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Capital Punishment

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CAPITAL PUNISHMENT

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The United States Supreme Court recently handed down Gregg v. Georgia, a decision that attempted to resolve the question of the constitutionality of capital punishment. The author analyzes that decision within the context of those that preceded it and reviews decisions handed down by the Supreme Court of Florida after it. He questions whether the law has really been clarified as to the constitutionality of capital punishment, raising possible challenges not only under the eighth amendment, but also under substantive due process concepts.

I. PROLOGUE—AN EXPLANATION

Two obvious difficulties beset one who attempts to analyze the United States Supreme Court's recent decisions in the field of criminal procedure and to apply that analysis to Florida criminal procedure: the field is so vast that it cannot be treated in any but a superficial way; and the field has been changing so quickly that fundamental principles and processes are often lost sight of while events of the moment become the focal points of attention. In this article, I have tried to meet these difficulties by focusing rather narrowly upon the problem of capital punishment, to which the eighth amendment is primarily addressed. The hope is that an in-depth study of a selected area of criminal procedure can have a representative significance for those who are actors in the criminal field.

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II. THE RESURRECTION OF CAPITAL PUNISHMENT

A. *Introduction*

At the end of the 1975-1976 term, the United States Supreme Court, in perhaps its most important and certainly its most visible series of decisions of the term, clarified its position regarding the death penalty vis-a-vis the cruel and unusual punishment clause of the eighth amendment.[1] The statutes of Georgia, Texas, and Flor-

1. In the 1976-1977 term, the United States Supreme Court, instead of further clarifying the law of capital punishment, appears to be adding more uncertainty into the area by questioning the decisions it handed down in the 1975-1976 term.

The Supreme Court recently heard oral arguments in the case of Gardner v. Florida, 45 U.S.L.W. 3425 (U.S. December 14, 1976). In this case counsel for a condemned defendant asked the Court to hold that a judge who imposes the death penalty must disclose to the defense all information upon which he intends to rely. The defense counsel argued that the failure of a Florida judge to disclose portions of a presentence investigative report denied the defendant any opportunity to rebut or explain the information contained in the report. The information in the report referred to the fact that the defendant had been drinking heavily before his wife's murder which came at the end of an argument about her refusal to tell him where their children were. Furthermore, the report continued, death was caused by a severe beating resulting in internal and external bleeding. The jury, which did not see the report, recommended life imprisonment, but the trial judge overruled the recommendation, as he is entitled to do under the statute upheld in Proffitt v. Florida, 96 S. Ct. 2960 (1976). (In *Proffitt*, however, the jury recommended death.)

A Florida assistant attorney general argued that one ground on which the Court struck down North Carolina's statute in Woodson v. North Carolina, 96 S. Ct. 2978 (1976), was the law's failure to provide a way for the sentencing authority to consider personalized aspects of the defendant's character and record. He further argued that the presentence report provides this information, but that if disclosure is made mandatory, sources for such information would dry up, interminable delays would be caused, and ultimately efforts to rehabilitate defendants would be inhibited.

Mr. Justice Stewart appeared worried more about *Proffitt* than *Woodson*. He felt that the Supreme Court had assumed, in holding the Florida Statute constitutional, that the sentencing hearing would be conducted entirely in the open. "This Court upheld that statute on the representations of the State of Florida and the decisions of its courts that this was an open and above-board proceeding. This case gets here and it's apparent that it isn't." 45 U.S.L.W. at 3426.

Justices Brennan and Stevens were also troubled by the fact that the Supreme Court of Florida affirmed the defendant's sentence without seeing the confidential portions of the presentence report. Both pointed out that in a later Florida case, Tedder v. State, 322 So.2d 908 (1975), the Supreme Court of Florida imposed a duty upon itself in capital cases to dispose of any issue which appears on the record. Mr. Justice Stewart also pointed out that, under *Tedder*, a trial judge may override a jury's recommendation of noncapital sentencing only when "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person would differ." 45 U.S.L.W. at 3425. Finally, Mr. Justice Stewart angrily commented that "perhaps as many as three members of the Court" might "change their minds" in view of the facts presented by this case. N.Y. Times, Dec. 1, 1976, § A at 24, col. 1. Such a change as Justice Stewart indicates could reverse the seven to two ruling that upheld the Florida statute in *Proffitt*.

ida, which provide guidelines governing the imposition of the death

On Tuesday, December 14, 1976, the United States Supreme Court was assured by Attorney General Shevin that the Florida Supreme Court makes it a practice in all death cases to look at reports of presentence investigation by the Parole Commission. The assurance was sent to clear up the doubts of Mr. Justice Stewart. Miami Herald, Dec. 15, 1976, § D at 2, col. 1. Nevertheless, on March 22, 1977, the Supreme Court, in an opinion written by Justice Stevens and in which Justice Stewart and Powell joined, reversed and remanded the judgement. The Court felt that "without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." 45 U.S.L.W. 4275, 4279 (U.S. March 22, 1977).

The Court also created new confusion in the law of capital punishment by announcing that it would decide whether it is constitutional for a state to make the death penalty mandatory for anyone convicted of killing a police officer. The Court said that it would consider the issue in the context of a Louisiana man sentenced to death for killing a policeman and under a Louisiana statute that had appeared to have been held unconstitutional in Roberts v. Louisiana, 96 S.Ct. 3001 (1976) N.Y. Times, Dec. 1, 1976, § A, at 24, col. 3. In *Roberts,* the Supreme Court, by a five to four vote, reversed the death penalty sentence of the defendant and seemingly declared the Louisiana statute unconstitutional. The Louisiana Legislature, in fact, subsequently rewrote its death penalty law on that theory. Moreover, the *Roberts* decision was viewed as rejecting the concept of mandatory death penalties, with the possible exception of murders committed by persons serving life sentences. 96 S. Ct at 3006 n.9. The Court's announcement renders all the assumptions made following *Roberts* questionable.

Thus the question arises as to whether the decisions rendered in the Supreme Court's 1975-1976 term actually clarified the Court's position on capital punishment.

The Court also made rulings on several other cases involving the death penalty.

On December 6, 1976 the Supreme Court issued an order reversing a murder conviction and a subsequent sentence of death and remanding the case for further proceedings because of the improper exclusion of one member of the venire. The Court reasoned that "[u]nless a venireman is irrevocably committed, before trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings . . . he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." Davis v. Georgia, 97 S. Ct. 399, 400 (1976).

In White v. Texas, 45 U.S.L.W. 3415 (1976), the court granted the application for a stay on the execution of the death sentence imposed by a Texas county court pending the timely filing of a petition for a writ of certiorari.

In Gilmore v. Utah, 97 S. Ct. 436 (1976), a case in which the defendant desired to be executed rather than face life imprisonment, a closely divided Supreme Court concluded, upon examination of hearings held following Utah's imposition of the death sentence, that the defendant made a knowing and intelligent waiver of any and all federal rights he may have asserted. Furthermore, the Court found that the state's determination of his competence was firmly grounded. The stay of execution granted on December 3, 1976 was terminated. Gary Gilmore was executed by a firing squad on January 17, 1977. For further discussion of the *Gilmore* case see note 35, *infra.*

The *Gilmore* case may support the proposition that capital punishment, rather than being a deterrent, actually may act as an incentive for people with death wishes to commit crimes. The argument can be made that the *Gilmore* execution will attract those with a strong death wish to commit violent crimes so that the state will sanction and carry out their deaths. Under this theory the state will be guilty of encouraging two crimes: a violent criminal act by the individual with a death wish and the "suicide" of the same individual carried out officially by the state.

penalty, were upheld.[2] The statutes of Louisiana and North Carolina, which provided for the automatic imposition of the death penalty upon conviction of specified crimes, were declared unconstitutional.[3]

These decisions will be analyzed in terms of a change in the policy and focus of the Court from its position in *Furman v. Georgia.*[4] In *Furman,* the Supreme Court, ruling directly for the first time on the constitutionality of capital punishment under the cruel and unusual punishment clause of the eighth amendment, declared the death penalty, as imposed in Georgia and Texas, unconstitutional.[5]

The discussion then will shift to an analysis of the recent decisions[6] of the Supreme Court of Florida regarding the infliction of the death penalty. The purpose of this analysis is threefold: (1) to determine whether the review process utilized by the Supreme Court of Florida comports with the standards enunciated by the United States Supreme Court;[7] (2) to determine the effect of the United

2. Gregg v. Georgia, 96 S. Ct. 2909 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976). For text of the Florida statute, see note 83, *infra.*

3. Woodson v. North Carolina, 96 S. Ct. 2978 (1976); Roberts v. Louisiana, 96 S. Ct. 3001 (1976).

However, the assumption that *Roberts* invalidated the Louisiana statute in all circumstances is now questionable. See discussion note 1 *supra.*

4. 408 U.S. 238 (1972).

