without their consent. Note, *supra* note 222, at 893 n.16. Jesse Bishop withdrew his appeals, but voluntarily appeared before the Nevada Pardons Board. Lenhard v. Wolff, 444 U.S. 807, 810 (1979) (Marshall, J., dissenting). Bishop told the Board that he would accept commutation, *id.*, in a way which "reveal[ed] that he considers it undignified to ask for mercy." *Id.* at 811 n.2. (Marshall, J., dissenting). The Board, in a 5-2 vote, declined to commute Bishop's sentence when he had so off-handedly requested commutation. *Id.* at 810.

Since *Gregg*, several death-sentenced inmates have asked the Court not to interfere with their executions, or permit others to do so; these inmates wanted to commit what Justice Marshall termed "state-administered suicide." *Id.* at 815. (Marshall, J., dissenting). The Court has acceeded to three such requests. *See* Hammett v. Texas, 448 U.S. 725 (1980); Lenhard v. Wolff, 444 U.S. 807 (1979); Gilmore v. Utah, 429 U.S. 1012 (1976).

302 This request was perhaps necessary in view of Potts' expressed willingness to die. The Board may have been trying to circumvent Georgia's archaic law on insanity on death row. Georgia

neither present nor represented. A few days later the Board denied clemency. In its opinion, the Board described the kidnapping and murder as "horrible and inhuman," and noted Potts' efforts to conceal the crime. The Board rejected the contention that Potts was not mentally responsible at the time of the two offenses.[303]

The Board handled the four most recent clemency applications in Georgia[304] under its new procedures,[305] and denied them without a hearing in less than a week.[306] In three cases, the state quickly executed the defendant after the Board denied clemency.[307] In the other, the United States Supreme Court granted a last-minute stay based on questions the defendant raised about racial discrimination in application of the death penalty in Georgia.[308] The Court lifted the stay, without explanation, a year later and the defendant was promptly executed.[309]

John Eldon Smith[310] and his wife Rebecca Akins Smith were convicted and sentenced to death for the killing of Mrs. Smith's former husband and his new bride. A desire to obtain insurance proceeds, as well as Smith's desire to impress the Mafia as a "hit man," apparently motivated the couple to commit the murder. John Maree provided key testimony

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law provides today, as it did in 1903, that "No person . . . convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity." GA. CODE ANN. § 27-2601 (1983). Only the Governor may, at his discretion, initiate an inquiry; he also makes the ultimate determination of sanity after receiving the report of the examining committee. *Id.* § 27-2602. In Solesbee v. Balkcom, 339 U.S. 9 (1950), the Court upheld the constitutionality of these provisions. *Id.* at 13. These statutes have also survived more recent challenges. *See* McCorquodale v. Balkcom, 525 F. Supp. 408, 429-30 (N.D. Ga. 1981), *aff'd*, 721 F.2d 1493 (11th Cir. 1983) (en banc); McCorquodale v. Stynchcombe, 239 Ga. 138, 143-45, 236 S.E.2d 486, 489-90, *cert. denied*, 434 U.S. 975 (1977); "Neither legal nor medical insanity is a standard for commutation of capital cases in Georgia." Note, *supra* note 224, at 170.

303. Potts Clemency Opinion, *supra* note 300.

304. Applications of John Eldon Smith, Alpha Otis Stephens, Ivon Ray Stanley and Roosevelt Green. *See infra* notes 307-24 and accompanying text.

305. Amended Rules, *supra* note 243.

306. Telephone conversations with L. Silas Moore, *supra* note 239 and George Kendall, *supra* note 277.

307. John Eldon Smith, put to death on Dec. 15, 1983, was the first person executed in Georgia since 1964. N.Y. Times, Dec. 16, 1983, at A23, col. 1. Ivon Ray Stanley was executed on July 12, 1984 and Roosevelt Green was executed on January 9, 1985. *See supra* note 277.

