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Eight Amendment--Trial Court May Impose Death Sentence Despite Jury's Recommendation of Life Imprisonment

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EIGHTH AMENDMENT—TRIAL COURT MAY IMPOSE DEATH SENTENCE DESPITE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT

Spaziano v. Florida, 104 S. Ct. 3154 (1984)

I. INTRODUCTION

In *Spaziano v. Florida*,[1] the United States Supreme Court made two important decisions. First, the Court held that a jury need not be instructed about lesser included offenses if the defendant cannot be convicted of those offenses.[2] Second and more importantly, the Court held that Florida's death penalty statute is constitutional, even though the trial judge can disregard the jury's decision on the appropriateness of the death penalty.[3] This Note focuses on the second of these holdings, because in upholding the Florida statute, the Supreme Court departed from its established method of analyzing capital punishment statutes by failing to defer to the statutory schemes adopted in a majority of the states.[4] The Court previously has recognized that the death penalty is a national concern and, as such, deserves fairly uniform treatment.[5] Statutory enactments typically reflect community beliefs, and when taken as a whole, the statutes compose the national attitude.[6] Further, this Note argues that Florida's death penalty statute violates the eighth amendment of the Constitution, because to comport with the requirements of the eighth amendment, the question of life or death must be left to the jury.[7]

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1 104 S. Ct. 3154 (1984).

2 *Id.* at 3161. *See infra* notes 79-89 and accompanying text.

3 *Id.* at 3165. *See infra* notes 90-117 and accompanying text.

4 *Id.* at 3164-65. *See infra* notes 14-24 and accompanying text.

5 *See infra* notes 18-24 and accompanying text.

6 *See infra* notes 18-24 and accompanying text.

7 Although this Note argues that the death sentence should be imposed by a jury, it assumes that as with the right to a jury trial, the defendant can waive this right.

II. HISTORY

Since the Supreme Court's landmark decision in *Furman v. Georgia*,[8] the Court has reviewed many death penalty cases, establishing a framework for analyzing these decisions in light of the eighth[9] and fourteenth amendments.[10] This framework generally has three interrelated and overlapping components. First, the imposition of the death penalty must be consistent with community values and evolving standards of human decency.[11] Second, death must be a punishment proportionate to the crime for which it is sought.[12] Finally, the death penalty must be applied in a consistent and nonarbitrary fashion.[13]

In determining whether a particular state's death penalty statute reflects community values and evolving standards of decency, the Court has surveyed and relied on the death penalty statutes used in other states, as well as the current trend of the law.[14] The Court has engaged in this method of analysis to ensure that particular statutory schemes impose death only in appropriate cases.[15] Hence, as Justice Stevens pointed out in his dissent in *Spaziano*:

> In the 12 years since *Furman v. Georgia*, every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified

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8 408 U.S. 238 (1972) (per curiam). The *Furman* decision was a consolidation of the appeals of one murderer and one rapist sentenced to death under Georgia law and one rapist sentenced to death under Texas law. The Court held that because the death penalty statutes in these states were discretionary and very likely to achieve arbitrary and discriminatory results, they violated the eighth amendment's "cruel and unusual" punishment clause. *Id.* at 240. *See also* F. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 113-25 (1978) (analyzing the *Furman* decision and the States' reaction to it).

9 U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

10 U.S. CONST. amend. XIV, § 1 provides:

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

The Court has held that the fourteenth amendment extends the restrictions of the eighth amendment to the states. *See* Robinson v. California, 370 U.S. 660 (1962).

11 *See Furman*, 408 U.S. at 241-42.

12 *See* Solem v. Helm, 103 S. Ct. 3001, 3008-09 (1983); Coker v. Georgia, 433 U.S. 584, 597-99 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 172-73 (1976) (plurality opinion).

13 *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

14 *See* Enmund v. Florida, 458 U.S. 782, 789-95 (1982); *Coker*, 433 U.S. at 593-97.

15 *Coker*, 433 U.S. at 593.

response to a given offense.[16]

The Court has noted that a particular case is appropriate for the death sentence when "public" sentiment supports the sentence.[17] The Court has made it clear that this "public" is national rather than local or regional[18] because the Court has characterized the death penalty as a national concern.[19] Thus, in an attempt to articulate the national attitude toward the death penalty, the Court consistently has relied upon the national sentiment represented by the majority of state statutes because it views state legislation as reflective of the view of the majority of the national population. In *Coker v. Georgia*,[20] for example, the Court surveyed death penalty statutes adopted in other states.[21] The Court relied on the values reflected in this legislation when declaring Georgia's statute unconstitutional because, in certain cases, the statute provided death as the punishment for rapists.[22]

Capital punishment differs from typical criminal sanctions because of this strong public sentiment about the nature of the death penalty and the circumstances for which it is appropriate.[23] The

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16 *Spaziano*, 104 S. Ct. at 3167 (Stevens, J., concurring in part and dissenting in part) (citation omitted).