5. Three cases, *Furman v. Georgia, Jackson v. Georgia* and *Branch v. Texas,* were consolidated in *Furman.*

Many law review articles have extensively analyzed the *Furman* decision. For an in-depth analysis of the opinion of each Justice, see Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After* Furman v. Georgia, 25 STAN. L. REV. 62 (1972); 86 HARV. L. REV. 76 (1972); 4 SETON HALL L. REV. 244 (1972-1973). For a comprehensive discussion of the historical and legislative background of the death penalty up to *Furman,* see Polsy, *The Death of Capital Punishment?* Furman v. Georgia, in 1972 SUP. CT. REV. 1 (P.B. Kurland ed. 1973); Comment, Furman v. Georgia *A Postmortem of the Death Penalty,* 18 VILL. L. REV. 678 (1973).

6. The recent decisions include those decided between January 1, 1976 and December 1, 1976. For a brief discussion of earlier cases see Tatum & Marx, *Criminal Law and Procedure, Twelfth Survey of Florida Law: Part Three,* 30 U. MIAMI L. REV. 635, 704 (1976); Chatilovicz, Berkowitz & Frisch, *Criminal Law and Procedure, Eleventh Survey of Florida Law: Part Four,* 28 U. MIAMI L. REV. 815, 877 (1974).

7. The process used by Florida to review death penalty sentences was discussed by the United States Supreme Court in Proffitt v. Florida, 96 S. Ct. 2960, 2967, 2969-70 (1976). Pursuant to Florida Statute section 921.141(4) (1975), the judgment of conviction and the sentence of death is subject to automatic review by the Supreme Court of Florida within sixty days after certification by the sentencing court of the entire record. The time limit may be

States Supreme Court decisions on future Florida cases; and (3) to examine possible challenges to various facets of capital punishment that were not considered by the United States Supreme Court.

B. *Furman v. Georgia*

The death sentences which were before the United States Supreme Court in *Furman v. Georgia*[8] were vacated in a brief *per curiam* order. The Court held, in a 5-4 opinion, "that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[9] Five Justices joined in this order, but each wrote a separate opinion articulating his own reasons for vacating the sentences, and none of the Justices joined in the opinion of any other. Mr. Justice Brennan[10] and Mr. Justice Marshall[11] focused upon the essence of the death penalty itself, rather than the method used to impose it.

Both Justices Brennan and Marshall concluded, after historical analysis, that the death penalty was *per se* unconstitutional. The primary consideration of Justice Brennan was that the eighth amendment bars punishment which by its severity is degrading to human dignity.[12] Justice Marshall's historical analysis reached back to English law in 1583. He concluded that the eighth amendment must draw its meaning from "the evolving standards of decency[13]

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extended by the supreme court for good cause shown for a time period not to exceed thirty days. The Court approved this system of review based upon cases decided by the Supreme Court of Florida during the period of time between 1973 and early 1976. The scope of the present analysis will be limited to the cases decided subsequent to January 1, 1976. For the most recent cases to be heard by the United States Supreme Court see note 1, *supra*.

8. 408 U.S. 238 (1972). Petitioner Furman, a black man, had been convicted of murder, and petitioners Jackson and Branch, also black, had been convicted of rape. Each had been sentenced to death, and in each case the decision to impose the death penalty had been left to the jury.

Furman was decided in the context of great ferment in the case law over the death penalty. *See* McGautha v. California, 402 U.S. 183 (1971); Witherspoon v. Illinois, 391 U.S. 510 (1968).

9. 408 U.S. at 239-40. The eighth amendment has been held applicable to the states through the due process clause of the fourteenth amendment. *See, e.g.*, Robinson v. California, 370 U.S. 660, 667 (1962).

10. 408 U.S. at 257.

11. *Id.* at 314.

12. *Id.* at 281.

13. This phrase was first used to describe the historical flexibility in the interpretation of the eighth amendment in Trop v. Dulles, 356 U.S. 86, 101 (1958) (Opinion of Warren, C.J.).

that mark the progress of a maturing society."[14] He then equated the "excessive and unnecessary" test for determining whether a punishment is cruel and unusual with a substantive due process test.[15]

> [B]ecause capital punishment deprives an individual of a fundamental right (*i.e.*, the right to life) . . . the State needs a compelling interest to justify it . . . . [P]unishment may not be more severe than is necessary to serve the legitimate interests of the State.[16]

Mr. Justice Douglas grounded his analysis in the concept that the death penalty statutes were unconstitutional because, as imposed, they violated the equal protection clause of the fourteenth amendment.[17]

The two most significant opinions in *Furman* are those of Jus-

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14. 408 U.S. at 329.

15. In Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975) and Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), the Second Circuit held that although the cruel and unusual punishment clause may not be applicable to the treatment of unconvicted detainees, the due process and equal protection clauses of the fourteenth amendment entitled the detainees, who were challenging the living conditions in the jail, to protection from such cruel and unusual treatment. For further discussion on the use of the due process clause rather than the eighth amendment to prohibit cruel and unusual punishment see the various opinions of the judges of the Fifth Circuit in Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972). As Judge Goldberg states in his opinion:

> There are many roads to Rome, and while one is clearly marked "Eighth Amendment," I agree that passage can be had along that wide, familiar boulevard known as "Due Process." 456 F.2d at 843.

In Commonwealth v. O'Neal, 339 N.E.2d 676 (Mass. 1975), the Supreme Judicial Court of Massachusetts used both the due process and cruel and unusual punishment clauses of the state constitution to find the death penalty, as imposed in a case of murder in the first degree committed in the course of rape, unconstitutional. The court reasoned, under substantive due process standards, that a statute affecting fundamental rights must be shown to serve a compelling governmental interest and that a heavy burden fell on the state to show such an interest. Furthermore, the statutory scheme must be shown to be the least onerous method of reaching the compelling governmental goal. If an alternative means exists by which the state can fulfill its purpose, which has less adverse an affect on fundamental constitutional rights, "the State is required to use the less restrictive, more precisely adapted means." 339 N.E.2d at 678. Finding life to be the most fundamental of all rights, the court held that the Commonwealth of Massachusetts did not demonstrate that the death penalty was a deterrent superior to lesser punishment.

For further analysis of substantive due process, see Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); *see* note 45 *infra*.

16. Furman v. Georgia, 408 U.S. 238, 359-60 n.141 (1972) (citations omitted). The plurality opinion in Gregg v. Georgia, 96 S. Ct. 2909, 2926 (1976), expressly rejected the proposition that the legislature must select the least severe penalty possible.

17. Furman v. Georgia, 408 U.S. 238, 240 (1972).

tices Stewart[18] and White.[19] Both Justices focused on the arbitrary and capricious imposition of the death penalty. No legislative purpose—neither retribution nor deterrence, both viewed as legitimate legislative purposes—could be served where the death penalty was imposed in this manner and at such infrequent intervals. However, neither Justice found it necessary to rule on the ultimate issue of whether the death penalty was unconstitutional *per se*. The significance of these opinions lies in the fact that both Justices subsequently ruled that the death penalty as imposed by Georgia, Texas, and Florida[20] was constitutionally permissible.

Each dissenting Justice[21] in *Furman* also wrote his own opinion.[22] These opinions were grounded on two bases. First, from a historical perspective, the death penalty always has been accepted as a legitimate punishment. This alone was considered to be a constitutionally adequate foundation. In support of this contention, Mr. Justice Powell emphasized the affirmative references to capital punishment in the United States Constitution.[23]

The second basis was the impermissible judicial encroachment on the power of the legislature to determine the punishment imposed for violations of the law. Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, emphasized that the presumption that the legislative judgment embodies "the basic standards of decency prevailing in the society . . . . can only be negated by unambiguous and compelling evidence of legislative default."[24]

Thus, after *Furman* it remained unclear what procedures, if any, could be employed to impose the death penalty in a manner that comports with the requirements of the eighth amendment.