308. On Dec. 13, 1983, nine hours before his scheduled execution, the United States Supreme Court, divided 5 to 4, granted a stay of execution to Alpha Otis Stephens. N.Y. Times, Dec. 14, 1983, at A25, col. 1.

309. Alpha Otis Stephens was executed in Georgia's electric chair on December 12, 1984. N.Y. Times, Dec. 13, 1984 at A18, cols. 1-5.

310. Unless otherwise noted, the following facts are taken from Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976).

by stating that he had agreed to help the Smiths carry out the planned homicides for $1,000. Maree and Smith, who both lived in North Miami Beach, Florida, drove to Macon, Georgia and lured the Akinses to a secluded area. Maree testified[311] that Smith shot the couple at close range with his rifle; the two men then drove back to Florida. Both Smith and his wife were sentenced to death, based on the aggravating circumstance that they committed the murders for the purpose of receiving money.[312]

While John Smith's collateral attacks on his conviction and sentence were still pending,[313] and before Smith applied for clemency, the Georgia Board of Pardons and Paroles conducted its clemency investigation. In 1982, the Board, through the chief parole officer in the district of conviction, interviewed Smith, his codefendants, other witnesses, and court officials.[314] The Board placed a 32 page report summarizing the findings of this investigation in Smith's file.

On December 7, 1983, the Board received Smith's application for clemency. The 50 page application requested a 90 day stay of execution, a public hearing, and commutation of the death sentence. The five Board members reviewed the application in light of the previously filed report and sent a letter to the Board Chairman with their decision. The consensus of the Board was that the facts did not warrant a delay in the execution. The Board did not hold a hearing, nor request a stay of the execution, and on December 13, 1983 it issued an order denying the application for consideration of commutation of Smith's death sentence.[315]

311. Maree swore that the prosecutor had not promised any leniency in exchange for his testimony. It developed later that his testimony was false. District Attorney Fred Hasty submitted an affidavit stating that he promised Maree a life sentence if he testified, and assured Maree that he would seek the death penalty against him as well if he failed to testify. Smith v. Zant, 250 Ga. 645, 650, 301 S.E.2d 32, 36 (1983).

312. GA. CODE ANN. § 27-2534.1(b)(4) (1983).

313 Smith challenged his conviction and sentence in both state and federal courts on the grounds that the trial court unconstitutionally excluded women from his jury, that the prosecution introduced evidence in violation of the fourth and fifth amendments, and that Georgia was applying the death penalty in an arbitrary and discriminatory fashion. Smith v. Zant, 250 Ga. 645, 646, 301 S.E.2d 32, 33 (1983); Smith v. Balkcom, 660 F.2d 573, 584-85 (5th Cir. 1981), *modified on reh'g,* 671 F.2d 858 (5th Cir. 1982); Smith v. Zant, 250 Ga. 645, 646, 301 S.E.2d 32, 33 (1983). The challenge involving the underrepresentation of women on Georgia juries saved the life of Smith's wife and coconspirator. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), *cert. denied,* 459 U.S. 1127 (1983). A racial discrimination challenge spared, but only for a year, Alpha Otis Stephens. *See supra* note 308-9 and accompanying text.

314. Conversations with L. Silas Moore, *supra* note 239.

315. Order, State Board of Pardons and Paroles, Denial of Application for Consideration of Commutation of Death Sentence: John Eldon Smith (December 13, 1983). (The Board's one-page order is on file with the author.)

Georgia executed Smith two days later.[316]

The Board denied Alpha Otis Stephens' clemency application on the same day as it denied Smith's.[317] The Board took even less time summarily to deny Stephens' application. The Board received the application on Saturday, December 10 and denied it on Tuesday, December 13.[318] The United States Supreme Court granted Stephens a stay of execution later that same day.[319]