17 *Coker*, 433 U.S. at 594.

18 *Id.* at 593-94.

19 *Id.* at 592. In *Coker*, the Court noted that "attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted." *Id.* The Court, however, has also stated:

> Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

Enmund, 458 U.S. at 797.

20 433 U.S. 584 (1977) (plurality opinion). In *Coker*, the Court held that a death sentence for the crime of rape of an adult woman was a "grossly disproportionate and excessive punishment." *Id.* at 592. Although the Court observed that rape was a serious crime that deserves a serious punishment, it determined that a rapist who did not take human life did not deserve to die for the crime. *Id.* at 597-99. The Court refused to allow a punishment for rape that in certain circumstances could exceed the penalty for murder. *Id.* at 600. The Court noted that under Georgia's death penalty statute, the sentencer must find only one of the statutory aggravating circumstances before imposing the death penalty. *Id.* at 598. It was possible, therefore, that a rapist who committed his crime with an aggravating circumstance could have received death, although a murderer who committed a murder without any aggravating circumstances could not. *Id.* at 600. Thus, the Court reversed the petitioner's death sentence. *Id.*

21 *Id.* at 593-97.

22 *Id.*

23 *See Gregg*, 428 U.S. at 179-82. *See also* H. BEDAU, THE DEATH PENALTY IN AMERICA 65-92 (3d ed. 1982). Bedau found that the public favors having a death penalty law by a

Court, therefore, has recognized that death penalty questions are not limited to a single state's values. In its analyses, the Court has stressed the values of the nation as a whole and has attempted to adopt in its holdings the view endorsed by the majority of the population through their state statutes.[24]

In addition to examining the laws in other states, the Court also has looked to the proportionality of the sentence.[25] When defining the limits of a "proportional sentence," the Court has articulated virtually an "eye for an eye" test, finding death an appropriate punishment only in cases involving murder.[26] For instance, in *Coker*, the Court held that death was a per se disproportionate punishment for the crime of rape because that crime did not result in the loss of life.[27] Similarly, in *Enmund v. Florida*,[28] the Court refused to uphold the death sentence of an individual simply because a co-defendant murdered someone during the course of a felony.[29] The "eye for an eye" requirement ensures that the death sentence in a particular case or for a particular crime comports with the community's sense of justice or fairness.

Finally, the Court has recognized that death penalty statutes must be consistent and nonarbitrary in application to meet the standards espoused in *Furman*, as well as be reflective of community val-

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two-to-one margin, but the average person is indifferent to whether the executions take place quickly or, in some cases, at all. *Id.*

[24] *See* Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977).

In *Coker*, the Court surveyed the death penalties adopted in other states and concluded that of the sixteen states in which rape was a capital offense before *Furman*, only three—Georgia, North Carolina, and Louisiana—provided for the death penalty in rape cases after *Furman*. 433 U.S. at 594. After later Supreme Court decisions, only Georgia allowed a rapist to be sentenced to death. *See* Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion). The Court placed great weight on the fact that in Gregg v. Georgia, 428 U.S. 153 (1976), *post-Furman* legislation in a large majority of the states had "heavily influenced" the Court's decision. 433 U.S. at 594.

[25] "Punishment may be cruel and unusual because of its barbarity or because it is excessive or disproportionate to the offense." *Spaziano*, 104 S. Ct. at 3172 (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

[26] *See supra* note 25; *infra* notes 27-28.

[27] *Coker*, 433 U.S. at 598-99. *See supra* note 20.

[28] 458 U.S. 782 (1982). In *Enmund*, the Court held that the sentence of death was a disproportionate penalty for a robber who did not murder, although a co-defendant did commit a murder in the course of the robbery. The Court refused on proportionality grounds to affirm the death sentence of a person "who does not himself kill, attempt to kill or intend that a killing take place." *Id.* at 797. The Court once again weighed the severity of the crime against the punishment of death and concluded that a robber who does not take a life cannot receive the death penalty. *Id.* at 797-99.

