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Catherine H. McMahon

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THE 1977 ILLINOIS DEATH PENALTY STATUTE: DOES IT COMPLY WITH CONSTITUTIONAL STANDARDS?

Prior to 1972 the constitutionality of capital punishment was presumed by the United States Supreme Court.¹ The death penalty per se had never been adjudicated by the Court in terms of the cruel and unusual punishment clause of the eighth amendment² as incorporated by the fourteenth amendment.³ Also, the fact that a majority of the states, the District of Columbia, and the federal government provided for capital punishment by statute⁴ was a strong indication of the widespread assumption of the constitutionality of capital punishment.

The first time the Supreme Court addressed the question of whether capital punishment was violative of the cruel and unusual punishment clause was in *Furman v. Georgia*.⁵ In that landmark decision the Court reviewed the imposition of the death penalty in three specific cases. Two arose under the Georgia statute,⁶ and one arose under that of Texas.⁷ In *Furman* the Court held that, as applied pursuant to those statutes, the death penalty violated the eighth amendment.⁸ The Court declared the Illinois capital punishment system unconstitutional on the same day in *Moore v. Illinois*.⁹

The *Furman* decision consisted of nine separate opinions.¹⁰ This

1. *Furman v. Georgia*, 408 U.S. 238, 285 (1972).

2. U.S. CONST. amend. VIII ("... nor cruel and unusual punishments inflicted").

3. Eighth amendment inquiries by the Supreme Court prior to 1972 had focused on whether particular methods of capital punishment were violative of the cruel and unusual punishment clause. *See, e.g.*, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878). Also, capital punishment and other criminal penalties had been held unconstitutional as violative of the cruel and unusual punishment clause where disproportionate to the crime. *See, e.g.*, *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1910). For a thorough discussion of the background of capital punishment in the United States and the historical background of the cruel and unusual punishment clause of the eighth amendment, *see Furman v. Georgia*, 408 U.S. 238, 314-74 (1972) (Marshall, J., concurring).

4. 408 U.S. 238, 385 (1972).

5. *Id.*

6. *Id.* at 239.

7. *Id.*

8. *Id.* at 239-40.

9. 408 U.S. 786, 800 (1972).

10. In the 5-4 *Furman* decision, only Justices Brennan and Marshall held that capital punishment was unconstitutional per se under the eighth and fourteenth amendments. 408 U.S. at 304-05 (Brennan, J., concurring); *id.* at 359, 360, 369 (Marshall, J., concurring). Justices Douglas, Stewart, and White more narrowly held capital punishment unconstitutional where imposed under discretionary statutes in an arbitrary manner. *Id.* at 256-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 312-13 (White, J., concurring). Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented. *Id.* at 375 (Burger, C.J., dissenting); *id.* at

made its rationale unclear and its precise directives difficult to discern. However, since only two Justices held that capital punishment was per se unconstitutional, most state legislatures believed that a properly drafted statute would survive constitutional challenge.

Illinois was one of thirty-five states¹¹ to enact a new death penalty statute¹² in an effort to comply with the dictates of *Furman*. Nevertheless, in 1975 the Illinois Supreme Court in *People ex rel. Rice v. Cunningham*¹³ held this statute violative of the Illinois Constitution.¹⁴ The Illinois Supreme Court acted prior to any further constitutional challenge of a death penalty statute in the federal courts. Following the statute's invalidation in *Cunningham*, the drafting of a new statute in the House Judiciary Committee of the Illinois General Assembly was immediately begun.¹⁵

New guidelines concerning death penalty procedure were set out by the United States Supreme Court in *Gregg v. Georgia*¹⁶ and its companion decisions¹⁷ during the summer of 1976. In these decisions, the Supreme Court examined the death penalty statutes in five states. The statutes of Georgia,¹⁸ Florida,¹⁹ and Texas²⁰ were upheld, while those of North Carolina²¹ and Louisiana²² were found to be unconstitutional.

405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

11. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 n.23 (1976) for a list of the states. Also, the Congress of the United States passed the Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (codified at 49 U.S.C. § 1472) which provided for imposition of the death penalty for any death resulting from hijacking of an aircraft. 49 U.S.C. § 1472(n) (Supp. IV).

12. ILL. REV. STAT. ch. 38, §§ 9-1, 1005-5-3, 1005-8-1A (1973) (amended 1977). For an excellent legislative background and analysis of the 1973 statute, see generally Feature, *The New Illinois Death Penalty: Double Constitutional Trouble*, 5 LOY. U.L.J. 351 (1974) [hereinafter cited as *The New Illinois Death Penalty*].

13. 61 Ill. 2d 353, 336 N.E.2d 1 (1975).

14. *Id.* at 362, 336 N.E.2d at 7.

15. Telephone interview with Rep. Roman J. Kosinski (D.-Chicago), October 28, 1977 [hereinafter cited as Kosinski interview]. Rep. Kosinski stated that most of the committee's work on the statute was completed without the knowledge of what the Supreme Court would do in regard to capital punishment.

16. 428 U.S. 153 (1976).

17. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). [These cases, together with *Gregg v. Georgia*, 428 U.S. 153 (1976), will hereinafter be referred to in the text and the footnotes as the *Gregg* decisions.]

18. 428 U.S. 153, 207 (1976). GA. CODE ANN. §§ 26-1101 (1972), 26-3102, 27-2534.1, 27-2537 (Supp. 1976). For purposes of this note, citations are to the statutes in effect at the time of the *Gregg* decisions, with the exception of the two Illinois statutes.

19. 428 U.S. 242, 260 (1976). FLA. STAT. ANN. §§ 775.082, 782.04 (West 1976), 921.141 (West Supp. 1976-77).

20. 428 U.S. 262, 276 (1976). TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974), TEX. CRIM. PRO. CODE ANN. art. 37.071 (Vernon Supp. 1975-76).

21. 428 U.S. 280, 305 (1976). N.C. GEN. STAT. § 14-17 (Supp. 1975).

22. 428 U.S. 325, 336 (1976). LA. REV. STAT. ANN. § 14:30 (Supp. 1975) amending LA. REV. STAT. ANN. § 14:30 (West 1974).

In addition to the *Gregg* decisions, the Court ruled on capital punishment in four other instances in 1977.²³

Illinois passed its new death penalty statute on June 21, 1977.²⁴ This note will examine that statute in light of present standards as established by the Supreme Courts of the United States and Illinois. It will begin with the constitutional background of capital punishment and the imposition of the death penalty after *Furman*. It will then set forth the guidelines for imposition of the death penalty under *Gregg* and post-*Gregg* decisions. Next the note will consider the constitutional and statutory background of capital punishment in Illinois, and it will conclude with an analysis of the new Illinois death penalty statute and a showing that it conforms with the constitutionally required guidelines.