Stephens[320] was convicted of murdering Roy Asbell, who surprised Stephens and an accomplice while they were burglarizing the home of Asbell's son.[321] According to Stephens' statement to the police, Asbell said "What are you niggers doing in my house?" and pulled his gun. Stephens and his accomplice hit Asbell and knocked him unconscious. They then drove him to a nearby pasture and shot him when Asbell tried to run away. Stephens testified at the penalty phase that his accomplice had actually done the killing; he also testified that he was sorry for what he had done and that both men had been very high on drugs.[322]

The Board of Pardons and Paroles ordered an investigation of Stephens in the summer of 1983, after the United States Supreme Court reinstated his death sentence.[323] The Board interviewed the inmate by use of a questionnaire; the last question on the form provided the inmate an opportunity to tell his side of the story. Again the Board placed the report of the investigation in Stephens' file. When Stephens' attorney sent the Board Stephens' clemency application, the Board compared the application with the investigative report. As with Smith, the Board de-

316. *See supra* note 307. The United States Supreme Court denied Smith's stay application by a vote of 6 to 3. 52 U.S.L.W. 3484 (U.S., 12/14/83).

317. Order, State Board of Pardons and Paroles, Denial of Application for Consideration of Commutation of Death Sentence: Alpha Otis Stephens (Dec. 13, 1983). *See also* New York Times, Dec. 14, 1983, at A25, col. 1.

318. Telephone conversations with L. Silas Moore, *supra* note 239.

319. Stephens v. Kemp, 104 S. Ct. 562 (1984), *vacated,* 104 S. Ct. 1263 (1984). *See supra* note 309 and accompanying text.

320. The United States Supreme Court had already heard Stephens' case on other issues. *See supra* notes 46-54 and accompanying text.

321. The following facts are taken from Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976), *cert. denied,* 429 U.S. 986 (1976).

322. Zant v. Stephens, 103 S. Ct. 2733, 2736 (1983).

323. The Court of Appeals for the Fifth Circuit had reversed Stephens' death sentence on the ground that the jury's finding of an unconstitutional aggravating circumstance undermined the validity of the sentence. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). The United States Supreme Court reinstated Stephens' death sentence. Zant v. Stephens, 103 S. Ct. 2733 (1983). *See supra* notes 46-54 and accompanying text.

cided that the facts did not warrant a further delay of the execution. It denied a stay and refused to grant a hearing. In a one-page order the Board denied the application for consideration of commutation and stated that "there are insufficient grounds for further consideration of the application."[324]

Although the small number of applications for clemency makes predicting the Board's future treatment of applications speculative, it is possible to make some observations about the treatment the Board accorded these seven men. The Board's involvement was considerable in the three earlier clemency applications; in one case it actually granted clemency. The courts' comparatively cursory review of the death sentences in those cases probably triggered the Board's active involvement. In each of these three cases, the state was ready to execute the defendant after astonishingly little judicial review. The inmate did not know, until a few days before his scheduled execution, whether the Board would consider clemency. The Board did fully consider all three applications. In its consideration of these applications, the Board undertook tasks that the judiciary should have accomplished. In Hill's case, the Board modified a plainly excessive sentence; this modification was clearly the responsibility of the Georgia Supreme Court. In Dix and Potts, the Board more carefully considered the defendant's mental state in mitigation of the sentence, rather than solely in exculpation, as the judiciary had done.

If these three inmates had pursued collateral attacks on their sentences, the Board might well have treated their cases differently. Attorneys filed the four recent applications after exhausting full collateral review of the defendants' death sentences in both state and federal courts, in accordance with the Board's new procedures. The Board handled these recent applications in a much more superficial fashion. Indeed, the Board appears to have changed its view of its function considerably. Because the courts, upon habeas corpus petitions, are performing the task of reversing many death sentences in cases that do not seem to warrant the extreme penalty,[325] the Board of Pardons and Paroles may have decided that commutation of a death sentence should be a rarity.