III. Recent Supreme Court Decisions on Capital Punishment

In response to *Furman*, state legislatures enacted two types of

18. *Id.* at 306.

19. *Id.* at 310.

20. Gregg v. Georgia, 96 S. Ct. 2909 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976).

21. Chief Justice Burger, Mr. Justice Blackmun, Mr. Justice Powell, and Mr. Justice Rehnquist.

22. It is important to note that the dissenters displayed a high degree of solidarity and, unlike the concurring Justices, each joined in the others' opinions, with the exception of Mr. Justice Blackmun's opinion, which was couched in personal terms.

23. Furman v. Georgia, 408 U.S. 238, 417 (1972).

24. *Id.* at 384.

death penalties—the discretionary type, which provided for the consideration of specific factors before the imposition of the death penalty, and the mandatory type, which provided for the automatic infliction of the death penalty for the commission of specified crimes.[25] The constitutionality of these statutes was determined in *Gregg v. Georgia*[26] and its companion cases.[27]

In *Gregg*, the Court began its analysis by rejecting the argument that the death penalty was *per se* unconstitutional.[28] The plurality opinion, delivered by Mr. Justice Stewart and joined by Mr. Justice Powell and Mr. Justice Stevens,[29] adopted the philosophy and rationale of the *Furman* dissenters. The plurality held that although the eighth amendment prohibits excessive punishments,[30]

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25. *See* Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZ. L. REV. 651 (1974), for a comprehensive analysis of the costs and benefits of capital punishment and a detailed examination of the statutes that were passed in response to *Furman*. The traditional discretionary aspects in the impositon of capital punishment, analyzed in terms of the concurring opinions in *Furman* and the various legislative responses to *Furman*, are discussed in Note, 35 OHIO ST. L.J. 651 (1974).

26. 96 S. Ct. 2909 (1976).

27. Jurek v. Texas, 96 S. Ct. 2950 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976); Roberts v. Louisiana, 96 S. Ct. 3001 (1976).

28. 96 S. Ct. 2909, 2922-23 (1976).

29. The plurality which announced the judgment of the Court in all five cases was composed of Justices Stewart, Powell, and Stevens. Their analysis of constitutionality *per se* began with an historical overview of death penalty cases decided by the Court over the years. Prior to *Furman*, the plurality noted, the Court had several times "both assumed and asserted the constitutionality of capital punishment." Gregg v. Georgia, 96 S. Ct. 2909, 2922 (1976). Whether the death penalty had come to constitute cruel and unusual punishment *per se* was not faced by the Court until *Furman*, and it was not resolved even then. Furthermore, an examination of precedents such as Trop v. Dulles, 356 U.S. 86 (1958), and Robinson v. California, 370 U.S. 660 (1962), dealing with the constitutionality of various forms of punishment under the cruel and unusual punishment clause of the eighth amendment revealed "that the Eighth Amendment has not been regarded as a static concept" and that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Gregg v. Georgia, 96 S. Ct. 2909, 2925 (1976) (citations omitted). This meant that contemporary values concerning the death penalty must be assessed. However, this assessment calls for an analysis of objective indicia reflecting the public attitude toward a particular sanction. The plurality continued by noting that the penalty must do more than satisfy public perceptions of standards of decency; it must also accord with the basic concept which underlies the eighth amendment: Man's dignity.

The Court continued: "This means, at least, that the punishment not be 'excessive'." *Id.* at 2925.

30. The parameters governing the determination of "excessiveness" were described as follows:

> First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime. Gregg v. Georgia, 96 S. Ct. 2909, 2925 (1976) (citations omitted).

"the requirements of the Eighth Amendment must be applied with an awareness of the limited role . . . [of] the courts."[31] The Court emphasized the presumption of validity that must be accorded to a punishment selected by a democratically elected legislature, and noted that the judiciary "may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."[32] Both the weight of the legislative judgment in assessing contemporary standards and considerations of federalism assume prominence here, as does the fact that the selection of the particular punishment is peculiarly within the legislative sphere. This analysis implicitly rejects the compelling state interest—substantive due process test suggested by Mr. Justice Marshall in *Furman*.[33] Thus the shift in the attitude of the Court from one where it liberally construed the Court's power under the Constitution to one where it sees a very narrow basis for using the Constitution to "interfere" with the states' rights became readily apparent.[34]

The plurality also adopted the second basic theme of the *Furman* dissenters, that the death penalty never has been considered inherently cruel and unusual punishment and society today has continued to regard it "as an appropriate and necessary criminal sanction."[35] Three indices were utilized to reach this conclusion:

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31. *Id.*

32. *Id.* at 2926. This explicity rejects the analysis used by the Supreme Judicial Court of Massachusetts in Commonwealth v. O'Neal, 339 N.E.2d 676 (Mass. 1975); *see* note 15 *supra*.

33. See text accompanying note 15 *supra*.

34. The new plurality's citations to the dissenting *Furman* opinions of Chief Justice Burger, Mr. Justice Rehnquist and Mr. Justice Powell, all within the same paragraph, further emphasize this shift. 96 S. Ct. at 2926.

35. Gregg v. Georgia, 96 S. Ct. 2909, 2928 (1976).

The public's acceptance of the death penalty recently was demonstrated in Utah. Gary Gilmore, sentenced to death, requested that he be allowed to die as soon as possible before a firing squad at Utah State Prison. Miami Herald, Nov. 12, 1976, § A, at 1, col. 2. After the Supreme Court of Utah agreed to allow Gilmore to waive his appeal and be executed, more than two dozen persons volunteered to participate on the firing squad. Miami News, Nov. 11, 1976,]] A, at 1, col. 4. On Monday, December 13, 1976, the United States Supreme Court terminated its stay of the execution of Gilmore. The Court, in a five-four ruling, found that Gilmore competently waived any rights he might have had to delay his own death by a firing squad. 45 U.S.L.W. 4053 (1976); *see* note 1 *supra*. Gilmore twice attempted to commit suicide, but failed. Miami Herald, Dec. 17, 1976, § A, at 2, col. 3. On Friday, December 17, 1976, Gilmore won another court victory in his quest to be executed. The United States Supreme Court rejected a plea from Gilmore's mother to reconsider its refusal to block his execution 45 U. S. L. W. 3449 (1976).

1) The legislatures of at least thirty-five states had enacted post-*Furman* statutes that provided for the death penalty; 2) in the only statewide referendum on the issue, the people of California adopted a constitutional amendment that authorized capital punishment; 3) the jury can be used as a significant and reliable index of contemporary values.[36]

The plurality concluded its analysis of the constitutionality of the death penalty by considering the social purposes of the punishment and the proportionality of the punishment in relation to the crime. It held that the eighth amendment required more than contemporary acceptance of a punishment. There also must be some penological justification for it. This justification is provided by the service of two social purposes: retribution and deterrence.[37]

Studies regarding the deterrent effect of capital punishment were viewed as inconclusive.[38] The Court, however, adopted the position that lack of deterrence must be proven in order to invalidate the death penalty, rather than the position that affirmative proof

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Another bizarre aspect to the Gilmore case was raised after a federal judge in Texas ruled on Monday, January 3, 1977, that executions in that state could be filmed. Although this decision does not now affect Utah, it may in the future. However, Gilmore expressed his opposition to the filming of his execution. Miami Herald, Jan. 6, 1977, § B, at 8, col. 1. Gilmore was finally executed by a firing squad on January 17, 1977. Miami Herald, Jan. 18, 1977, § A, at 1, col. 5.

Gilmore's desire to die immediately, rather than spend any more time in prison, focuses on another aspect of the cruelty and unusualness of the death penalty: *i.e.*, the concept that the attendant mental suffering of a convict under a sentence of death is itself cruel and unusual punishment, apart from the actual death sentence. For a detailed analysis of this proposition, see 57 IOWA L. REV. 814 (1972). *See also* MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 144-48 (1973), wherein the proceedings of the case of Robert Lee Massie are discussed. Massie's lawyer filed an appeal of Massie's death sentence in the United States Supreme Court, contrary to Massie's instruction. Thereupon, Massie filed his own motion to dismiss this petition on the ground that he no longer had any interest in the issue being litigated: his life. At this point what measures may the lawyer take consistent with legal ethics? Is he obligated to follow his client's desires?