CONSTITUTIONAL BACKGROUND

Prior History

Although *Furman* was the first Supreme Court case in history to address the issue of whether capital punishment violated the eighth amendment, the Court had questioned capital punishment in another context just one year prior to *Furman*. In *McGautha v. California*²⁵ the Court had considered the question of whether the imposition of the death penalty was a violation of the due process clause of the fourteenth amendment. The same basic argument was presented in both *Furman* and *McGautha*: it was alleged that a sentencing system that provided no standards to aid the jury in its decision of whether to impose the death penalty was arbitrary, and that such unguided jury discretion was therefore unconstitutional. The Court in *McGautha* held that the lack of standards was not a violation of due process, stating that "untrammelled" jury discretion had never been declared unconstitutional.²⁶ The following year, however, the Court indicated that statutes which provided for arbitrary imposition of the death penalty at the discretion of the jury violated the cruel and unusual punishment clause.²⁷

23. *Coker v. Georgia*, 433 U.S. 584 (1977); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Roberts v. Louisiana*, 431 U.S. 633 (1977); and *Gardner v. Florida*, 430 U.S. 349 (1977) [hereinafter referred to in the text and footnotes as post-*Gregg* decisions].

24. Public Act 80-26 (June 21, 1977). See appendix for the complete text of the 1977 Illinois Death Penalty Statute. Since three of the post-*Gregg* decisions were decided in June, it is obvious that they had no influence on the content of the bill.

25. 402 U.S. 183 (1971).

26. *Id.* at 207-08.

27. *Furman v. Georgia*, 408 U.S. 238 (1972).

The Court never completely reconciled its position in *McGautha* with *Furman* and its subsequent decisions on capital punishment, but *McGautha* was never explicitly overruled. Both Chief Justice Burger and Justice Douglas have recognized this lack of consistency. It troubled Justice Douglas in his *Furman* opinion that the Court was "now imprisoned in the *McGautha* holding."²⁸ And Chief Justice Burger, in his dissenting opinion, called the plurality opinion a complete rejection of *McGautha*. He claimed that *Furman* presented a procedural due process argument, and that the Court had in essence overruled *McGautha* in the guise of an eighth amendment adjudication.²⁹

The Furman Rationale

Because each United States Supreme Court Justice wrote a separate opinion in *Furman*, the precise reason the death penalty statutes in Texas and Georgia were found to be unconstitutional was unclear. Examination of the various opinions illustrates the difficulty state legislatures were to have in drafting new statutes.

Justices Marshall and Brennan held that capital punishment was per se unconstitutional,³⁰ a position that both have consistently adhered to in subsequent capital punishment cases.³¹ Justice Douglas, Stewart, and White more narrowly held that capital punishment was unconstitutional where imposed under discretionary statutes, those that left the decision to impose or not to impose the death penalty entirely to the discretion of the judge or jury.³² Such unbridled discretion led to arbitrary as well as discriminatory imposition of the death penalty.

Justice Douglas' opinion was based on an equal protection ration-

28. 408 U.S. 238, 248 (1972) (Douglas, J., concurring). Justice Douglas had dissented in *McGautha*, 402 U.S. 183, 226 (1971) (Douglas, J., dissenting).

29. 408 U.S. 238, 400 (1972) (Burger, C.J., dissenting). See also Comment, *Resurrection of Capital Punishment—The 1976 Death Penalty Cases*, 81 DICK. L. REV. 543, 564-65 (1977).

30. 408 U.S. 238, 257-306 (Brennan, J., concurring); *id.* at 314-74 (Marshall, J., concurring). Marshall's and Brennan's opinions closely follow the arguments as presented in the briefs of the N.A.A.C.P. Legal Defense Fund, and reflect in general the major arguments of capital punishment opponents. England, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between Furman and Gregg*, 52 NOTRE DAME LAW. 596, 597-98 (1977) [hereinafter cited as England].

31. *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Marshall, J., concurring); *id.* (Brennan, J., concurring); *Dobbert v. Florida*, 432 U.S. 282, 304 (1977) (Marshall, & Brennan, JJ., concurring); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (*per curiam*); *Gardner v. Florida*, 430 U.S. 349, 364 (1977) (Brennan, J., dissenting); *id.* at 365 (Marshall, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Brennan, J., concurring); *id.* at 306 (Marshall, J., concurring); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (Brennan, J., concurring); *id.* (Marshall, J., concurring).

32. 408 U.S. 238, 256-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 314 (White, J., concurring).

ale: the death penalty was not applied equally to all.³³ The poor and black were more likely to receive the death penalty than were the rich and white. Thus, discretionary statutes were unconstitutional in their operation, a result that was “not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”³⁴

Justices Stewart and White, on the other hand, said the death penalty was unconstitutional where “freakishly”, “wantonly”, and “infrequently” imposed.³⁵ Imposition on only a few persons out of all that were eligible failed to serve any social ends, and was therefore cruel and unusual.³⁶ Justice White did, however, indicate in his opinion that capital punishment, if properly administered, could serve legitimate ends.³⁷

All four dissenting Justices agreed that the plurality opinions were moral judgments that overstepped the boundaries of judicial review.³⁸ Although Justices Blackmun and Burger found capital punishment personally distasteful,³⁹ the dissenters were unanimous in their belief that capital punishment was a legislative matter.

It was to these dissenters coupled with the concurring opinions of Justices Douglas, Stewart, and White, that the legislatures had to look in drafting new statutes. In order to be upheld as constitutional, a statute would have to obtain the approval of at least one Justice in addition to the four dissenting Justices. Since Justices Brennan and Marshall believed capital punishment to be unconstitutional in any case, the approval would have to come from Justices Douglas, Stewart, or White.⁴⁰

Because *Furman* did not set out specific standards or guidelines, the state legislatures received no definite direction in formulating new death penalty statutes. The consensus of legislative opinion seemed to be that a statute that eliminated or narrowed arbitrariness or discretion in the imposition of the death penalty would be acceptable. Consequently, the states were faced with three alternatives: they could abolish capital punishment altogether,⁴¹ they could enact mandatory

33. *Id.* at 240-57 (Douglas, J., concurring).

34. *Id.* at 257 (Douglas, J., concurring).

35. *Id.* at 310 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

36. *Id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

37. *Id.* at 311-13 (White, J., concurring).

38. *Id.* at 375, 384, 404 (Burger, C.J., dissenting); *id.* at 410 (Blackmun, J., dissenting); *id.* at 418 (Powell, J., dissenting); *id.* at 465-70 (Rehnquist, J., dissenting).

39. *Id.* at 375 (Burger, C.J., dissenting); *id.* at 405-06 (Blackmun, J., dissenting).

40. See *The New Illinois Death Penalty*, *supra* note 12, at 361-66. At present the composition of the Court remains the same as it was at the time of *Furman*, with the exception of one Justice. Justice Stevens has replaced Justice Douglas.