Whether or not the Board has changed its view of its role in the capital punishment process, the Georgia experience does not justify the conclusion that the clemency board will eliminate whatever arbitrariness re-

324. Stephens Order, *supra* note 317.

325 Courts have set aside death sentences in a very high proportion of cases. *See supra* note 163 and accompanying text.

mains in the judicial system that selects defendants for death row. While the Board commuted Hill's death sentence, it upheld Stephens' sentence in three days and without a hearing, even though the penalty may have resulted from racial discrimination. Where the defendant has unsuccessfully exhausted all available forms of direct and collateral relief, the Board seems to find it difficult to believe that judicial process made either a mistake in fact or a significant procedural error. The Board will rarely request a stay of execution, because the clemency application and the secret investigative report are not likely to raise important questions that a jury or federal judge have not already addressed. The Board is simply likely to deny applications for capital clemency. If this is true, the Board's role in the Georgia capital punishment system will become vestigial.

The clemency authority certainly has the power to avoid blatant injustice; it can also perpetuate or contribute to it. By its very nature, the clemency authority is ill-suited to the job of eliminating the arbitrary results of a system that is fundamentally discretionary. Even with its best efforts, the Board can not do much to correct the failure of Georgia to meet the requirement that "capital punishment be imposed fairly, and with reasonable consistency, or not at all."[326]

CONCLUSION

Examination of the results produced by the Georgia capital punishment system several years after the post-*Furman* statute went into effect leads to the conclusion that the new law has failed to bring about fair and evenhanded imposition of death sentences. The safeguards that the *Gregg* plurality relied on to avoid discriminatory and freakish application of the penalty have not performed that function. The broad, unreviewable discretion of prosecutors, deemed either not significant for eighth amendment purposes or assumed to be exercised properly by the Justices in *Gregg*, contributes immeasurably to the risk of arbitrary or discriminatory imposition of death sentences. Moreover, the unfettered discretion of the executive branch to grant or deny clemency adds the potential for further inequities.

Proponents of capital punishment may assert that the system, while not perfect, has limited discrimination and arbitrariness. This study has shown, however, that even a system as carefully calibrated as the one

326. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

enacted in Georgia is unequal to the task of selecting murderers for the extreme penalty who can be distinguished in a rational and objective way from other murderers who are either not charged with a capital crime or not sentenced to death. Proponents may respond to these findings by justifying capital punishment because of the claimed societal benefits of imposing death sentences on at least some murderers. The answer to that argument inherently involves basic value judgments. This author concludes that if society cannot impose death sentences in a fair, nondiscriminatory, nonarbitrary manner, it should abandon the effort.

APPENDIX

MURDER CONVICTIONS APPEALED TO SUPREME COURT OF GEORGIA IN 1981

NAME OF DEFENDANT	CITATION	AGGRAVATING CIRCUMSTANCES PRESENT					RELATIONSHIP BETWEEN DEFENDANT AND VICTIM†	DEATH SENTENCE SOUGHT	SENTENCE	PERTINENT PROCEDURAL INFORMATION	REGION††	DISTRICT ATTORNEY
		(b)(2)*	Multiple Crime Victims	Hired Murderer	(b)(7)**	Police Officer						
1) ALDRIDGE	247 Ga. 142 274 S.E.2d 525						Husband killed wife	No	Life	Aff'd on appeal	SW	Cole
2) ALEXANDER	247 Ga. 780 279 S.E.2d 691						Defendant killed girlfriend's husband	No	Life	Aff'd on appeal	Atl.	Slaton
3) APPLEBY	247 Ga. 587 278 S.E.2d 366						Defendant killed female victim after argument	No	Life	Aff'd on appeal	N	Wayne
4) BERRY	240 Ga. 430 283 S.E.2d 888	X						No	Life	Murder conviction aff'd; robbery rev'd; accomplice did killing	N	Caldwell
5) BLACKWELL	248 Ga. 138 281 S.E.2d 599	X						No	Life	Aff'd on appeal; Co-defendant pleaded guilty for life sentence	C	Miller
6) BLANCHARD	247 Ga. 415 276 S.E.2d 593						Man killed former father-in-law	No	Life	Aff'd	N	Williams
7) BLANKENSHIP	247 Ga. 579 277 S.E.2d 505	X			X			Yes	Death	Rev'd for *Witherspoon* violation	SE	Ryan
8) BORDEN	247 Ga. 477 277 S.E.2d 9	X			X			No	Life	Co-defendant Cole; Aff'd on appeal	C	Mallory
9) BROWN	247 Ga. 298 275 S.E.2d 52	X	X		X			Yes	Death	Death sent. aff'd on murder, rev'd on kidnapping, armed robbery	C	Goolsby
10) BURKE	248 Ga. 124 281 S.E.2d 607	X	X					Yes	Life	Jury recommended life sentence w/o parole; aff'd	N	D. Wilson
11) CAFFO	247 Ga. 751 279 S.E.2d 678	X			X			No	Life	Aff'd on appeal	SE	Lawton
12) CERVI	248 Ga. 324 282 S.E.2d 629	X			X			Yes	Death	Aff'd on appeal	C	Goolsby