[29] *Id.* at 801.

ues.[30] Thus, the Court has approved capital punishment statutes that establish "aggravating" and "mitigating" circumstances which provide the sentencer with standards to guide its death penalty decision.[31] The Court has reasoned that statutory guidelines ensure consistent and nonarbitrary application of capital punishment by limiting a sentencer's discretion in imposing death. The sentencer must follow the guidelines and may impose the penalty only when the aggravating factors outweigh the mitigating factors.[32]

In short, the Court has concluded that the death penalty differs greatly from other types of criminal sanctions. Thus, the Court has established standards to guide its review of various capital punishment statutes. The Court, therefore, has stressed the importance of having capital punishment decisions comport with community values expressed through the laws of the states. Still, the concept of fair and consistent applications of the death penalty should impact greatly on the Court's decision.

III. FACTS

On September 12, 1975, the petitioner, Joseph Robert Spaziano, was indicted by a Seminole County, Florida, grand jury for the murder[33] of Laura Lynn Harberts.[34] Ms. Harberts' decomposing body was discovered on August 21, 1973, in a garbage dump in

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30 *See* Lockett v. Ohio, 438 U.S. 586, 601 (1977). In *Lockett*, the Court held that Ohio's capital punishment statute, which imposed a mandatory death penalty, violated the eighth and fourteenth amendments. *Id.* at 609.

31 *See* Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion approving Texas statutory scheme); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion approving Florida statutory scheme); Gregg v. Georgia, 428 U.S. 153 (1976) (approving Georgia statutory scheme). *See also infra* notes 44-45 (Florida statute).

32 *See* Proffitt v. Florida, 428 U.S. 242, 258 (1976) (plurality opinion). In *Proffitt*, the Court upheld Florida's capital punishment statute because it addressed the constitutional deficiencies identified in *Furman* by having the sentencer weigh the legislatively prescribed aggravating and mitigating factors against one another. *Id.* at 260. *But cf.* Barclay v. Florida, 103 S. Ct. 3418 (1983) (holding that trial judge could take into account aggravating factor not legislatively enumerated provided that discretion was not so arbitrary as to violate Constitution).

33 FLA. STAT. ANN. § 782.04(1)(a) (West 1976) provides:

> The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

34 Brief for Petitioner at 2, Spaziano v. Florida, 104 S. Ct. 3154 (1984).

Seminole County.[35]

At trial, Anthony Dilisio,[36] a sixteen-year-old acquaintance of Spaziano, was the State's principal witness.[37] Dilisio testified that the petitioner had taken him and another individual to the garbage dump to show them where Spaziano had raped and tortured two women.[38] An unidentified witness[39] also testified that Spaziano told him that he cut off Harberts' breasts and cut out her vagina while she was still living.[40]

After deliberation, the jury found Spaziano guilty of murder in the first degree.[41] In accordance with Florida law,[42] the trial court conducted a separate sentencing hearing after Spaziano's conviction of the capital felony to determine if the death penalty should be imposed.[43] At this sentencing hearing, the State and the defendant presented evidence of aggravating[44] and mitigating[45] circumstances

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35 *Id.*

36 The defense unsuccessfuly challenged Dilisio's credibility at trial because of his tendency to exaggerate and his admitted use of drugs both before and after his visit to the garbage dump. *Id.* Dilisio denied having taken drugs on the day the petitioner took him to the dump. Spaziano v. Florida, 393 So. 2d 1119, 1120 (Fla. 1981), *aff'd*, 104 S. Ct. 3154 (1984). The Supreme Court of Florida noted, however, that Dilisio's drug use did not impair his directing the police to the dump. *Id.*

37 *Spaziano*, 104 S. Ct. at 3157.

38 *Id.* Another body that was never identified was also found. *Spaziano*, 393 So. 2d at 1119.

39 The Petitioner's Brief, Respondent's Brief, and the appellate cases do not indicate the identity of this witness.

40 Joint Appendix at 44, Spaziano v. Florida, 104 S. Ct. 3154 (1984).

41 Brief for Petitioner at 4, Spaziano v. Florida, 104 S. Ct. 3154 (1984).

42 FLA. STAT. ANN. § 921.141(1) (West Supp. 1985).

43 *Spaziano*, 104 S. Ct. at 3158.

44 FLA. STAT. ANN. § 921.141(5) (West Supp. 1985) provides:

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, sexual battery, 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.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification.