41. Nine states had no capital punishment at the time of *Furman*: Alaska, Hawaii, Iowa,

statutes, or they could enact statutes providing standards to aid judge and jury in their imposition of the death penalty. Mandatory statutes providing for capital punishment for certain specified crimes would eliminate discretion entirely. The majority of states enacted either mandatory statutes, statutes with standards, or a combination of the two.⁴²

NEW GUIDELINES

The Gregg Decisions

For those who had welcomed *Furman* as an indication that the Supreme Court might be ready to abolish capital punishment, the five *Gregg* decisions were a source of disappointment. *Gregg v. Georgia*, for the first time in history, reached the issue of whether capital punishment was unconstitutional per se, and held that it was not.⁴³ The Court primarily relied on the overwhelming legislative response in the wake of *Furman*.

Since historical and constitutional precedent firmly supported capital punishment,⁴⁴ it could only be adjudged violative of the eighth amendment in terms of the constitutional tests traditionally applied to determine whether or not a punishment was cruel and unusual, *i.e.*, whether it comported with contemporary standards of decency and whether it was excessively severe.⁴⁵

In applying the first test, the Court recognized that the eighth amendment could not be regarded as a static concept; it must instead "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴⁶ The Court then concluded that contemporary standards of decency as indicated by the democratic process since *Furman* did not reject capital punishment.⁴⁷

As for the second test, a punishment was not excessively severe where it served the legitimate purposes of retribution and deterrence and was not disproportionate to the crime. The Court believed that retribution, although no longer the dominant objective, was nevertheless

Maine, Michigan, Minnesota, Oregon, West Virginia and Wisconsin. California's death penalty had been abolished by the State Supreme Court in *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 405 U.S. 983 (1972), but it was reinstated by a referendum which amended the constitution to authorize capital punishment. See England, *supra* note 30, at 600-01, nn.29-30.

42. See England, *supra* note 30, at 601-02.

43. 428 U.S. 153, 169 (1976).

44. *Id.* at 174-76.

45. *Id.* at 173.

46. *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

47. 428 U.S. 153, 179-81 (1976).

essential in an orderly society.⁴⁸ And while the deterrent effect of the death penalty was still an unresolved question, it was not for the Court to say that the judgment of the Georgia legislature was in error.⁴⁹ The Court did not find the death penalty disproportionate for the crime of murder; rather it was "an extreme sanction, suitable to the most extreme of crimes."⁵⁰

After holding that capital punishment was not per se unconstitutional, the Court decided whether the discretion encountered throughout the entire criminal justice system rendered capital punishment unconstitutional. The argument presented was that elimination of discretion only at the sentencing stage could not effectively resolve the discretion problem. Nonsentencing discretion would have to be eliminated as well in the areas of arrest, competence of counsel, prosecutorial choice, plea-bargaining, grand jury indictment, jury deliberation, appellate review, and clemency.⁵¹ The Court held otherwise, however.⁵² Since nonsentencing discretion was present in all criminal areas, acceptance of that argument would be an indictment of the entire criminal justice system.⁵³ The Court interpreted *Furman* as prohibiting the imposition of the death penalty in an arbitrary and capricious manner, not prohibiting discretion at all levels of a criminal proceeding.⁵⁴ Nonsentencing discretion, therefore, was not unconstitutional under the cruel and unusual punishment clause of the eighth amendment.⁵⁵

Since the Court in *Gregg* did interpret *Furman* as mandating the elimination or at least the minimizing of discretion in the capital sentencing procedure, it concluded that a system that provided objective standards to control sentencing discretion is constitutional.⁵⁶ While stating that the procedure provided by the Georgia statute was not the

48. *Id.* at 183.

49. *Id.* at 186.

50. *Id.* at 187.

51. This theme is presented again and again in post-*Furman* and post-*Gregg* decisions. See Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U.L. REV. 1, 11 (1976); Comment, *Capital Punishment After Furman*, 64 J. CRIM. L. 281, 284-85 (1973); Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261, 280 (1976); Note, *Capital Punishment Statutes After Furman*, 35 OHIO S.L.J. 651, 679 (1974); Comment, *Illinois' Post-Furman Capital Punishment Statute*, 1974 U. ILL. L.F. 440, 448-49; Comment, *Capital Punishment: Constitutional Parameters for the Ultimate Punishment*, 11 U. RICH. L. REV. 101, 117 (1976). Nonsentencing discretion as it affects the unique penalty of death remains a vulnerable issue, and it is not unlikely that a future court will find such discretion in violation of the cruel and unusual punishment clause of the eighth amendment.

52. 428 U.S. 153, 199 (1976).

53. *Id.* at 225-26 (White, J., concurring).

54. *Id.* at 199.

55. *Id.*

56. *Id.* at 193-95.

only permissible sentencing system,⁵⁷ it held that Georgia's procedures did satisfy the constitutional requirements of *Furman*.⁵⁸ It likewise found the procedures in Florida⁵⁹ and Texas⁶⁰ satisfactory.

In contrast, the Court found the procedures in North Carolina⁶¹ and Louisiana⁶² to be unconstitutional. These states had mandatory death penalty statutes which effectively eliminated all discretion. The Court commented that society had long ago rejected automatic death penalties as being too harsh and rigid. Since they were then too marked a departure from contemporary standards of decency, mandatory death penalty statutes were held violative of the eighth and fourteenth amendments.⁶³

A Further Guideline

The five *Gregg* decisions all involved crimes of murder. One year later in *Coker v. Georgia*⁶⁴ the Court was asked to decide whether a sentence of death for a rape conviction was constitutional. The defendant was charged with escape, armed robbery, motor vehicle theft,

57. *Id.* at 195.

58. *Id.* at 196-98. GA. CODE ANN. §§ 26-1101 (1972), 26-3102, 27-2534.1, 27-2537 (Supp. 1976).

59. *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976). FLA. STAT. ANN. §§ 775.082, 782.04 (West 1976), 921.141 (West Supp. 1976-77).

60. *Jurek v. Texas*, 428 U.S. 262, 276 (1976). TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974), TEX. CRIM. PRO. CODE ANN. art. 37.071 (Vernon Supp. 1975-76).

61. *Woodson v. North Carolina*, 428 U.S. 280, 301-05 (1976). N.C. GEN. STAT. § 14-17 (Supp. 1975).

62. *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976). LA. REV. STAT. ANN. § 14:30 (Supp. 1975) amending LA. REV. STAT. ANN. § 14:30 (West 1974).

63. *Roberts v. Louisiana*, 428 U.S. 325, 332 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 301-03 (1976).