36. The plurality cites the dissenting opinion of Chief Justice Burger in *Furman*, to support this contention. Chief Justice Burger interpreted the infrequency of jury verdicts imposing the death sentence to "reflect the humane feeling that this . . . sanction should be reserved for a small number of extreme cases" rather than to indicate a general rejection of capital punishment. Furman v. Georgia, 408 U.S. at 388, *discussed in* Gregg v. Georgia, 96 S. Ct. at 2929.

37. For an excellent analysis of the theories and justification for criminal punishment see H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

38. For a comprehensive analysis of two conflicting studies on the deterrent effect of capital punishment see *Statistical Evidence on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 164 (1975); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1976); Ehrlich, *Rejoinder*, 85 YALE L. J. 368 (1976).

of deterrence is necessary to uphold the death penalty. Moreover, the Court returned to its "legislative function" rationale and stated that state legislatures were better equipped to evaluate the results of statistical studies in terms of their own local conditions and thus could properly find a deterrent effect.

Furthermore, the Court implied that even if deterrence was not a factor, retribution alone would be sufficient justification in some cases:

> Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only *adequate response* may be the penalty of death.[39]

The ultimate significance of the concurring opinions of Mr. Justice Stewart and Mr. Justice White in *Furman* become apparent here. Both Justices had stated in *Furman*, unlike the other concurring Justices, that retribution and deterrence were both valid legislative purposes. Therefore, in the present cases, where the death penalty was imposed with a degree of regularity so that these purposes might be served,[40] it was constitutionally permissible.

In view of these social purposes, the plurality concluded that where capital punishment is imposed for the crime of deliberate murder, it is not a disproportionate penalty. The Court expressly left undecided the proportionality of the sanction where no victim's life has been taken.[41]

The dissenting opinions of Mr. Justice Brennan[42] and Mr. Justice Marshall[43] emphasize the policy change that the Court underwent. The focus of the plurality was viewed to rest upon the procedure used to impose the death penalty, rather than the essence of the penalty itself.[44] The dissenters emphasized that it is the penalty itself that is cruel and unusual.[45]

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39. Gregg v. Georgia, 96 S. Ct. 2909, 2930 (1976) (footnote omitted) (emphasis added).

40. The basic objection to the *Furman* statutes was that the penalty was imposed so arbitrarily and freakishly that it could not possibly serve any purpose. Here, although it has not been proven that a purpose is served, it is sufficient that one might *possibly* be served.

41. Gregg v. Georgia, 96 S. Ct. 2909, 2932 n.35 (1976).

42. *Id.* at 2971.

43. *Id.* at 2973.

44. *Id.* at 2971. This is consistent with their analysis in *Furman*.

45. The scope of the cruel and unusual punishment clause of the eighth amendment extends beyond criminal punishments and the procedures used to inflict these punishments.

Mr. Justice Brennan viewed the issue as essentially a moral question. The cruel and unusual punishment clause "embodies in

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An interesting comparison can be made between these "criminal" contexts and the "civil" situations to which the eighth amendment has been applied. *See* Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (administration of a drug which induces vomiting as part of behavioral modification treatment); Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972) (rehabilitation of juveniles pursuant to a statute which did not authorize any punishment); Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972) (unintentional deprivation of adequate heating for patients civilly committed or committed for observation); New York State Ass'n. for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (civil commitment for status); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972) (civil commitment for status); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972) (the absence of criminal incarceration did not prohibit the consideration of an eighth amendment claim regarding the conditions of confinement).

On November 2 and 3, 1976, the United States Supreme Court heard oral arguments regarding the applicability of the cruel and unusual punishment clause and the due process clause to corporal punishment administered by public school officials. Ingraham v. Wright, 45 U.S.L.W. 3337 (U.S. Nov. 9, 1976). The junior high school student plaintiffs disagreed that the cruel and unusual punishment clause is limited to a criminal context. Although when enacted, the clause was directed to methods of punishing criminals, plaintiffs asserted that the inherent flexibility of the clause mandates a broader interpretation that is in keeping with contemporary values. Counsel stated, "This Court has recognized that for a principle to be vital it must be capable of wider application than the mischief which gave it birth." 45 U.S.L.W. at 3337. Plaintiffs further argued that the eighth amendment is invoked and the procedural due process guarantees apply whenever an instrument is used to inflict bodily harm upon public school children.

Counsel for the schoolboard argued that the eighth amendment did not apply at all. In response to questions by Mr. Justice Stevens and Mr. Justice Blackmun, counsel asserted that if there were two inmates in a mental institution, one civilly committed and one criminally committed, the eighth amendment protections would apply only to the criminally committed inmate. 45 U.S.L.W. at 3338.

Although the issue was not briefed by the parties, Mr. Justice Stevens suggested the applicability of substantive due process guarantees as an alternative to the cruel and unusual punishment clause.

In rebuttal plaintiffs emphasized that the element of punishment was the key factor involved, rather than the element of criminal activity. 45 U.S.L.W. at 3339.

The Supreme Court dismissed the case on April 19, finding that the guarantees of the eighth amendment apply to convicted criminals, not to students who are in a school open to public scrutiny. 45 U.S.L.W. 4364 (U.S. April 19, 1977). "The prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Id.* at 4369. An argument can therefore still be made that the eighth amendment guarantees do apply to those cruelly committed to mental health institutions.

For a discussion of various specific aspects of cruel and unusual punishment, see Annot., 27 A.L.R. FED. 110 (1976) (Impositon of enhanced sentence under recidivist statute); Annot., 25 A.L.R. FED. 431 (1975) (Administration of corporal punishment in the public school system); Annot., 53 A.L.R. 3d 960 (1973) (Validity of statutes authorizing asexualization or sterilization of criminal or mental defectives); Annot., 51 A.L.R. 3d 111 (1973) (Prison conditions as amounting to cruel and unusual punishment); Annot., 33 A.L.R. 3d 335 (1970) (Length of sentences); Annot., 24 A.L.R. 2d 350, 362 (1952) (Cruel and unusual punishment under statutes relating to sexual psychopaths).

unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws."[46] Thus "the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings."[47] This premise led him to the conclusion that since the death penalty necessarily denies the executed person's humanity, it is therefore excessive and constitutionally impermissible.

Mr. Justice Marshall criticized the validity of the two social purposes used by the Court as justification for the penalty. First, he attacked the study by Isaac Ehrlich[48] which is the only study to support the deterrent effect of capital punishment. Thereupon, he concluded that the evidence remained convincing that " 'capital punishment is not necessary as a deterrent to crime in our society.' "[49]

Mr. Justice Marshall then denounced the policy expressed by the plurality, that retribution is an adequate justification for the death penalty:

> [S]uch a punishment has as its very basis the total denial of the wrongdoer's dignity and worth.
>
> The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments. . . .[50]

After the initial determination that the death penalty is not *per*

46. Gregg v. Georgia, 96 S. Ct. 2909, 2972 (1976) (Brennan, J., dissenting). Mr. Justice Brennan might well have quoted from the arguments of Albert Camus. To Camus the death penalty

> is not simply death . . . . It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is in itself a source of moral sufferings more terrible than death . . . . For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.

A. CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH 131, 151-52 (Modern Library ed., J. O'Brien trans. (1960)).

47. Gregg v. Georgia, 96 S. Ct. 2909, 2972 (1976) (Brennan J., dissenting).

48. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

49. Gregg v. Georgia, 96 S. Ct. 2909, 2975 (1976) (Marshall J., dissenting) (citation omitted).

50. *Id.* at 2977 (footnote omitted).

se unconstitutional,[51] the Court examined the specific statutes of five states.[52]

In *Woodson v. North Carolina*,[53] the United States Supreme Court held that North Carolina's mandatory death sentence for first degree murder violated the eighth and fourteenth amendments. As in *Gregg*, the judgment of the Court was announced by Mr. Justice Stewart, joined by Mr. Justice Powell and Mr. Justice Stevens. The plurality listed three shortcomings of the North Carolina statute:[54] 1) contemporary society has rejected the practice of inexorably imposing a death sentence upon everyone who is convicted of a specified offense;[55] 2) there were no standards provided in the statute to guide a jury in its imposition of the death penalty;[56] 3) there is no provision for the consideration of the character and record of the individual offender as well as the particular acts by which the crime was committed.[57]

Mr. Justtice Brennan and Mr. Justice Marshall, reiterating their belief in the *per se* unconstitutionality of the death penalty, concurred in the judgment.[58]

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51. The views of the remaining four Justices who voted to uphold capital punishment *per se* were spelled out most thoroughly not in the lead case of *Gregg*, but in a part of Mr. Justice White's dissenting opinion in Roberts v. Louisiana, 96 S. Ct. 3001, 3008 (1976). Chief Justice Burger and Justices Blackmun and Rehnquist joined in this opinion. The opinion focused on the widespread acceptance, both past and present, of capital punishment, and on its legitimacy as an instrument of retribution and deterrence.