At the sentencing hearing, the trial judge did not allow the state to introduce evidence of the petitioner's conviction of forcible carnal knowledge and aggravated battery, Spazi-

to the same jury that had convicted Spaziano.[46] A majority of the jury recommended that the petitioner be sentenced to life imprisonment.[47] Nevertheless, the trial court in Spaziano's case disregarded the jury's recommendation, then determined that the aggravating circumstances[48] outweighed the mitigating circumstances and imposed the sentence of death.[49] Under Florida law, Spaziano's death sentence was appealed automatically to the Supreme Court of Florida.[50]

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ano v. Florida, 433 So. 2d 508, 510 (Fla. 1983), because that conviction was on appeal. The Supreme Court of Florida, in its review of the case, found that the trial judge should have permitted introduction of these convictions in light of its own decision in Peek v. State, 395 So. 2d 492, 499 (Fla. 1980), *cert. denied*, 451 U.S. 964 (1981) (trial judge may properly consider convictions on appeal during sentencing). Spaziano v. Florida, 433 So. 2d 508, 511 (Fla. 1983), *aff'd*, 104 S. Ct. 3154 (1984).

45 FLA. STAT. ANN. § 921.141(6) (West Supp. 1985) provides:

> 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.

46 *Spaziano*, 104 S. Ct. at 3157-58. Justice Stevens described Florida's death penalty scheme as follows:

> Florida has adopted an unusual "trifurcated" procedure for identifying the persons convicted of a capital felony who shall be sentenced to death. It consists of a determination of guilt or innocence by the jury, an advisory sentence by the jury, and an actual sentence imposed by the trial judge. *Proffitt v. Florida*, 428 U.S. 242, 248-50 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). The judge's determination is then reviewed by the Florida Supreme Court to determine whether the aggravating and mitigating circumstances found by the trial judge are supported by the evidence and justify a sentence of death. *Id.* at 250-51, 253.

104 S. Ct. at 3168 (Stevens, J., concurring in part and dissenting in part). *See also* FLA. STAT. ANN. § 921.141 (West Supp. 1985).

47 *Spaziano*, 104 S. Ct. at 3158.

48 The trial court found the following aggravating circumstances: Spaziano had murdered Ms. Harberts in an especially heinous and atrocious way, and Spaziano had been convicted previously of a felony in which he used or threatened to use violence. *Id.* On August 13, 1975, the petitioner had been sentenced to life imprisonment for a violent sex crime that occurred on February 9, 1974. Joint Appendix at 14, Spaziano v. Florida, 104 S. Ct. 3154 (1984). This information was contained in a presentence investigation ordered by the court. 104 S. Ct. at 3158.

49 *Spaziano*, 104 S. Ct. at 3158.

50 FLA. STAT. ANN. § 921.141(4) (West Supp. 1985) provides:

> The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause

The Supreme Court of Florida affirmed Spaziano's murder conviction, but reversed the death sentence on two grounds. First, the court found that the trial judge should not have considered a confidential portion of the presentence investigation report in his sentencing decision.[51] Neither the State nor the defendant had the opportunity to review this report.[52] The Supreme Court of Florida reasoned that *Gardner v. Florida*[53] afforded the petitioner an opportunity to respond to the evidence contained in the presentence report.[54]

Second, the Florida Supreme Court rejected the petitioner's argument that the trial court had erred by failing to instruct the jury on lesser included offenses as provided for by *Beck v. Alabama*.[55] The trial court refused to instruct the jury on the lesser included, noncapital offenses of attempted first degree murder, second degree murder, third degree murder, and manslaughter unless Spaziano would waive the statute of limitations.[56] The two-year statute of limitations had run on these noncapital offenses prior to the discovery of Harberts' body.[57] Spaziano refused to make such a waiver.[58]

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shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

51 Spaziano v. Florida, 393 So. 2d 1119, 1121 (Fla. 1981). This portion contained information about the petitioner's previous felony convictions and other charges brought against the petitioner. *Id.*

52 *Id.*

53 430 U.S. 349 (1977). In *Gardner*, the United States Supreme Court held that the petitioner was denied due process because the Florida trial judge overrode a jury's recommendation of a life sentence after relying in part on portions of a presentence investigation report that were not disclosed to either party. The Court concluded that because the petitioner did not have the opportunity to refute or explain the information, the trial judge erred in imposing the death sentence. *Id.* at 362. The Court in *Gardner*, however, did not consider the constitutionality of Florida's statutory death penalty scheme.

54 393 So. 2d at 1122.