64. 433 U.S. 584 (1977). Unlike *Coker*, the other three post-*Gregg* decisions did not pertain to issues that *Furman* had left unresolved. *Gardner v. Florida*, 430 U.S. 349 (1977), held that failure to disclose a confidential presentence report used by the judge to impose the death penalty after the jury had advised life imprisonment was a violation of due process. *Gardner* is relevant in the area of evidence rules to be employed in the sentencing procedure of a capital case. See note 112 *infra*. *Roberts v. Louisiana*, 431 U.S. 633 (1977), involved another unsuccessful challenge of Louisiana's mandatory statute under the subparagraph which provided a mandatory death penalty for the murder of a police officer. *Dobbert v. Florida*, 432 U.S. 282 (1977), should be noted for its implications in the capital punishment area. The challenge here was that imposition of the death penalty was unconstitutional as an *ex post facto* law, since the statute had not been in effect at the time the murder had occurred. The Court rejected that argument, holding that since the changes in the death penalty were procedural and ameliorative, there was no *ex post facto* violation. This holding is of particular interest in Illinois, since the first constitutional challenge to the new death penalty statute is already in progress. William R. Hill was sentenced to death under the new Illinois statute in Cook County on October 19, 1977, for murders committed prior to the existence of a constitutional death penalty statute. See Wolfson, Warren D., *A Hypothetical Case Under the New Illinois Death Penalty Statute*, 4 CRIM. JUST. NEWSLETTER 9 Dec., 1977.

kidnapping, and rape.⁶⁵ There were two aggravating circumstances⁶⁶ present: conviction for a prior capital felony and commission of the rape in the course of the commission of another capital felony, that of armed robbery.⁶⁷ The Court held that death was a grossly disproportionate and excessive punishment for the rape of an adult woman, thereby violating the eighth and fourteenth amendments.⁶⁸

In determining whether a punishment was disproportionate to the severity of the crime, the Court stated that public attitudes, history and precedent, legislative attitudes, and response of juries should be considered.⁶⁹ Looking for guidance in history, the Court noted that a majority of the states had not authorized a death sentence for rape in the past fifty years.⁷⁰ Also, since only three of thirty-five new statutes provided for the death penalty for rape⁷¹ and nine out of ten juries had not imposed the death penalty for rape,⁷² legislative and jury attitudes confirmed the Court's judgment that capital punishment was disproportionate for the rape of an adult woman.⁷³

In his dissent Chief Justice Burger stated that the implication of the *Coker* holding was that capital punishment was appropriate for murder only.⁷⁴ Whether it is constitutional to impose the death penalty for any crimes other than murder has yet to be adjudicated.

In summary, the *Gregg* decisions and *Coker* resolved five issues that had been left unanswered by *Furman*. First, capital punishment is not unconstitutional per se; second, nonsentencing discretion throughout the entire criminal justice system is not unconstitutional; third, death penalty statutes for certain categories of murder that provide objective standards to guide judge and jury are constitutional; fourth, mandatory death penalty statutes are unconstitutional; and finally, capital punishment is not an appropriate penalty for the rape of an adult woman.

65. 433 U.S. 584, 587 (1977).

66. Aggravating circumstances refer to those factors present in a particular crime that render it a capital offense. They can be statutorily specified and include such things as the murder of a police officer or fireman, murder for hire, prior history of conviction for capital crimes, or commission of the offense during the commission of another felony.

67. 433 U.S. 584, 588-89, 591 (1977).

68. *Id.* at 592.

69. *Id.*

70. *Id.* at 593.

71. *Id.* at 594.

72. *Id.* at 597.

73. *Id.*

74. *Id.* at 621 (Burger, C.J., dissenting).

CONSTITUTIONAL STANDARDS

A determination of constitutionally acceptable standards or guidelines to be provided in a death penalty statute can be made by an examination of the acceptable statutes in conjunction with their interpretation by the Supreme Court in the *Gregg* decisions. It is equally important to examine the unacceptable statutes for what they failed to provide. From such an examination it is possible to extract the standards deemed essential by the Court, as well as those merely deemed desirable.

Bifurcated Proceeding

A separate sentencing hearing following the determination of guilt seems to be the preferable procedure for imposition of the death penalty. Both the Florida statute⁷⁵ and the Texas statute⁷⁶ specifically provide for a separate sentencing hearing; the Georgia statute⁷⁷ is not explicit. The Court, however, referred to the bifurcated trial provided by the Georgia statute in *Gregg v. Georgia*,⁷⁸ and indicated that it was the best system.⁷⁹ While not deemed essential, a bifurcated proceeding is thus favored in capital cases.

The bifurcation of a capital trial is preferable because it allows the judge or jury to consider every fact prior to the imposition of the death penalty. Without a bifurcated proceeding, irrelevant and inadmissible facts would be barred. Such an approach would deprive judges and juries in capital cases of the fullest possible knowledge of all facts surrounding the particular crime. Ideally, death penalty determinations should be made by judges and juries that have considered every vital fact.⁸⁰

Aggravating Circumstances

The Georgia statute provides that the judge or jury consider any of ten specified aggravating circumstances⁸¹ that might be supported by the evidence. Except in cases of treason or aircraft hijacking, there must be a finding of at least one of these aggravating circumstances in

75. FLA. STAT. ANN. §§ 775.082, 782.04 (West 1976), 921.141 (West Supp. 1976-77).

76. TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974), TEX. CRIM. PRO. CODE ANN. art. 37.071 (Vernon Supp. 1975-76).

77. GA. CODE ANN. §§ 26-1101 (1972), 26-3102, 27-2534.1, 27-2537 (Supp. 1976).

78. 428 U.S. 153 (1976).

79. *Id.* at 190-92.

80. See generally Davis, *The Death Penalty and the Current State of the Law*, 14 CRIM. LAW BULL. 7, Jan./Feb. (1978) [hereinafter cited as Davis].

81. GA. CODE ANN. § 27-2534.1(b)(1)-(10) (Supp. 1976).

order to impose the death penalty.⁸² Florida's statute specifies eight aggravating circumstances,⁸³ and one or more of these must be present to warrant the death penalty.⁸⁴

The Texas statute does not specify aggravating circumstances as such. Like Florida, Texas restricts the imposition of the death penalty to murder, but it narrows the categories of murder to five specified situations.⁸⁵ The Court in *Jurek v. Texas*⁸⁶ believed that this narrowing served much the same purpose as a statutory list of aggravating circumstances, particularly since each of the five corresponded to aggravating circumstances in the Georgia and Florida statutes.⁸⁷ Although the presence of such an aggravating circumstance was determined in the guilt stage, it was required prior to the imposition of the death penalty and was, therefore, satisfactory. The important factor was a focusing on the particularized nature of the crime.⁸⁸

Thus, a consideration of aggravating circumstances must be provided in a death penalty statute. These can either be specifically set out in the statute, or the statute can alternatively specify certain categories of murder. There is no prescribed number.

Mitigating Circumstances

The Court specifically stated in *Jurek* that mitigating circumstances must be considered prior to a sentence of death.⁸⁹ Although the Texas statute lacked statutory mitigating circumstances, the Court found this requirement satisfied by the submission of three issues to the jury in the sentencing stage of the trial.⁹⁰ Since the Texas statute provided for guidance and objective consideration by the jury of the particular circumstances of both the offense and the offender prior to imposing the death penalty, the Court found its procedure constitutional.⁹¹

The Florida statute specifies seven mitigating circumstances which are to be balanced against the statutory aggravating circumstances in the deliberation of the jury. Specific mitigating circumstances are not provided by the Georgia statute, but there must be a consideration of

82. *Id.*, § 27-2534.1(c).