52. *See* notes 2, 3 *supra*, and accompanying text.

53. 96 S. Ct. 2978 (1976). In *Woodson*, the petitioners were convicted of first degree murder for their participation in an armed robbery of a convience food store, in the course of which the cashier was killed and a customer was seriously injured.

54. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975). Before the *Furman* decision, the North Carolina law had provided "that in cases of first-degree murder, the jury in its unbridled discretion could choose whether the convicted defendant should be sentenced to death or to life imprisonment." 96 S. Ct. at 2982. After *Furman*, the North Carolina statute was changed in order to make the death penalty mandatory for murder in the first-degree.

55. 96 S. Ct. at 2983-90. The Court, however, specifically left open the question of the constitutionality of a mandatory death penalty statute limited to an extremely narrow category of homicide. 96 S. Ct. at 2983 n.7; *see* note 1 *supra* and note 63 *infra*.

56. The court noted that under a mandatory system, juries traditionally have considered the consequences of a guilty verdict and thus arbitrarily and capriciously refused to return guilty verdicts in some cases. 96 S. Ct. at 2990-91.

57. *Id.* at 2991-92.

58. *Id.* at 2992. Mr. Justice Rehnquist, dissenting in *Woodson*, disagreed strongly with each of the three grounds stated by the plurality in support of its conclusion that the North Carolina statute was unconstitutional. 96 S. Ct. at 2993. However, before analyzing these three grounds, Justice Rehnquist found a fundamental problem with the majority's unarticulated assumption that the "evolving standards of decency" test provides a basis for declaring

The Louisiana death penalty statute,[59] which required the imposition of the death penalty whenever a defendant had been found guilty of any of five narrowly defined categories of first degree murder[60] and which required the jury to be instructed on manslaughter and second-degree murder regardless of the evidence,[61] was held unconstitutional in *Roberts v. Louisiana.*[62] The plurality held that even though the category of crimes punishable by death under Louisiana law was narrower than under North Carolina law, this was not a difference of constitutional significance.[63]

Furthermore, the procedure whereby the jury was permitted to consider the lesser offenses of second-degree murder and manslaughter in the absence of any evidence to support such a verdict invites the capriciousness that was denounced in *Furman.*[64]

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a punishment cruel and unusual. To Justice Rehnquist, it is not at all clear that the eighth amendment was not limited to punishments considered cruel and unusual at the time it was adopted. He then went on to attack the three grounds that the plurality relied on in striking down the statute.

59. LA. REV. STAT. ANN. § 14.30 (1974).

60. The five categories defined in LA. REV. STAT. ANN. § 14.30 (1974), are:

1. When the offender has a specific intent to kill or inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
2. When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
3. Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
4. When the offender has a specific intent to kill or inflict great bodily harm upon more than one person; [or]
5. When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

61. State v. Cooley, 260 La. 768, 257 So.2d 400 (1972); LA. CODE CRIM. PROC. ANN. Art. 814(A)(1) (Supp. 1975).

62. 96 S. Ct. 3001 (1976). In *Roberts,* petitioner was found guilty of first degree murder for his participation in an armed robbery of a gas station, in the course of which the attendant was killed. In order to have found the defendant guilty of any of the five categories of first degree murder, the jury had to find that the defendant had a specific intent to kill or to inflict great bodily harm.

63. The Court noted that one of the five Louisiana categories—the intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder—may be narrow enough to be constitutionally permissible. Although this category still does not permit the consideration of mitigating factors, it is at least defined in terms of the character or record of the individual offender. 96 S. Ct. at 3006 n.9. As discussed in note 1 *supra,* the Supreme Court has now said that it will decide whether category 2, note 60 *supra,* is narrow enough to be constitutionally permissible.

64. However, the Court raised no objections to this same procedure in Gregg v. Georgia,

The Court upheld the discretionary type statutes enacted by the legislatures of Georgia,[65] Texas,[66] and Florida.[67] These statutes all provide for a bifurcated procedure. In the first stage, the guilt of the accused is determined. In the second stage, the penalty is determined. Prior to the imposition of the death penalty, the sentencing authority[68] must determine the presence of at least one statutory aggravating factor, consider certain mitigating factors, and then determine that the aggravating factors outweigh the mitigating factors. Furthermore, each state provides for an automatic appellate review of the death sentence by the state supreme court. The plurality emphasized that this review would insure that the penalty was imposed with the regularity[69] required by *Furman.*[70]

The Court also held, in each case, that the existence of various discretionary stages, which are present in all criminal prosecutions, were not determinative of the issues.[71]

In *Gregg,* the defendant was convicted of two counts of armed robbery and murder. The evidence established that the defendant and a companion were hitchhiking through Florida when they were picked up by the two decedents. During a rest stop in Georgia, the defendant shot the decedents and robbed them. One died from a bullet wound in the eye and the other died from bullet wounds in the cheek and back of the head. After finding beyond a reasonable doubt the presence of two aggravating factors[72] the jury imposed the death penalty.

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96 S. Ct. 2909, 2937 (1976); Jurek v. Texas, 96 S. Ct. 2950, 2957 (1976); or Proffitt v. Florida, 96 S. Ct. 2960, 2967 (1976).

65. GA. CODE §§26-3102, 27-2514, -2534.1, -2537 (1975), *upheld in* Gregg v. Georgia, 96 S.Ct. 2909 (1976).

66. TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974); TEX. CRIM. PRO. CODE ANN. art. 37.071 (Vernon Supp. 1975-1976), *upheld in* Jurek v. Texas, 96 S. Ct. 2950 (1976).

67. FLA. STAT. § 921.141 (1975), *upheld in* Proffitt v. Florida, 96 S. Ct. 2960 (1976).

68. The jury determines the sentence in Georgia and Texas. In Florida, the jury gives an advisory opinion to the trial judge, who then makes the final decision.

69. "Regularity" is the consistent imposition of penalty. Adequate review provides a check on the capriciousness of any jury by comparing the sentence with that imposed in previous cases.

70. Gregg v. Georgia, 96 S. Ct. 2909, 2940 (1976); Jurek v. Texas, 96 S. Ct. 2950, 2958 (1976); Proffitt v. Florida, 96 S. Ct. 2960, 2969 (1976).

71. Gregg v. Georgia, 96 S. Ct. 2909, 2937 (1976); Jurek v. Texas, 96 S. Ct. 2950, 2957 (1976); Proffitt v. Florida, 96 S. Ct. 2960, 2967 (1976).

72. The aggravating factors found were: 1) that the murder was committed while the defendant was engaged in the commission of two other capital felonies, to wit: the armed robbery (of each decedent); and 2) that the defendant committed the murder for the purposes of receiving the decedent's money and automobile.

In upholding the constitutionality of the Georgia statute, the Court focused upon three major aspects of the statute: 1) before imposing the death sentence the jury must find beyond a reasonable doubt the presence of one of ten statutory aggravating circumstances; 2) the jury is authorized to consider any appropriate nonstatutory aggravating or mitigating circumstances and in a jury trial the trial judge is bound by the jury's recommended sentence; and 3) there is an automatic review of each death sentence by the Supreme Court of Georgia "to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and '[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.' "[73] Furthermore, the court noted that the Supreme Court of Georgia is required to specify in its opinion the similar cases which it took into consideration during the review.[74]

Jurek v. Texas[75] can be viewed as the dividing line between a constitutional and an unconstitutional death penalty scheme. The defendant in *Jurek* was convicted of the murder of a ten-year-old girl "by choking and strangling her with his hands, and by drowning her in the water, by throwing her into a river . . . in the course of committing and attempting to commit kidnapping of and forcible rape upon [her] . . . ."[76]

The Texas statute, like the Louisiana statute, limits capital homicides to intentional and knowing murder committed in five narrow situations: 1) murder of a peace officer or fireman acting in his official capacity; 2) murder intentionally committed in the course of a kidnapping, burglary, robbery, forcible rape, or arson; 3) murder committed for remuneration; 4) murder committed during a prison escape; and 5) the murder of a penal institution employee committed by an inmate. However, the Texas statute goes

73. Gregg v. Georgia, 96 S. Ct. 2909, 2939- 40 (1976) (citation omitted).

74. Mr. Justice White, joined by Chief Justice Burger and Mr. Justice Rehnquist, wrote a concurring opinion dealing primarily with the assertion that Georgia's death penalty procedure was rendered unconstitutional by unbridled prosecutorial discretion. He claimed that none of the facts support the argument that prosecutors behave arbitrarily in deciding which cases to try as capital felonies. Gregg v. Georgia, 96 S. Ct. 2909, 2941 (1976).