NAME OF DEFENDANT	CITATION	AGGRAVATING CIRCUMSTANCES PRESENT					RELATIONSHIP BETWEEN DEFENDANT AND VICTIM†	DEATH SENTENCE SOUGHT	SENTENCE	PERTINENT PROCEDURAL INFORMATION	REGION††	DISTRICT ATTORNEY
		(b)(2)*	Multiple Crime Victims	Hired Murderer	(b)(7)**	Police Officer						
13) COFIELD	247 Ga 98 247 S E 2d 530	X						Yes	Death	Remanded for hearing on competency of witness	SW	Peek
14) COLE	247 Ga 477 277 S E 2d 9	X			X			No	Life	Aff'd on appeal	C	Mallory
15) COMER	247 Ga 167 275 S E 2d 309			X			Defendant killed fellow pool player	No	Life	Aff'd on appeal	SE	Allen
16) CUNNINGHAM	248 Ga 558 284 S E 2d 390	X			X			Yes	Death	Death sentence murder aff'd, rev'd for robbery	C	Goolsby
17) DANIEL	248 Ga 485 282 S E 2d 314						Defendant killed ex-wife's boyfriend	No	Life	Aff'd on appeal	MI	Slaton
18) DARLING	248 Ga 485 260 S E 2d 268						Defendant killed cousin with whom had affair	No	Life	Aff'd on appeal	SW	Cole
19) DUPREE	247 Ga 470 277 S E 2d 18	X			X			No	Life	Aff'd on appeal	SE	West
20) ELLIS	248 Ga 414 283 S E 2d 870	X			X			No	Life	Aff'd on appeal	SE	Sibley
21) EVANS	247 Ga 204 275 S E 2d 65						Defendant killed male friend of former girlfriend	No	Life	Aff'd on appeal	C	Briley
22) FORD	248 Ga 241 282 S.E.2d 308	X						No	Life	Guilty plea; Appeal from denial of habeas; aff'd	C	R. Wilson
23) FORTNER	248 Ga. 107 281 S E.2d 533	X			X			No	Life	Co-defendants: McCluskey & Riley; Aff'd on appeal	N	Salmon
24) FOSTER	248 Ga 409 283 S.E.2d 873					X		No	Life	Aff'd on appeal	SE	Thompson
25) GAYLOR	247 Ga 759 279 S.E.2d 207						Defendant regular customer of victim's car repair service	No	Life	Aff'd on appeal	N	Salmon