55 *Spaziano*, 393 So. 2d at 1122 (discussing Beck v. Alabama, 447 U.S. 625 (1980)). In *Beck*, the United States Supreme Court held that Alabama's death penalty statute was unconstitutional because the trial judge was precluded from instructing the jury on a lesser included offense for a capital crime. 447 U.S. at 647. The Alabama statute left the jury with only two choices, either convicting a defendant of a capital crime for which it must impose the death penalty, or acquitting the defendant. The Court concluded that because jurors were presented with these extreme choices, there existed the possibility that jurors might either acquit an otherwise guilty defendant in order to avoid the imposition of the death penalty or convict a guilty person who should not be killed simply because death was preferable to releasing the defendant. *Id.* at 643. Thus, the Court decided that "both the eighth amendment as made applicable to the states by the fourteenth amendment and the Due Process Clause of the fourteenth amendment" were violated by "substantially increasing the risk of error in the fact finding process." *Id.* at 632.

56 Brief for Petitioner at 3, Spaziano v. Florida, 104 S. Ct. 3154 (1984).

57 In 1973, the time of the offense, Florida had a two-year statute of limitations for noncapital offenses. FLA. STAT. ANN. § 932.465(2) (West 1973). The murder occurred

The Supreme Court of Florida concluded that because the petitioner could not have been convicted on any lesser charge resulting from the failure to make such a waiver, *Beck* did not require such instructions.[59] Thus, the Florida court remanded the case to the trial judge for resentencing.[60]

On remand, the trial judge ordered the preparation of a new presentence report.[61] At resentencing, the petitioner was allowed to, but did not respond to the information contained in the report.[62] Once again, after review of the record, the judge determined that the aggravating circumstances justified the petitioner's death sentence.[63]

On automatic appeal,[64] the Supreme Court of Florida affirmed Spaziano's death sentence.[65] The Florida court refused to accept the petitioner's argument that the State should not have introduced additional evidence concerning the petitioner's previous felony convictions in the second sentencing proceeding.[66] The Florida court found that the original presentence report contained the information and that the trial judge improperly excluded such evidence originally.[67] The Supreme Court of Florida also rejected the petitioner's contention that the trial judge had erred by not allowing the jury to consider the felony convictions in its advisory opinion, even though the trial judge had considered them in his sentencing decision.[68] In addition, the petitioner argued that the trial court had considered his prior felony convictions and these convictions were improper aggravating circumstances.[69] The Florida court stated that it had held previously that prior felony convictions constituted legitimate aggravating circumstances.[70]

The petitioner also contended that failing to follow the jury's recommendation violated the double jeopardy protections of the

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sometime before August 21, 1973, the date the body was discovered; however, the petitioner was not indicted until September 12, 1975, after the running of the two-year statute of limitations. There is no statute of limitations for first degree murder. *See id.* at § 932.465(1).

58 Brief for Petitioner at 3-4, Spaziano v. Florida, 104 S. Ct. 3154 (1984).

59 393 So. 2d at 1122.

60 *Id.* at 1123.

61 Joint Appendix at 14, Spaziano v. Florida, 104 S. Ct. 3154 (1984).

62 *Id.* at 15.

63 *Id.*

64 *See supra* note 50.

65 Spaziano v. Florida, 433 So. 2d 508, 512 (1983).

66 *Id.* at 510.

67 433 So. 2d at 510-11. *See also supra* note 44.

68 433 So. 2d at 511.

69 *Id.*

70 *Id.*

fifth amendment,[71] as articulated in the United States Supreme Court's decision in *Bullington v. Missouri*.[72] The Florida Supreme Court held that it had previously rejected a similar argument in *Douglas v. State*.[73] Finally, the petitioner alleged that he was denied due process when the resentencing hearing was assigned to the same judge.[74] The Florida court reasoned that similar arguments had been rejected by other courts and should not be adopted in this case.[75]

The United States Supreme Court granted certiorari on January 9, 1984.[76]

IV. THE SUPREME COURT'S DECISION

A. THE MAJORITY OPINION

In a six-three decision, the Supreme Court affirmed the decision of the Supreme Court of Florida. Justice Blackmun, writing for the majority,[77] held that the Florida Supreme Court had not erred in its decision to affirm the petitioner's death sentence even though the trial court had refused to give the jury an instruction of lesser included offenses and the trial judge had refused to adopt the jury's recommended decision of a life sentence.[78]

The Court first reviewed the petitioner's contention that the trial court should have given the jury an instruction on lesser included offenses.[79] The Court recognized that in *Beck v. Alabama*,[80] it had determined that when a jury does not have the option of choos-

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71 U.S. CONST. amend. V provides in part: "[N]or shall any person be subject to the same offense to be twice put in jeopardy of life or limb."