75. 96 S. Ct. 2950 (1976).

76. *Id.* at 2953 (quoting the indictment with which Jurek was charged).

one step further than the Louisiana statute, and requires the jury to answer "yes" to three statutory questions before the imposition of the death penalty:

> (1) whether the conduct of the defendant which caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[77]

The plurality held that although Texas did not statutorily provide for the consideration of specific aggravating or mitigating circumstances, the combination of the narrowly defined capital crimes and the statutory questions served the same purpose. "[T]he Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."[78] This, plus assurance of prompt judicial review in a court of state-wide jurisdiction, avoids freakish or wanton imposition of the death penalty, and therefore, the statute is constitutional.

IV. *Proffitt v. Florida:* A LOOK AT FLORIDA LAW

In terms of its impact on Florida law, the most significant opinion handed down by the United States Supreme Court[79] is *Proffitt*

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77. TEX. CRIM. PRO. CODE ANN. art. 37.071(b) (Vernon Supp. 1975-1976). Before the jury can impose the death penalty, it must be convinced beyond a reasonable doubt that the answer to the three questions is yes. If the jury finds that the answer to any question is no, then a sentence of life imprisonment results.

78. Jurek v. Texas, 96 S. Ct. 2950, 2957 (1976).

79. The United States Supreme Court denied certiorari in six other Florida cases. Alvord v. State, 322 So. 2d 533 (Fla. 1975), *cert. denied,* 96 S. Ct. 3234 (1976); Spenkelink v. State, 313 So. 2d 666 (Fla. 1975), *cert. denied,* 96 S. Ct. 3227 (1976); Sawyer v. State, 313 So. 2d 680 (Fla. 1975), *cert. denied,* 96 S. Ct. 3226 (1976); Alford v. State, 307 So. 2d 433 (Fla. 1975), *cert. denied,* 96 S. Ct. 3227 (1976); Hallman v. State, 305 So. 2d 180 (Fla. 1974), *cert. denied,* 96 S. Ct. 3226 (1976); Sullivan v. State, 303 So. 2d 632 (Fla. 1974), *cert. denied,* 96 S. Ct. 3226 (1976). In each case, Mr. Justice Brennan and Mr. Justice Marshall dissented from the denial of the petition for writ of certiorari on the ground that the imposition of the death

v. Florida.[80] In *Proffitt*, the defendant was convicted of first degree murder. The evidence at the trial established that while burglarizing the decedent's house, the defendant stabbed him with a butcher knife. When the decedent's wife awakened, the defendant hit her several times with his fist, and then fled.

During the sentencing hearing, the jail physician testified that the defendant had come to him seeking psychiatric help. The defendant told the physician that he had an uncontrollable desire to kill that had already resulted in one person's death and that this desire was building up again. The physician further testified that the defendant was dangerous and would be a danger to his fellow inmates if imprisoned, but that his condition could be treated successfully.

The Florida death penalty statute provides that upon a conviction of a defendant for a capital felony[81] the court shall conduct a separate sentencing hearing before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment.[82] After this hearing, the jury determines whether the

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penalty constitutes a cruel and unusual punishment forbidden by the eighth and fourteenth amendments.

The Court granted certiorari in one Florida case. Gardner v. State, 313 So. 2d 675 (Fla. 1975), *cert. granted sub. nom.*, Gardner v. Florida, 96 S. Ct. 3219 (1976). *See* note 1 *supra*.

80. 96 S. Ct. 2960 (1976). Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens announced the judgment of the Court and filed the purality opinion delivered by Mr. Justice Powell. The Chief Justice, and Justices White, Rehnquist, and Blackmun concurred in the judgement. Justices Brennan and Marshall each filed a dissenting opinion.

81. In *Proffitt*, the defendant was convicted of first degree murder in violation of Florida Statute section 782.04(1)(a) (1975). However, Florida has also classified sexual battery committed by a person over the age of eighteen upon a person eleven years of age or younger as a capital felony. FLA. STAT. § 794.011 (2) (1975). As discussed in note 41 *supra*, and accompanying text, the constitutionality of this statute has not yet been decided.

82. Subsequent to *Proffitt*, pursuant to a certified question, the Supreme Court of Florida held that where the defendant has pleaded guilty to first degree murder and waived his right to the advisory jury recommendation, the trial judge may still require this jury hearing. State v. Carr, 336 So. 2d 358 (Fla. 1976).

Another possible constitutional challenge to this procedure concerns the jury selection. Currently, jurors are excused for cause from the trial venire if they will not impose the death penalty. However, since the trial venire's determination of guilt or innocence must be made without regard to the possible penalty, this unfairly deprives the defendant of his right to be tried by a jury composed of a cross section of the community. In the above situation, the proper procedure would be to impanel a new jury for the purpose of sentencing, and at this time allow such challenges for cause. This issue was presented to the Supreme Court of Florida in Darden v. State, 329 So. 2d 287 (Fla.), *cert. granted sub. nom.*, Darden v. Florida, 97 S. Ct. 308 (1976). The Supreme Court of Florida viewed this contention as unworthy of consideration. However, the United States Supreme Court granted certiorari to consider, *inter alia*, the following question: "Were defendant's constitutional rights infringed by exclu-

mitigating circumstances outweigh the aggravating circumstances,[83] and based upon this, determines the sentence.

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sion for cause of five veniremen who acknowledged that to vote for death penalty would violate their moral and religious principles?" 45 U.S.L.W. 3356. The Supreme Court later voted 7-2 that they should never have granted certiorari and dismissed the case. 45 U.S.L.W. (U.S. April 19, 1977). For a case presenting a similar issue, see Davis v. Georgia, 97 S. Ct. 399 (1976), *rev'g sub nom.*, Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976).

83. Florida Statute section 921.141 (1975), provides in pertinent part:

(5) AGGRAVATING CIRCUMSTANCES

Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES

Mitigating circumstances shall be the following:

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

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

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

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

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

The United States Supreme Court noted that although the aggravating circumstances that would support the imposition of the death penalty were limited to the eight specified in the statute, there was no such limitation in the language introducing the list of statutory mitigating factors. Proffitt v. Florida, 96 S. Ct. 2960, 2965 n.8 (1976). However, subsequent to *Proffitt*, the Florida Supreme Court held that during the sentencing hearing the trial court properly excluded testimony regarding the defendant's prior employment because "the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty . . . and we are not free to expand the list." Cooper v. State, 336 So. 2d 1133, 1139 (Fla. 1976).

The petitioner in *Proffitt* asserted that the list of aggravating circumstances was so vague and broad that it could apply to virtually anyone convicted of first degree murder.[84] Specifically, the petitioner attacked both the third circumstance, which authorizes the death penalty if the defendant knowingly creates a risk of death to many persons, and the eighth circumstance, which authorizes the death penalty if the capital felony was especially heinous, atrocious, or cruel. The United States Supreme Court held that these factors, as construed by the Supreme Court of Florida, provided adequate guidance for the jury.[85] In *Proffitt,* the trial court had found that the third factor existed, despite the fact that the defendant attacked only one person other than the decedent and that this attack was only with the defendant's fist. However, since the Supreme Court of Florida, in affirming this decision, did not specifically uphold each of the four aggravating factors[86] found by the trial court, the United States Supreme Court relied upon the construction previously given to this third factor by the Supreme Court of Florida. In *Alvord v. State,*[87] which is the only other case in which this third factor has been found, the defendant murdered two of the victims in order to avoid a surviving witness to the first murder. The plurality hinted that if this third factor had been the sole circumstance applied in *Proffitt,* it would have rendered the factor unconstitutionally broad.[88]

The plurality also approved the construction given to the eighth statutory provision by the Supreme Court of Florida in *State v. Dixon,* that is, "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."[89]

After the jury renders an advisory opinion as to the sentence, the final decision is made by the trial court. The plurality in *Proffitt* viewed this unique procedure in a positive light, reasoning that due

84. 96 S. Ct. at 2967-68.