NAME OF DEFENDANT	CITATION	AGGRAVATING CIRCUMSTANCES PRESENT					RELATIONSHIP BETWEEN DEFENDANT AND VICTIM†	DEATH SENTENCE SOUGHT	SENTENCE	PERTINENT PROCEDURAL INFORMATION	REGION††	DISTRICT ATTORNEY
		(b)(2)*	Multiple Crime Victims	Hired Murderer	(b)(7)**	Police Officer						
26) GILREATH	247 Ga. 652 279 S.E.2d 650		X		X		Defendant shot wife and father-in-law	Yes	Death	Aff'd on appeal	C	Charron
27) GOBER	247 Ga. 652 278 S.E.2d 386		X				Defendant killed girlfriend & assaulted her daughter	No	Life	Aff'd on appeal	C	Morgan
28) GODFREY	248 Ga. 616 284 S.E.2d 422	X	X				Defendant killed wife and mother-in-law	Yes	Death	Aff'd after remand for second penalty hearing	C	Foster
29) GRIBBLE	248 Ga. 567 284 S.E.2d 277						Defendant killed aunt	No	Life	Aff'd on appeal	N	Williams
30) GRIFFIN	248 Ga. 133 281 S.E.2d 589	X						No	Life	Codefendant Kelly: Aff'd on appeal	C	Mallory
31) HARDY	247 Ga. 235 275 S.E.2d 319	X			X			Yes	Death	Aff'd after remand pursuant to *Godfrey*	C	Hancock
32) HEARD	248 Ga. 348 283 S.E.2d 270				X		Defendant killed female drinking companion	No	Life	Appeal withdrawn as frivolous & judgment aff'd	C	Miller
33) HIGH	247 Ga. 289 276 S.E.2d 5	X	X		X			Yes	Death	Death sentence aff'd on murder, rev'd on robbery and kidnapping	G	Goolsby
34) HILL	248 Ga. 304 283 S E.2d 252		X		X			No	Life	Non-jury trial; Aff'd on appeal	C	Mallory
35) HOLT	247 Ga. 648 278 S.E.2d 390				X		Defendant killed 23-month-old nephew	No	Life	Aff'd on appeal	Atl.	Slaton
36) JACKSON	248 Ga. 480 284 S.E.2d 267	X	X					No	Life	Aff'd on appeal	Atl.	Slaton
37) JONES	247 Ga. 268 275 S.E.2d 67						Defendant killed former wife	No	Life	Aff'd on appeal	C	Keller
38) JORDAN	247 Ga. 328 276 S.E.2d 224	X	X			X		Yes	Life	Aff'd on appeal	SE	Cheney
39) JUSTUS	247 Ga. 276 276 S.E.2d 242	X			X			Yes	Death	Defendant pleaded guilty; sentence aff'd on appeal	C	Huff

NAME OF DEFENDANT	CITATION	AGGRAVATING CIRCUMSTANCES PRESENT (b)(2)*	Multiple Crime Victims	Hired Murderer	(b)(7)**	Police Officer	RELATIONSHIP BETWEEN DEFENDANT AND VICTIM†	DEATH SENTENCE SOUGHT	SENTENCE	PERTINENT PROCEDURAL INFORMATION	REGION††	DISTRICT ATTORNEY
40) KELLEY	248 Ga 133 281 S E 2d 589	X						No	Life	Co-defendant Griffin, Aff'd on appeal	C	Mallory
41) LANE	247 Ga 19 273 S E 2d 397	X	X					No	Life	Aff'd on appeal	SE	Thomas
42) LARKIN	247 Ga 586 278 S E 2d 365		X		X		Defendant killed mother-in-law and attacked wife	No	Life	Aff'd on appeal	SW	Christy
43) LEE	247 Ga 411 276 S E 2d 590						Defendant killed wife	No	Life	Aff'd on appeal	C	Lee
44) LYONS	247 Ga 465 277 S E 2d 244	X	X					No	Life	Aff'd on appeal	Atl	Slaton
45) MCCLUSKEY	248 Ga 107 281 S E 2d 533	X			X			No	Life	Aff'd on appeal	C	Salmon
46) MCDANIEL	283 S E 2d 862	X						No	Life	Aff'd on appeal	C	R Wilson
47) MCKENZIE	248 Ga 294 282 S E 2d 95	X	X					Yes	Life	Aff'd on appeal	N	D Wilson
48) MARABLE	247 Ga 509 277 S E 2d 52						Defendant killed drinking companion	No	Life	Aff'd on appeal	C	Mallory
49) MARSHALL	248 Ga 227 282 S E 2d 301	X						No	Life	Defendant 3 days short of 15th birthday; aff'd	C	Charron
50) MESSER	247 Ga 316 276 S.E 2d 15	X			X		Defendant killed 8-year-old niece	Yes	Death	Aff'd on appeal	C	Foster
51) MILTON	248 Ga 192 282 S.E 2d 90	X		X	X			No	Life	Rev'd; accomplice testimony not corroborated	SE	Ryan
52) MULLIS	248 Ga. 338 282 S E.2d 334						Defendant killed husband	No	Life	Aff'd on appeal	SW	Neugent
53) MYRON	248 Ga. 120 281 S E 2d 600	X		X				No	Life	Defendant represented self; aff'd on appeal	Atl.	Slaton
54) NELSON	247 Ga 172 274 S.E 2d 317	X			X			Yes	Death	Aff'd; state habeas granted, rev'd by Ga. Sup. Ct.	SE	Ryan