72 451 U.S. 430 (1981). In *Bullington*, the Court held that Missouri's capital sentencing proceeding before a jury was so similar to a trial of guilt and innocence that in case of a new trial, the double jeopardy protections attach to the second sentencing procedure. *Id.* at 446. Thus, a defendant cannot be sentenced to death in a retrial after the original jury had sentenced him to life imprisonment. *Id.* at 445.

73 373 So. 2d 895 (Fla. 1979). In *Douglas*, the Florida Supreme Court rejected the petitioner's double jeopardy claim because the jury's opinion is merely advisory and only a binding jury verdict would violate *Furman v. Georgia*. *Douglas*, 373 So. 2d. at 896-97.

74 433 So. 2d at 512.

75 *Id.* (citing United States v. Gaither, 503 F.2d 542 (5th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975); Douglas v. Wainwright, 521 F. Supp. 790 (M.D. Fla. 1981), *aff'd in part*, 714 F.2d 1532 (1983)).

76 Joint Appendix at 53, Spaziano v. Florida, 104 S. Ct. 3154 (1984).

77 Justice Blackmun was joined by Chief Justice Burger, and Justices Powell and O'Connor. Justice White, joined by Justice Rehnquist, filed an opinion concurring in part and concurring in the judgment.

78 *Spaziano*, 104 S. Ct. at 3161, 3164.

79 *Id.* at 3159.

80 447 U.S. 625 (1980); *see supra* note 55.

ing a lesser included offense,[81] a risk of an unwarranted conviction is created, and that this risk increases where the death penalty is involved.[82] The Court, however, reasoned that Spaziano was attempting to benefit from having the jury instructed of the lesser included offenses and, at the same time, set up the defense of the expired period of limitations on those offenses.[83] Although a constitutionally fair capital trial generally requires a lesser included offense instruction,[84] the Court held that the purpose behind this requirement, enhancing the rationality and reliability of jury deliberations,[85] is not served by tricking a jury into believing a choice of crimes exists when in actuality none does.[86] The Court concluded that either the defendant must waive the statute of limitations, benefitting by a possible conviction on a lesser included offense, or refuse to waive the statute, benefitting by either a guilt or innocence decision on only the capital charge.[87] The Court held, however, that the choice of benefitting from the lesser included offense instruction or asserting the statute of limitations on those offenses was the defendant's alone.[88] Thus, the trial court did not err in its refusal to instruct the jury of the lesser included offenses because the petitioner refused to waive the statute of limitations.[89]

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81 *Spaziano*, 104 S. Ct. at 3159-60. The Court in *Beck* determined that

> [w]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

447 U.S. at 637.

82 *Spaziano*, 104 S. Ct. at 3159-60.

83 *Id.* at 3160. Because the two-year period of limitations had run on all but the capital offense, if the jury had returned a verdict on only one of those lesser offenses, Spaziano would have eluded the possibility of being sentenced at all.

84 *Id.*

85 *Id.* The Court observed that:

> The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. In *Beck*, [447 U.S. 625 (1980)] the Court found that risk unacceptable and inconsistent with the reliability this Court has demanded in capital proceedings. *Id.* at 643. The goal of the *Beck* rule, in other words, is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence. *Id.* at 638-643. Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted, however, would simply introduce another type of distortion into the fact-finding process.

Id.

86 *Spaziano*, 104 S. Ct. at 3160.

87 *Id.* at 3161.

88 *Id.*

89 *Id.*

The Court then confronted the major issue in the case: whether a trial judge can override the jury's recommended sentence of life imprisonment and impose the death penalty.[90] The Court determined that the fundamental premise of the petitioner's argument was that the jury, not the judge, should make the sentencing decisions in a capital case.[91] In fact, the Court noted that a capital sentencing proceeding often resembles a trial on the issue of guilt or innocence.[92] The Court also recognized that the double jeopardy clause[93] prohibits multiple attempts by the State to convince the sentencer to impose the death penalty, just as it prevents the retrial of an individual who has been found not guilty.[94]

The Court, however, refused to hold that defendants have a right to a sentencing hearing before a jury or that a judge must follow a jury's recommendation.[95] Although the Court wanted to protect against the imposition of an erroneous death sentence, it noted that a jury does not guarantee this protection any more than a judge.[96] The Court determined that a capital sentencing proceeding involves the same issues as any other sentencing proceeding[97] and refused to hold that the sixth amendment[98] guaranteed a jury decision on the death question.[99]

The Court then proceeded to reject the petitioner's argument that the eighth amendment entitled the defendant to a binding jury determination of his death sentence.[100] Petitioner argued that juries best effectuate the purpose behind the eighth amendment because juries are inherently better decision-makers than judges.[101] Petitioner further contended that juries are more consistent and less

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90 *Id.*

91 *Id.*

92 *Id.* at 3162.