85. *Id.* at 2968.

86. The other two aggravating factors were (1) that the murder was premeditated and occurred in the course of a felony; and (2) that the defendant has the propensity to commit murder. Proffitt v. State, 315 So. 2d 461, 466 (Fla. 1975), *aff'd,* 96 S. Ct. 2960 (1976).

87. 322 So. 2d 533 (Fla. 1975), *cert. denied,* 96 S. Ct. 3234 (1976).

88. 96 S. Ct. at 2968 n.13.

89. 283 So. 2d 1, 9 (Fla. 1973), *cited in* Proffitt v. Florida, 96 S. Ct. 2960, 2968 (1976). The Supreme Court of Florida has affirmed death sentences in several other cases in which the eighth statutory factor was found without specifically stating that the homicide was "pitiless" or "torturous to the victim." 96 S. Ct. at 2968 n.12.

to the trial court's experience in sentencing, rather than leading to arbitrariness, this would lead to greater consistency in the imposition of capital punishment at the trial court level.[90] Furthermore, in order for the trial court to overrule a jury's recommendation of a life sentence, the facts supporting the death penalty should be so clear and convincing that virtually no reasonable person could differ.[91]

In addition, the plurality held that arbitrariness was reduced by the method the Supreme Court of Florida used to review sentences. Although, unlike the approved Georgia statute,[92] the Florida statute does not require the consideration of previous cases in which the death penalty has been imposed, the Supreme Court of Florida has nevertheless chosen to follow this procedure. This factor, together with the observation that over one third of the cases reviewed have been reversed, led the plurality to the conclusion that the appellate review was performed in a rational and consistent manner and was not a cursory or rubber stamp review of the trial court's sentence.[93]

The review process utilized by the Supreme Court of Florida has remained constant. First, the facts and circumstances surrounding the crime are recited. Next, pertinent portions of the trial court's order imposing the death penalty are set forth. This includes the list of aggravating and mitigating factors found by the trial court to support the sentence. In *Provence v. State*,[94] where the trial court did not specify in its order which of the statutory aggravating circumstances induced it to override the jury's recommendation of life imprisonment, the sentence was reversed.

The testimony adduced at trial in *Provence* established that the defendant and the decedent, Dent, had gone to the Skyway Bridge to purchase narcotics. After they arrived at the bridge, the defendant murdered Dent by stabbing him eight times and then robbing him. On appeal, the State argued that there were two aggravating factors present that could be used to support the trial court's sentence of death: 1) the murder occurred in the commission of the

90. 96 S. Ct. at 2966.

91. This test was enunciated by the Supreme Court of Florida in Tedder v. State, 322 So. 2d 908, 910 (1975).

92. GA. CODE § 27-2537(c)(3). (Supp. 1975); *see* Gregg v. Georgia, 96 S. Ct. 2909, 2939-41 (1976).

93. 96 S. Ct. at 2969-70.

94. 337 So. 2d 783 (Fla. 1976).

robbery; and 2) the crime was committed for pecuniary gain. The Supreme Court of Florida held that this constituted only one aggravating factor and that the trial court erred in overruling the jury's recommendation.[95]

Likewise, in *Thompson v. State*,[96] the Supreme Court of Florida emphasized the need for the trial court to express "concise and particular reasons" for overruling a jury's recommendation. In *Thompson*, the defendant, who had no prior criminal record, was convicted of first degree murder. The evidence at trial showed that the defendant entered the decedent's restaurant and attempted to take money out of the cash register. A fight ensued when the decedent, armed with a knife, tried to stop the defendant. The defendant followed the decedent outside, where the fight continued. The defendant subsequently took the decedent's knife and fatally stabbed him several times. Based upon these facts, the supreme court held that it was error for the trial court to overrule the jury's recommendation.

The above-mentioned two cases are the only cases this year in which the Supreme Court of Florida has reversed a death sentence due to lack of sufficient aggravating circumstances.[97]

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95. *Id.* at 786.

96. 328 So. 2d 1, 5 (Fla. 1976).

97. The death sentence in Messer v. State, 330 So. 2d 137 (Fla. 1976), was reversed because the trial court erred in excluding certain mitigating evidence that the defendant sought to introduce. The defendant in *Messer* was convicted of first degree murder and robbery. The defendant and his codefendant, Brown, were travelling down the Interstate Highway and stopped at a rest station. The defendant and Brown entered the decedent's car, held him up and drove him to several locations. Finally, Brown struck the decedent, and the defendant fatally shot him in the head. The two factors that the defendant was not permitted to submit to the jury were: 1) the fact that the co-defendant had negotiated a plea of guilty to second degree murder and was sentenced to thirty years imprisonment—the court held that the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation; and 2) psychiatric testimony to establish the mitigating circumstance that the defendant committed the murder while under the influence of extreme mental or emotional disturbance. The court did not list the aggravating factors that were found by the trial court. The last death penalty case to be reversed, *Tibbs v. State*, 337 So. 2d 788 (Fla. 1976), was remanded for a new trial on the ground that there was insufficient evidence presented to identify the defendant as the perpetrator of the crime. Neither aggravating nor mitigating factors were discussed by the court.

The only other case reviewed by the Supreme Court of Florida in which a death penalty recommended by both the jury and the trial court has been reversed is Halliwell v. State, 323 So. 2d 557 (Fla. 1975). This case stands, *inter alia*, for the proposition that the aggravating circumstances must involve the actual murder of the victim, and not events that occurred after the victim is already dead. In *Halliwell*, the defendant became enraged at the victim after the victim bragged about beating his wife, Sandra, with whom the defendant was in

In six[98] of the seven[99] cases where the death penalty was af-

love. The defendant grabbed a breaker bar and fatally struck the decedent in the head. He continued to beat the decedent after these first fatal blows were struck. Several hours later, the defendant dismembered the decedent's body and placed it in Cypress Creek. In mitigation, the record indicated that the defendant had no prior arrests and was a highly decorated Green Beret in Vietnam. Furthermore, police officers testified that the defendant was under emotional strain over the mistreatment of Sandra by the victim and that he was greatly influenced by Sandra. The supreme court held that the aggravating factor found by the trial court—that the crime was committed in an extremely heinous, atrocious, and cruel manner—was not supported by the evidence since the murder itself was no more shocking than a majority of murders, and the dismemberment should not be considered because it occurred several hours after the actual murder.

98. In Knight v. State, 338 So. 2d 201 (Fla. 1976), the defendant was convicted of two counts of first degree murder. The defendant first approached Mr. Gans, one of the decedents, in the parking lot of Mr. Gans' business. Mr. Gans was forced to drive home, pick up his wife and proceed to his bank to obtain $50,000. While in the bank, Mr. Gans informed the bank president of the abduction. Mr. and Mrs. Gans were later found fatally shot through their necks. Four statutory, aggravating circumstances were found by the trial court: 1) the murders were committed during the commission of a robbery and/or kidnapping; 2) the murders were committed to avoid a lawful arrest; 3) the murders were committed for pecuniary gain; and 4) the murders were especially heinous, atrocious, and cruel.

In Cooper v. State, 336 So. 2d 1133 (Fla. 1976), the defendant was convicted of the robbery of a grocery store and the subsequent murder of a deputy sheriff who attempted to apprehend the defendant. The deputy had stopped the defendant's car shortly after the robbery occurred. Thereupon, either the defendant or his accomplice walked over to the deputy and fired two shots into his head, killing him instantly. The trial court found the following statutory aggravating circumstances: 1) the defendant was previously convicted of two armed robberies; 2) the murder was committed while the defendant was in flight after committing a robbery; 3) the murder was committed to avoid a lawful arrest; and 4) the murder was especially heinous, atrocious and cruel. The supreme court disregarded the trial court's finding of this last factor. *See* note 102 *infra*, and accompanying text.