NAME OF DEFENDANT	CITATION	AGGRAVATING CIRCUMSTANCES PRESENT					RELATIONSHIP BETWEEN DEFENDANT AND VICTIM†	DEATH SENTENCE SOUGHT	SENTENCE	PERTINENT PROCEDURAL INFORMATION	REGION††	DISTRICT ATTORNEY
		(b)(2)*	Multiple Crime Victims	Hired Murderer	(b)(7)**	Police Officer						
55) NICHOLS	247 Ga. 534 277 S.E.2d 50		X					No	Life	State withdrew death request after long jury deliberations	C	Hancock
56) ODOM	248 Ga. 434 283 S.E.2d 885	X			X			No	Life	Aff'd on appeal	SW	Hind
57) PATRICK	247 Ga. 168 274 S.E.2d 570	X			X			Yes	Death	Vacated pursuant to *Godfrey*; new penalty hearing ordered	SW	Smith
58) PENNAMON	248 Ga. 611 284 S.E.2d 403						Defendant killed wife	No	Life	Aff'd on appeal	C	Briley
59) PHILLIPS	247 Ga. 13 273 S.E.2d 606				X		Defendant killed drinking companion	No	Life	Aff'd on appeal	C	Hancock
60) PRATHER	247 Ga. 789 279 S.E.2d 697		X				Argument in bar over girl	No	Life	Aff'd on appeal	C	Mallory
61) RACHEL	247 Ga. 130 274 S.E.2d 475	X			X			No	Life	Co-defendant: Robinson; Aff'd on appeal	Atl.	Slaton
62) RAINES	247 Ga. 504 277 S.E.2d 47						Defendant killed wife over boyfriend	No	Life	Rev'd for failure to charge voluntary manslaughter	SW	Lee
63) RILEY	248 Ga. 107 281 S.E.2d 533	X			X			No	Life	Aff'd on appeal	N	Salmon
64) ROBINSON	247 Ga. 130 274 S.E.2d 475	X			X			No	Life	Codefendant: Rachel Aff'd on appeal	Atl.	Slaton
65) ROBINSON, J.	248 Ga. 627 284 S.E.2d 400				X			No	Life	Aff'd on Appeal	C	Foster
66) SIMS	283 S.E.2d 862	X						No	Life	Aff'd on appeal	C	R. Wilson
67) SINNS	248 Ga. 385 283 S.E.2d 479							No	Life	Aff'd, 3 justices dissenting on evidentiary point	Atl.	Slaton
68) SATTERFIELD	248 Ga. 538 285 S.E.2d 3	X	X				Defendant killed mother-in-law & stabbed ex-wife	No	Life	Aff'd on appeal	C	Hancock
69) SMITH, T.	247 Ga. 453 276 S.E.2d 633						Argument outside pool hall	No	Life	Aff'd on appeal	N	Salmon