93 U.S. CONST. amend V provides, in part, "nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb."

94 *Spaziano*, 104 S. Ct. at 3162; *see also supra* note 72.

95 *Id.* at 3163-64.

96 *Id.* at 3164.

97 *Id.* at 3162. The Court stated that "the fundamental issue involved in any other sentencing proceeding—[is] a determination of the appropriate punishment to be imposed on an individual." *Id.*

98 U.S. CONST. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

99 *Spaziano*, 104 S. Ct. at 3163.

100 *Id.* at 3163-65.

101 *Id.* at 3163.

arbitrary than judges in making death decisions, that imposition of the death penalty by a jury better serves the death penalty's retributive function, and, finally, that because a majority of the states require capital sentencing by a jury, an eighth amendment norm of jury sentencing had been established.[102]

The petitioner contended that capital punishment inherently differs from noncapital punishment sentences.[103] Furthermore, juries are more representative of the population than judges and therefore make better capital punishment decisions.[104] The Court rejected this argument, noting that it had held that the constitutionality of a death penalty statute rests solely on compliance with the "twin objectives" of "measured, consistent application and fairness to the accused."[105] The Court noted that legislatively adopted safeguards[106] attempt to protect against arbitrary application of the death penalty.[107] In addition, the Court held that a qualitative difference in the death penalty does not require that death, as opposed to other sentences, be imposed by a jury.[108] Moreover, the Court noted that it had ruled specifically[109] that Florida's death penalty scheme achieved a reasonable balance between "sensitivity to the individual and his circumstances" while ensuring the compliance with the "twin objectives."[110]

The petitioner also urged that the retributive nature of the death penalty distinguishes it from other types of criminal punishments and, as such, requires imposition by a jury.[111] The Court reviewed the various reasons behind the imposition of criminal sentences—rehabilitation, incapacitation, deterrence, and retribution.[112] After indicating that retribution is "an expression of com-

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102 *Id.* at 3162-63.

103 *Id.* at 3163.

104 *Id.*

105 *Id.* at 3162. The State need only be able to "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Id.* at 3162-63. *See also* Zant v. Stephens, 103 S. Ct. 2733 (1983).

106 *See, e.g.*, FLA. STAT. ANN. § 921.141(5) (West Supp. 1985) (aggravating circumstances); *id.* at § 921.141(6) (mitigating circumstances); *supra* notes 44 and 45.

107 *Spaziano*, 104 S. Ct. at 3162-63.

108 *Id.* at 3163.

109 *See* Barclay v. Florida, 103 S. Ct. 3418 (1983); Proffitt v. Florida, 428 U.S. 242 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

110 *Spaziano*, 104 S. Ct. at 3165.

111 *Id.* at 3163.

112 *Id.* The Court has characterized retribution as follows:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punish-

munity outrage," the Court concluded that retribution alone does not justify the death penalty.[113] Deterrence could be a primary justification for the death penalty, however, and other sentencing reasons may also play a factor.[114] Thus, the Court determined that the purposes behind the death penalty do not always differ from noncapital penalties.

The Court also indicated that because the sentencer weighs the aggravating and mitigating factors[115] in the determination of the imposition of death—factors espoused by the legislature as the voice of the community—community values are inherent in all death penalty cases. A jury, therefore, is unnecessary to guarantee the presence of the community in a death decision.[116] Further, the decision of the sentencer, be it a judge or jury, is automatically reviewed and thus is not a final sentence. The Court held, therefore, that sentencing by a judge, and not a jury, will not frustrate the purposes behind the imposition of the death penalty.[117]

The petitioner also argued that the majority of states recognize the importance of jury sentencing because of the unique nature of the death penalty.[118] Thus, the petitioner urged the Court to adopt this nearly unanimous opinion about the appropriateness of jury sentencing and hold Florida's statute unconstitutional.[119] The Court acknowledged that "30 out of 37 jurisdictions with a capital-sentencing statute give the life-or-death decision to the jury, with only 3 of the remaining 7 allowing a judge to override a jury's recommendation of life."[120] The Court, however, rejected the petitioner's argument with the following explanation:

> [T]hat a majority of jurisdictions has adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.[121] "Although

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ment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

113 *Spaziano*, 104 S. Ct. at 3163-64.