In Darden v. State, 329 So. 2d 287 (Fla. 1976), the defendant was convicted of three crimes: (1) first degree murder, (2) assault with intent to commit murder in the first degree, and (3) robbery. The evidence adduced at trial showed that the defendant entered the Turmans' furniture store and was in the process of robbing Mrs. Turman when Mr. Turman arrived. As Mr. Turman enter the store, the defendant fatally shot him between the eyes. Thereupon, a sixteen-year old boy tried to aid the wounded man, defendant shot this boy in the mouth, neck and side. Before leaving, the defendant unsuccessfully attempted to force Mrs. Turman to perform an unnatural sexual act upon him. The supreme court rejected as grounds for a new trial certain allegedly inflamatory remarks offered by the prosecution. The court inferentially upheld the trial court's findings of aggravating circumstances and went so far as to label the crimes as "uniquely vicious" and "heinous." The court further stated that there were no mitigating circumstances to reduce the penalty from death to life imprisonment.

In Dobbert v. State, 328 So. 2d 443 (Fla. 1976), the defendant was convicted of first degree murder, second degree murder, child torture, and child abuse. In an eight page majority opinion, the supreme court related the details of the crime that supported the finding of heinousness as an aggravating circumstance.

> The defendant murdered his own nine year old daughter, Kelly Ann Dobbert, by continuous beatings, kicking, hitting with fist and other objects, choking, sewing

firmed, the trial court specifically found that none of the statutory mitigating circumstances existed. The most common aggravating factor is that the crime was committed in an especially heinous, atrocious, or cruel manner.[100] In *Cooper v. State,*[101] the court reaffirmed the construction given to this category in *State v. Dixon,*[102] and approved by the United States Supreme Court in *Proffitt.*[103] In

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up her cuts with needle and thread and other torture and depriving her of medical care and finally murdered her, placed her body in a plastic garbage bag and buried her in an unknown and unmarked grave.

Id. at 436.

In Henry v. State, 328 So. 2d 430 (Fla. 1976), the defendant was convicted of first degree murder. The victim, found in his own bedroom, was bound and gagged with his throat cut. In addition, there were extensive head and facial wounds caused by blunt force. The actual cause of death was by suffocation from the gag which had been placed so tightly under the defendant's tongue that it forced the tongue back into the throat and cut off the airway. The following aggravating circumstances were found: 1) the defendant was previously convicted of a felony involving the threat of violence; 2) the murder was committed for pecuniary gain; and 3) the murder was especially heinous, atrocious and cruel.

In Douglas v. State, 328 So. 2d 18 (Fla. 1976), the defendant was convicted of first degree murder. The decedent and his wife were driving in their car when the defendant drove up behind them and ordered them to pull over. The defendant had lived with the decedent's wife on prior occasions. The defendant held a rifle on the decedent and forced him to proceed to a wooded area. The defendant then forced the decedent and his wife to perform various sexual acts. Thereupon, the defendant struck the victim in the head with his rifle, and then shot him three times in the head. The trial court found that the murder was especially heinous, atrocious, and cruel.

99. In Meeks v. State, 336 So. 2d 1142 (Fla. 1976), the only mitigating factor was the age (21) and the intelligence (dull-normal) of the defendant. The defendant was convicted of first degree murder by stabbing the decedent after she caught him trying to steal money from the cash register in her store. As aggravating circumstances, the trial court found that the defendant had previously been convicted of a capital felony, that the murder was committed in the course of a robbery and for pecuniary gain, and that the murder was committed to prevent arrest and to hinder the enforcement of the laws.

100. *See* Knight v. State, 338 So. 2d 201 (Fla. 1976); Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Darden v. State, 329 So. 2d 287 (Fla. 1976); Dobbert v. State, 328 So. 2d 433 (Fla. 1976); Henry v. State, 328 So. 2d 430 (Fla. 1976); and Douglas v. State, 328 So. 2d 13 (Fla. 1976). Furthermore, this is the only aggravating factor that has been used by itself as the basis for imposing the death penalty.

101. 336 So. 2d 1133, 1140-41 (Fla. 1976).

102. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So. 2d 19 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974).

103. 96 S. Ct. 2960, 2968.

Cooper, the Supreme Court of Florida discounted the trial court's finding of heinousness for the execution-type, but instantaneous and painless killing of a deputy. However, the remaining aggravating circumstances were sufficient to uphold the death sentence.[104]

The Supreme Court of Florida used the "comparison" test, in which the facts of the case are compared with the facts in other similar cases, only once this year. In *Provence,*[105] the supreme court found that the aggravating circumstances present were less severe than in at least four other cases previously considered by the court, two of which had been remanded for the imposition of a life sentence.[106]

Therefore, the process used by the Supreme Court of Florida to review death sentences, coupled with the fact that slightly less than forty percent of the cases this year have been reversed, leads to the conclusion that the death penalty currently is being imposed within constitutional boundries. However, future decisions should be carefully analyzed for there may come a time when the Supreme Court of Florida reverses such a substantial number of sentences that the few remaining affirmed sentences must also be reversed.[107]

V. Possible Challenges to Capital Punishment

Avenues of constitutional challenge that were not specifically addressed by the United States Supreme Court remain open for litigation.[108] In light of *Provence,* it is questionable whether the aggravating factor of committing a capital felony for pecuniary gain would, by itself, support the imposition of the death penalty. If the Supreme Court of Florida continues to make such comparisons, one or more of the aggravating categories may be rendered unconstitutional under the regularity or disproportionality test.[109] Furthermore, the Supreme Court of Florida now has restricted the mitigating factors to those listed in the statute. This contradicts one of the

104. Cooper v. State, 336 So. 2d 1133 (Fla. 1976).

105. 337 So. 2d 783 (Fla. 1976).

106. *Id.* at 786-87.

107. This would be a return to the "rarity" and "freakishness" denounced by the concurring Justices in *Furman.*

108. *See* note 82 *supra.*

109. It is important to note that the United States Supreme Court considered the constitutionality of only two of the eight statutory aggravating circumstances.

assumptions made by the United States Supreme Court in *Proffitt*.[110]

In addition, the "evolving standards of decency" test may require the employment of a more humane method of carrying out the sentence than electrocution. Substantive due process as well as the eighth amendment may require that the least painful method available must now be used.[111]

Finally, the constitutional challenge most likely to succeed is directed against the imposition of the death penalty for the crime of rape.[112] There are currently eighty-two[113] people on death row in Florida. Of these, two have been convicted of rape and two of sexual battery.[114] Thus, at least four lives would be affected by a decision on this issue.

VI. EPILOGUE

The only major effect that *Proffitt* will have on Florida cases will be to sharpen the appellate review process. *Proffitt* encourages the use of case-comparison to insure regularity and proportionality in the imposition of the death penalty.[115] Likewise, the Supreme Court of Florida must continue to require specific findings of fact regarding the presence of aggravating and mitigating circumstances. Having obtained the stamp of approval from the United States Supreme Court, the focus will now shift to the methods of actually carrying out the penalty.[116]

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110. *See* note 83 *supra*.

111. In *In re* Kemmler, 136 U.S. 436 (1880), the United States Supreme Court held that execution by electrocution did not result in a denial of due process. This result was reaffirmed in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), where the Court held that a second attempt at electrocution where the first attempt had failed was not a denial of due process because of cruelty. However, since these cases were decided, respectively, one-hundred years ago, and thirty years ago, this point seems ready for reconsideration.

112. The Court in Gregg v. Georgia, 96 S. Ct. 2909, 2932 n.35 explicitly left this point open. *See* notes 41, 81 *supra* and accompanying text. This particular issue was dealt with very recently in a landmark case. *See* Coker v. Georgia, 45 U.S.L.W. 4961 (U.S. June 26, 1977).

113. Letter from David S. Mitchell, Statistics Supervisor of the Florida Department of Offender Rehabilitation, to Irwin P. Stotzky (December 27, 1976).

114. *Id.*

115. 96 S. Ct. 2960, 2966-67 (1976).

116. Possible constitutional arguments in this regard may center around the right to be executed immediately, without the automatic statutory review and the right to privacy during an execution. *See* note 35 *supra*. Recent newspaper articles contain information regarding the form of the death warrant (Miami Herald, Nov. 11, 1976, § A, at 16, col. 1) and the implementation of rules controlling executive clemency and pardons (Miami Herald, Nov. 10, 1976, § A, at 12, col. 1).