NAME OF DEFENDANT	CITATION	AGGRAVATING CIRCUMSTANCES PRESENT					RELATIONSHIP BETWEEN DEFENDANT AND VICTIM†	DEATH SENTENCE SOUGHT	SENTENCE	PERTINENT PROCEDURAL INFORMATION	REGION††	DISTRICT ATTORNEY
		(b)(2)*	Multiple Crime Victims	Hired Murderer	(b)(7)**	Police Officer						
70) SMITH	247 Ga 511 277 S E 2d 53						Defendant killed wife	No	Life	Aff'd on appeal	C	Briley
71) STEVENS	247 Ga 698 278 S E 2d 398		X		X	X		Yes	Death	Death sentence aff'd, 2 of 3 agg circ held invalid	SE	Allan
72) STRICKLAND	247 Ga 219 275 S E 2d 29	X	X		X		Defendant killed 3 members of former girlfriend's family	Yes	Death	Aff'd on appeal	N	Wayne
73) STROUD	247 Ga 395 276 S E 2d 597							No	Life	Motion for new trial held properly denied	Atl	Slaton
74) THOMAS, C	247 Ga 7 273 S E 2d 396							No	Life	Rev'd for failure to grant individual voir dire	SE	Ryan
75) THOMAS, D	247 Ga 233 275 S E 2d 318	X			X			Yes	Death	*Godfrey* remand—aff'd	Atl	Slaton
76) THOMAS, I	248 Ga 247 282 S E 2d 316	X			X			Yes	Death	Sent rev'd because defendant's attempted plea admitted	SW	Matthews
77) TYLER	247 Ga. 119 274 S E 2d 549				X		Wife killed husband	Yes	Death	Aff'd on appeal	C	Miller
78) VAUGHN, H.	247 Ga 136 274 S.E 2d 479			X	X			No	Life	Aff'd on appeal	SE	Thompson
79) VAUGHN, J.	248 Ga. 127 281 S E 2d 594			X	X			Yes	Life	Rev'd for *Miranda* violations; Defendant convicted after new trial	SE	Thompson
80) WALKER	247 Ga. 746 280 S.E 2d 333	X						Yes	Life	Murder conviction aff'd; robbery rev'd	C	Briley
81) WALLACE	248 Ga. 255 282 S E 2d 325		X			X		Yes	Death	Aff'd on appeal	C	Briley
82) WATERS	248 Ga 355 283 S.E.2d 238	X	X					Yes	Death	Aff'd on appeal	SE	Thomas
83) WILLIS	279 S.E.2d 213				X			No	Life	Aff'd on appeal	SE	Sibley
84) WRIGHT	247 Ga 130 274 S.E.2d 475	X			X			No	Life	Rev'd on *Bruton* grounds	Atl	Slaton

NAME OF DEFENDANT	CITATION	AGGRAVATING CIRCUMSTANCES PRESENT					RELATIONSHIP BETWEEN DEFENDANT AND VICTIM†	DEATH SENTENCE SOUGHT	SENTENCE	PERTINENT PROCEDURAL INFORMATION	REGION††	DISTRICT ATTORNEY
		(b)(2)*	Multiple Crime Victims	Hired Murderer	(b)(7)**	Police Officer						
85) ZUBER	282 S.E.2d 900	X			X			No	Life	Aff'd on appeal	N	D. Wilson

* 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. GA. CODE ANN. § 27-2534.1(b)(2) (1983).

** "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 aggravated battery to the victim." *Id.* § 27-2534.1(b)(7) (1983). When the prosecutor did not seek a death sentence, the author examined the facts as given in the opinion for indications that this factor could have been alleged, consistently with the way it was defined in the death sentence appeals. These elements include a cruel or torturous method of accomplishing the murder, use of threats or taunts before the killing, and infliction of severe physical injury before the death.

† A blank means that no relationship existed between the defendant and victim before the crime; usually the defendant committed the murder during a robbery. †† This Article adopts the regional groupings used by Bowers & Pierce. Bowers & Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes,* 26 CRIME & DELINQ. 563 (1980). *See supra* note 202.