83. FLA. STAT. ANN. § 921.141(5)(a)-(h) (West Supp. 1976-77).

84. *Id.*, § 921.141(3)(a).

85. TEX. PENAL CODE ANN. tit. 5, § 19.03(a)(1)-(5) (Vernon 1974).

86. 428 U.S. 262 (1976).

87. *Id.* at 270.

88. *Id.* at 274.

89. *Id.* at 271.

90. *Id.* at 272-74.

91. *Id.* at 276.

“any” mitigating circumstances. The Court stated in *Proffitt v. Florida*⁹² that the use of aggravating and mitigating circumstances required a focusing on the particular crime and the character of the defendant.⁹³ Similar language is found in the *Gregg* holding: “We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.”⁹⁴

Thus, at a minimum, the Court requires individualized consideration of the particular crime and the particular defendant. It is because of the impossibility of satisfying this minimum standard that mandatory death penalty statutes were held unconstitutional in *Woodson v. North Carolina*⁹⁵ and *Roberts v. Louisiana*.⁹⁶ The Court added that a mandatory death penalty statute also fails by not providing standards to guide the jury.⁹⁷

Consideration of mitigating circumstances also is essential, though these circumstances need not be statutorily specified. A specific list would seem to be the most efficient way to focus attention in an individualized manner, but the exact method is left to the states. Again, there is no prescribed number.

Appellate Review

Prompt automatic review of a sentence of death is provided by all three of the acceptable statutes. The review in Florida and Georgia is by the respective Supreme Courts,⁹⁸ while the Texas statute provides an automatic review by the Court of Criminal Appeals.⁹⁹ This procedure insures that the death penalty is not imposed arbitrarily, and that it is not disproportionate in comparison with similar cases.

In *Roberts*, the Court specifically stated that mandatory death penalty statutes failed for not providing for review of a death sentence.¹⁰⁰ Therefore appellate review is an essential factor in any constitutional death penalty statute.

92. 428 U.S. 242 (1976).

93. *Id.* at 251.

94. 428 U.S. 153, 187 (1976).

95. 428 U.S. 280, 304 (1976). N.C. GEN. STAT. § 14-17 (Supp. 1975).

96. 428 U.S. 325, 333 (1976). LA. REV. STAT. ANN. § 14:30 (Supp. 1975) amending LA. REV. STAT. ANN. § 14:30 (West 1974).

97. 428 U.S. 280, 303 (1976).

98. FLA. STAT. ANN. § 921.141(4) (West Supp. 1976-77); GA. CODE ANN. § 27-2537(a) (Supp. 1976).

99. TEX. CRIM. PRO. CODE ANN. art. 37.071(f) (Vernon Supp. 1975-76).

100. 428 U.S. 325, 335-36 (1976).

Standards of Proof

The Georgia statute provides that a finding of an aggravating circumstance must be beyond a reasonable doubt.¹⁰¹ Similarly, each of the three issues submitted to the jury under the Texas statute must be proved by the state beyond a reasonable doubt.¹⁰² The required standard of proof is not specified in the Florida statute. The reason for the omission could be due to the fact that the jury's finding is advisory; the judge imposes the death penalty only after reweighing all the circumstances.

The Court has not specifically addressed the standard of proof to be utilized in a capital sentencing hearing. The safest approach in drafting a death penalty statute would seem to be an inclusion of the beyond reasonable doubt standard, at least where the finding of the death penalty is by the jury.

Rules of Evidence

Both the Florida and Texas statutes provide for an expansion of evidence rules beyond ordinary criminal rules.¹⁰³ Georgia makes no such provision; thus, this standard is optional.

Although the expansion of evidence rules has not been addressed by the Supreme Court, its desirability corresponds to that of bifurcated procedures. Death penalty determinations are best made by a fully informed jury, and facts vital to such a determination could be prohibited under ordinary criminal evidence rules.¹⁰⁴

Written Findings

Written findings of the specific aggravating circumstances by judge or jury are required by the Georgia statute if the death penalty is imposed.¹⁰⁵ Under the Florida statute the judge is required to set forth in writing the findings upon which the death sentence is based.¹⁰⁶ The Texas statute makes no specific reference to written findings.

The Supreme Court in *Proffitt* mentioned that written findings provided for a meaningful appellate review.¹⁰⁷ However, there has been no indication that they are essential to a statute's constitutionality.

101. GA. CODE ANN. § 27-2534.1(c) (Supp. 1976).

102. TEX. CRIM. PRO. CODE ANN. art. 37.071(c) (Vernon Supp. 1975-76).

103. *Id.*, art. 37.071(a); FLA. STAT. ANN. § 921.141(1) (West Supp. 1976-77).

104. See Davis, *supra* note 80.

105. GA. CODE ANN. § 27-2534.1(c) (Supp. 1976).

106. FLA. STAT. ANN. § 921.141(3) (West Supp. 1976-77).

107. 428 U.S. 242, 251 (1976).

Here, too, the safest approach would be to include a provision for written findings.

In summary, the minimum standard required of a constitutional death penalty statute is an individualized consideration of both the crime and the defendant followed by automatic review.¹⁰⁸ Individualized consideration is best achieved by the use of aggravating and mitigating circumstances,¹⁰⁹ and bifurcated proceedings are preferred.¹¹⁰ Specifying that proof be beyond a reasonable doubt, expanding the evidence rules, and requiring written findings¹¹¹ are desirable options.¹¹²

With the objective guidelines thus determined, an analysis of the new death penalty statute in Illinois will readily indicate whether it comports with those standards.

THE DEATH PENALTY IN ILLINOIS

Background

The death penalty in Illinois at the time of *Furman* could be imposed for three offenses: murder, aggravated kidnapping, and treason.¹¹³ The statute provided for a bifurcated proceeding in that the defendant's guilt was first determined, followed by a separate post-trial sentencing hearing. No specific findings were required. In cases where the defendant waived the right to jury trial, the judge could impose the death penalty. But a sentence of death could only be recommended by the jury in a jury trial, and the judge's concurrence was necessary in order for the death penalty to be imposed. If the jury recommended mercy, the judge could not impose the death penalty.

108. See text accompanying notes 75-100 *supra*.

109. See text accompanying notes 81-97 *supra*.

110. See text accompanying notes 75-80 *supra*.

111. See text accompanying notes 101-07 *supra*.

112. Historically and practically, different evidence rules have governed in trial and sentencing procedures. This is due to a recognition that intelligent and individualized imposition of punishment might be inhibited by the stricter open court rules. See *Williams v. New York*, 337 U.S. 241 (1949). Likewise, the proof beyond a reasonable doubt standard that is mandatory in the guilt determination during the trial stage is not necessarily applicable in the sentencing stage. However, more recently the Court held that it was a denial of due process to impose the death penalty when based on information that defendant had no opportunity to challenge or explain. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Although not explicitly overruling *Williams*, the Court believed that it was necessary to reevaluate capital sentencing procedures in light of evolving standards of procedural fairness since the death penalty was now recognized as different from other punishments. The Court also stated that in order to comply with *Furman* the confidential report had to be made part of the record on appeal. *Id.* at 360-61. Hence *Gardner* lends support to the contention that proof beyond a reasonable doubt, expansion of evidence rules, and written findings are desirable options in any death penalty statute. Further constitutional challenges could well arise in these areas.

113. ILL. REV. STAT. ch. 38, §§ 9-1(b), 10-2(b)(1), 30-1(c) (Supp. 1972) (amended 1973 and 1977).

But where the jury recommended death, the judge could choose to impose life imprisonment.¹¹⁴

It was precisely this type of discretionary sentencing system that was forbidden by *Furman*. The Supreme Court held the Illinois death penalty statute unconstitutional in *Moore v. Illinois*,¹¹⁵ citing their holding of that same day in *Furman v. Georgia*.¹¹⁶

In 1970 the citizens of Illinois had approved by referendum the 1970 Illinois Constitution, which by implication provided for capital punishment.¹¹⁷ In this same referendum, Illinois' voters had also chosen not to abolish capital punishment by approximately a two-to-one margin.¹¹⁸ The enactment of a new Illinois death penalty statute in November, 1973,¹¹⁹ can be seen as both a response to the voters of Illinois and to the mandate of *Furman*.

The 1973 Illinois Death Penalty Statute

The basic provisions of the 1973 Illinois death penalty statute: 1) narrowed capital offenses to murder;¹²⁰ 2) provided that the particular murder had to fall within one of six classifications specified as aggravating circumstances;¹²¹ 3) directed that if parts 1 and 2 were present, a three-judge panel was to be appointed by the chief judge of the circuit court to hear evidence in a special sentencing hearing;¹²² and 4) if a majority of the judges determined one of the circumstances existed and found no compelling reasons for mercy, the death penalty was mandatory.¹²³ The findings of the panel had to establish the appropriateness of the death penalty beyond a reasonable doubt.¹²⁴ Appeal was to be provided in two stages: the first to determine error as in all criminal appeals; the second, in the absence of error, to determine if the death penalty was imposed in a discretionary manner or was disproportionate, considering both the crime and the defendant.¹²⁵

114. See *The New Illinois Death Penalty*, *supra* note 12, at 352-53.

115. 408 U.S. 786 (1972).

116. *Id.* at 800.

117. ILL. CONST. art. I, §§ 2, 7, 9; art. VI, § 4(b). These four sections contain such language as "deprived of life", "a crime punishable by death", "capital offenses", and "a sentence of death".

118. Kosinski interview, *supra* note 15. See also *The New Illinois Death Penalty*, *supra* note 12, at 388-89.

119. ILL. REV. STAT. ch. 38, §§ 9-1, 1005-5-3, 1005-8-1A (1973) (amended 1977).

120. *Id.*, § 9-1(b).

121. *Id.*, § 1005-8-1A(1)-(6).

122. *Id.*, § 1005-8-1A.

123. *Id.*

124. *Id.*

125. *Id.*

The constitutionality of the 1973 statute was decided by the Illinois Supreme Court in September, 1975. At that time there had been no further challenges of death penalty statutes at the federal level since *Furman*.¹²⁶ *People ex rel. Rice v. Cunningham*¹²⁷ addressed four different aspects of the statute: the three-judge panel, the aggravating circumstances, the "compelling reasons for mercy" clause, and the procedure for appellate review.

In *Cunningham*, the court held that the legislature was without authority to create a three-judge panel to impose the death penalty.¹²⁸ That power was vested in the Supreme, Appellate, and Circuit Courts of Illinois.¹²⁹ The court also held that the three-judge panel of circuit court judges was constitutionally defective in that each judge was deprived of the jurisdiction that was vested in him alone.¹³⁰ However, the enumerated situations or aggravating circumstances requiring the imposition of the death penalty were held proper; they were not too vague and uncertain.¹³¹ Next, the "compelling reasons for mercy" clause was found to be unconstitutional because no standards or guidelines or considerations of the particular defendant were provided.¹³² Finally, the procedure for appellate review was unconstitutional because it was in direct conflict with article VI, section 4(b) of the Illinois Constitution, which provides for direct appeal of the death penalty to the Illinois Supreme Court.¹³³

Since the three constitutional defects were so dependent that they were not severable, the entire statute was held unconstitutional.¹³⁴ Thus Illinois was without an operable death penalty statute for a second time.

The 1977 Illinois Death Penalty Statute

The Illinois Supreme Court decision in *Cunningham* invalidating the 1973 death penalty statute provided no guidelines for formulating a

126. Since a determination of whether the 1973 statute would have survived a constitutional challenge on the federal level would be merely speculation, a discussion of that subject is unnecessary. It did, however, have several serious flaws: 1) the complete elimination of the jury at the sentencing stage, 2) the vagueness of the "compelling reasons for mercy" clause, and 3) the lack of specified consideration of the particular crime and particular defendant until the second stage of the appellate review.

127. 61 Ill. 2d 353, 336 N.E.2d 1 (1975).

128. *Id.* at 359, 336 N.E.2d at 5.

129. ILL. CONST. art. VI, § 1.

130. 61 Ill. 2d 353, 361, 336 N.E.2d 1, 6 (1975).

131. *Id.*, 336 N.E.2d at 6.

132. *Id.*, 336 N.E.2d at 6.

133. *Id.* at 362, 336 N.E.2d at 6. See ILL. CONST. art. VI, § 4(b).

134. *Id.*, 336 N.E.2d at 7.

new death penalty statute. Nevertheless, several bills were promptly introduced in the Illinois General Assembly.

The most important of these was the Kosinski-Sangmeister bill.¹³⁵ The drafters of this bill had taken into consideration a great variety of materials,¹³⁶ but were working without the benefits of the *Gregg* standards or guidelines, which were not rendered until the following summer. While incorporating many features of the 1973 statute, the bill contained substantial changes in areas that were defective in an attempt to conform with *Furman* and *Cunningham*.¹³⁷

The House Judiciary II Committee took the best components from various proposed bills, and with many modifications, incorporated them into House Bill 10.¹³⁸ The bill in its final form passed both Houses on June 14, and was approved by Governor James Thompson on June 21, 1977.¹³⁹

The 1977 Illinois death penalty statute was basically in the same form as the Kosinski-Sangmeister bill, with some additions and some deletions.¹⁴⁰ Its main provisions are: 1) a defendant found guilty of murder who has attained the age of eighteen may be sentenced to death in seven specified situations, called aggravating factors;¹⁴¹ 2) where the

135. H.B. 3204, 79th Gen. Ass., State of Illinois (1975 and 1976), sponsored by Rep. Roman J. Kosinski (D.-Chicago) and George E. Sangmeister (D.-Mokena).

136. Materials considered were: the 1970 Illinois Constitution, Illinois case law, post-*Furman* case law in other states, the Model Penal Code, the post-*Furman* death penalty statutes of other states, and the death penalty provisions of S.1, the legislation before the United States Senate Judiciary Subcommittee on Criminal Laws, which was proposing revision of the federal criminal code. See Garner, Mitchell, CHI. B.A. YOUNG LAW. J., Jan./Feb., 1976, at 4. [hereinafter cited as Garner]

137. See Garner, Jan./Feb., *supra* note 136, at 4.

138. Kosinski interview, *supra* note 15.

139. Chicago Tribune, June 22, 1977, § 1 at 1, col. 2. In a televised press conference, Governor Thompson signed the bill, commenting that the vast majority of Illinois' citizens supported it. He stated that the statute fit Supreme Court guidelines in his opinion and in those of his legal advisors. He also predicted that there would be a court test prior to imposition of the death penalty in Illinois, and estimated that it would take five years. Ironically, Thompson had participated in the prosecution of the last person to be executed in Illinois as an assistant State's Attorney. James Duke, convicted killer of a police officer, died in the electric chair in Cook County Jail on August 24, 1962.

140. There are only two significant differences between the statute and House Bill 3204. One is that the statute nowhere specifies that judge and jury findings in the separate sentencing hearing be written, and the other is that it provides that the aggravating and mitigating factors may include but need not be limited to the statutorily enumerated ones. Most of the other changes are fairly technical, although a mitigating factor is added pertaining to the absence of a history of criminal activity. There is also an additional aggravating factor pertaining to murder of a witness in a prosecution against the defendant. The crimes of armed robbery, deviate sexual assault, forcible detention, and burglary have been added to the felony murder factor. And the alternative term of imprisonment is not specified as a minimum of fourteen years in the new statute.

141. Public Act 80-26, § 9-1(b)(1-7) (June 21, 1977). See appendix for the complete text of the 1977 Illinois Death Penalty Statute.

state requests, a separate sentencing hearing shall be conducted to determine the existence of any of the seven aggravating circumstances or any of the five mitigating factors;¹⁴² 3) the hearing shall be conducted before a jury, or by judge alone where defendant waives the jury;¹⁴³ 4) rules of criminal evidence are to govern any information as to aggravating factors, whereas any information as to mitigating factors can be presented regardless of admissibility under criminal rules;¹⁴⁴ 5) the state must prove the existence of any aggravating factors beyond a reasonable doubt;¹⁴⁵ 6) if there is no finding of an aggravating factor, defendant is sentenced to a term of imprisonment;¹⁴⁶ 7) if the finding of an aggravating factor is unanimous, the judge or jury shall consider aggravating and mitigating factors;¹⁴⁷ 8) if there is a unanimous finding that no mitigating factor is present, defendant is sentenced to death, whereas he is sentenced to a term of imprisonment if the finding is not unanimous;¹⁴⁸ and 9) there is automatic review of a death sentence by the Illinois Supreme Court in accordance with its rules.¹⁴⁹

Analysis

On the federal level the new Illinois death penalty statute should encounter no constitutional problems. It has restricted capital punishment to the offense of murder, which has been held constitutional when administered under a proper statute.¹⁵⁰ It provides for individualized consideration of the particular murder and the particular defendant by statutorily specifying both aggravating and mitigating factors.¹⁵¹ It provides for automatic review by the Illinois Supreme Court of any death sentence.¹⁵² In addition, the statute provides for the preferred bifurcated system,¹⁵³ and is defendant-oriented in that the rules of evidence are expanded in his favor.¹⁵⁴ Any evidence regardless of admissibility under ordinary criminal trial rules may be presented to show the presence of a mitigating factor; conversely, criminal rules of evidence must be adhered to by the state in showing the presence of an aggravating

142. *Id.*, § 9-1(d).

143. *Id.*, § 9-1(d)(1-3).

144. *Id.*, § 9-1(e).

145. *Id.*, § 9-1(f).

146. *Id.*, § 9-1(g),(h).

147. *Id.*

148. *Id.*

149. *Id.*, § 9-1(i).

150. See text accompanying notes 50, 56-60 and 141 *supra*.

151. Public Act 80-26, § 9-1(b)(c) (June 21, 1977). See text accompanying note 93 *supra*.

152. See text accompanying notes 100 and 149 *supra*.

153. See text accompanying notes 78-79 and 142 *supra*.

154. See text accompanying note 144 *supra*.

factor. The presence of an aggravating factor must be proved beyond a reasonable doubt.¹⁵⁵ Even further, the Illinois statute requires a unanimous finding that no mitigating factor is present for the imposition of the death penalty,¹⁵⁶ a protection of the defendant not found in any of the other three constitutional statutes.

The only desirable standard not found in the Illinois statute is that of written findings. However, since this has not been deemed an essential standard by the Supreme Court, its absence should not make the statute constitutionally defective. The lack of a specific provision for written findings in the Texas statute supports this premise.¹⁵⁷

The advantage of written findings is that they provide for easier appellate review. Since the statute provides that review of a death sentence be in accordance with rules promulgated by the Illinois Supreme Court, it is feasible that written findings will be adopted by court rule. In that event, the Illinois death penalty statute would substantially conform with every constitutional standard deemed essential and desirable by the United States Supreme Court.

Although the Illinois statute will most likely survive any federal constitutional challenge, there is a potential problem concerning the review process.¹⁵⁸ In obvious deference to the authority of the Illinois Supreme Court, the new statute is vague in that it does not specify the procedures to be followed on review. While satisfying the concerns of *Cunningham* in this respect, it does not specifically insure that similar results are reached in similar capital punishment cases. The Georgia statute is very specific in this regard, whereas the Illinois statute resembles the Florida and Texas statutes. In *Proffitt* the United States Supreme Court found that the Supreme Court of Florida did review each death sentence to insure similarity of result in similar cases.¹⁵⁹ Therefore, it can be expected that the review procedures employed by the Illinois Supreme Court will be closely scrutinized by the United States Supreme Court.¹⁶⁰ As with the written findings standard, this feature could also be adopted by court rule.

It is unlikely that the new statute contains any constitutional flaws on the state level.¹⁶¹ It has effectively eliminated the three defects inval-

155. See text accompanying note 145 *supra*.

156. See text accompanying note 148 *supra*.

157. See TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974).

158. See generally *Illinois Supreme Court Review, Constitutional Law*, 1977 U. ILL. L.F. 254, 273-74 [hereinafter cited as *Illinois Supreme Court Review*].

159. 428 U.S. 242, 253 (1976).

160. *Illinois Supreme Court Review, supra* note 158, at 274.

161. This is not to say that the implementation of the statute is without procedural difficulties. See Wolfson, *A Hypothetical Case Under the New Illinois Death Penalty Statute*, 4 CRIM.

idated by the Illinois Supreme Court in *Cunningham*. It has eliminated the three-judge panel, substituted mitigating factors for the vague "compelling reasons for mercy" clause, and complied with the Illinois Constitution by providing for direct review by the Illinois Supreme Court rather than review on an intermediate level. In its addition of mitigating factors it has primarily relied on those suggested in the Model Penal Code.¹⁶² These are part of the Florida statute approved by the Supreme Court in *Proffitt*.

There are two related potential state constitutional problems. The first is that the statute does not statutorily limit aggravating and mitigating circumstances, and could therefore be struck for vagueness.¹⁶³ Second, there is a possible constitutional infirmity in that capital punishment is in conflict with the section of the 1970 Illinois Constitution which provides for restoration of offenders to useful citizenship.¹⁶⁴

It seems unlikely that the Illinois Supreme Court will hold that the statute is unconstitutional for either vagueness or because of the conflict for several reasons. First, the rehabilitation issue was present in the *Cunningham* case and the Illinois Court did not address it at that time. Second, the United States Supreme Court has meanwhile held that capital punishment per se is not unconstitutional.¹⁶⁵ And finally, one of the specified mitigating factors is the absence of a history of prior criminal activity. This will provide for an examination of the defendant's rehabilitation potential.¹⁶⁶ Also, a determination of rehabilitation potential would be aided by not statutorily limiting the aggravating and mitigating factors. These two features thus minimize any potential conflict. This could be an explanation as to why the legislators opted for the open-ended provision in the 1977 death penalty statute. They may well have considered the vagueness problem less of a risk than the potential conflict.

CONCLUSION

Given the same composition of the Supreme Court, capital punishment will not be held cruel and unusual punishment in violation of the eighth and fourteenth amendments in the near future. A majority

JUST. NEWSLETTER 9, Dec., 1977, for a demonstration of unanswered procedural questions raised by the new statute.

162. Model Penal Code § 210.6 (Proposed Official Draft 1962).

163. Telephone interview with Mitchell Garner, Assistant State's Attorney, October 31, 1977. (Mr. Garner's statements represented his personal views and not those of the State's Attorney's Office.)

164. ILL. CONST. art. I, § 11.

165. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

166. *Illinois Supreme Court Review*, *supra* note 158, at 275.

of the Court believes such a judgment to be beyond the scope of judicial review, whatever its personal views on the subject. In addition, the democratic process has overwhelmingly indicated its support for capital punishment for a very narrow category of crimes.¹⁶⁷ Until the day when society rejects capital punishment, or a United States Supreme Court no longer feels compelled to defer to the legislative process on the matter of life or death, the death penalty must be imposed in as rational a way as possible. The 1977 Illinois Death Penalty Statute has most likely achieved that goal.*

CATHERINE H. McMAHON

167. House Roll Call, 80th Gen. Ass., State of Illinois, H.B. 10, March 10, 1977. The vote was 119 for; 41 against. Senate Roll Call, 80th Gen. Ass., H.B. 10, June 2, 1977. The vote was 40 for; 13 against. In addition to the strong vote in support of the new death penalty statute, Rep. Kosinski and Mr. Garner both indicated that there is overwhelming support for capital punishment in Illinois today that exceeds that shown in the 1970 referendum, and that this same support exists throughout the country. See notes 15 and 163 *supra*.

* After this book was sent to press, the United States Supreme Court decided two additional capital punishment cases, both of which arose under the Ohio death penalty statute. See *Lockett v. Ohio*, 98 S. Ct. 2954 (1978); *Bell v. Ohio*, 98 S. Ct. 2977 (1978). A plurality consisting of Chief Justice Burger and Justices Stewart, Powell, and Stevens concluded in both cases "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers." *Id.* at 2965 and 2980. Since the Ohio statute limited the sentencer's consideration of mitigating circumstances, it was thus held "incompatible" with the eighth and fourteenth amendments. *Id.* at 2967 and 2980-81.

APPENDIX

The 1977 Illinois Death Penalty Statute, ILL. REV. STAT., ch. 38, §§ 9-1, 1005-5-3, 1005-8-1A (1973) (amended 1977) provides:

Section 1. Section 9-1 of the "Criminal Code of 1961", approved July 18, 1961, as amended, is amended to read as follows:

(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Aggravating factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

1. the murdered individual was a peace officer or fireman killed in the course of performing his official duties and the defendant knew or should have known that the murdered individual was a peace officer or fireman; or

2. the murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, or the murdered individual was an inmate at such institution or facility and was killed on the grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

4. the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

5. the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

6. the murdered individual was killed in the course of another felony if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child; or

7. the murdered individual was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness or possessed other material evidence against the defendant.

(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

1. the defendant has no significant history of prior criminal activity;

2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

3. the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

4. the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

5. the defendant was not personally present during commission of the act or acts causing death.

(d) Separate sentencing hearing.

Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c). The proceeding shall be conducted:

1. before the jury that determined the defendant's guilt; or

2. before a jury impanelled for the purpose of the proceeding if:

A. the defendant was convicted upon a plea of guilty; or

B. the defendant was convicted after a trial before the court sitting without a jury; or

C. the court for good cause shown discharges the jury that determined the defendant's guilt; or

3. before the court alone if the defendant waives a jury for the separate proceeding.

(e) Evidence and Argument.

During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any addi-

tional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

(f) Proof.

The burden of proof of establishing the existence of any of the factors set forth in Subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) Procedure—Jury.

If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.¹ If there is unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(h) Procedure—No Jury.

In a proceeding before the court alone, if the court finds that none of the factors found in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

If the Court determines that one or more of the factors set forth in Subsection (b) exists, the court shall consider any aggravating and mitigating factors as indicated in Subsection (c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.

Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(i) Appellate Procedure

The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

(j) Disposition of reversed death sentence.

In the event that the death penalty in this Act is held to be unconstitutional by the Supreme Court of the United States or the State of Illinois, any person convicted of murder shall be sentenced by the

1. Chapter 38, § 1005-1-1 et seq.

court to a term of imprisonment under Chapter V of the Unified Code of Corrections.

In the event that any death sentence pursuant to the sentencing provisions of this Section is declared unconstitutional by the Supreme Court of the United States or of the State of Illinois, the court having jurisdiction over a person previously sentenced to death shall cause the defendant to be brought before the court, and the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

Section 2. Section 5-5-3 of the "Unified Code of Corrections", approved July 26, 1972, as amended, is amended to read as follows:

Sect. 5-5-3. Disposition

(a) Every person convicted of an offense shall be sentenced as provided in this Section.

(b) When a defendant is found guilty of murder the State may either seek a sentence of imprisonment, under Section 5-8-1 of this Code, or where appropriate seek a sentence of death under Section 9-1 of the Criminal Code of 1961.