114 *Id.*

115 *See supra* notes 44-45.

116 *Spaziano*, 104 S. Ct. at 3164. Juries are representatives of the people, and Petitioner argued that if the people are so outraged that they want the death penalty, then only the jury can make this decision. *Id.* at 3163.

117 *Id.* at 3164.

118 *Id.* at 3163.

119 *Id.*

120 *Id.* at 3164. *See infra* note 128.

121 *Spaziano*, 104 S. Ct. at 3165. *See also* Robinson v. California, 370 U.S. 660 (1962). The Court in *Robinson* held that a state has a variety of valid ways of imposing criminal

> the judgment of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment" is violated by a challenged practice.[122]

Finally, the Court disposed of the petitioner's claim that in his case, the trial court violated Florida's standard for allowing a trial judge to override a jury's recommendation.[123] The Court found that the Florida Supreme Court followed its own standard of allowing trial judges to override a jury recommendation only when they conclude that no reasonable person would not impose the death penalty[124] and that trial courts make their decisions in a fair and consistent manner.[125] The evidence indicated that the trial judge had sufficient basis for his decision. The Court refused to disturb the decision and, therefore, affirmed the judgment of the Supreme Court of Florida.[126]

B. THE DISSENT

Justice Stevens, in his dissent,[127] disagreed with the majority's conclusion that a judge can sentence a defendant to death after a jury has decided that such a sentence is inappropriate.

Justice Stevens reviewed the current societal standards with respect to the death penalty and found that out of the thirty-seven states authorizing capital punishment,[128] only three permit a judge

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sanctions. The Court decided that it was the state, not the Court, that must choose the method within this spectrum. *Id.* at 664-65.

122 *Spaziano*, 104 S. Ct. at 3165 (quoting Enmund v. Florida, 458 U.S. 782, 797 (1982)).

123 *Id.* at 3164-65.

124 *See* Tedder v. State, 322 So. 2d 908 (Fla. 1975), where the Supreme Court of Florida announced its standard for when a jury override is permissible: "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Id.* at 910.

125 *Spaziano*, 104 S. Ct. at 3166.

126 *Id.* The Court characterized its role in reviewing the action of the Florida court as follows: "It is not our function to decide whether we agree with the majority of the advisory jury or with the trial judge and the Florida Supreme Court." *Id.*

127 Justice Stevens, concurring in part and dissenting in part, was joined by Justices Brennan and Marshall. *Spaziano*, 104 S. Ct. at 3167.

128 In twenty-nine states, a jury's verdict of life imprisonment is binding upon the court. *See* ARK. STAT. ANN. § 41-1301 (1977); CAL. PENAL CODE § 190.3 (West Supp. 1984); COLO. REV. STAT. § 16-11-103 (1978 & Supp. 1983); CONN. GEN. STAT. § 53a-46a (Supp. 1984); DEL. CODE ANN. tit. 11, § 11-4209 (1979); GA. CODE ANN. §§ 17-10-30 to 17-10-32 (Recodified 1983); ILL. REV. STAT. ch. 38, ¶ 9-1 (Supp. 1983-84); KY. REV. STAT. § 532.025(1)(b) (Supp. 1983); LA. CODE CRIM. PROC. ANN. art. 905.8 (West Supp. 1984); MD. ANN. CODE art. 27, § 413 (1982); MASS. GEN. LAWS ANN. ch. 279, §§ 68, 70 (West Supp. 1984); MISS. CODE ANN. § 99-19-101 (Supp. 1983); MO. REV. STAT. § 565.006 (1979); N.H. REV. STAT. ANN. § 630.5 (Supp. 1983); N.J. STAT. ANN. § 2c: 11-

to override a jury's recommendation of a life sentence.[129] Justice Stevens also observed that the current Florida statutory scheme came about in response to the Court's decision in *Furman v. Georgia*.[130] The Florida legislature wished to avoid arbitrary jury decisions prohibited by *Furman* and thus gave the ultimate sentencing power to the judge. Since *Furman*, however, the Court has approved jury sentencing.[131] In addition, Justice Stevens noted that although in Florida a judge is not supposed to override the jury's decision absent evidence that virtually no person could impose a lesser sentence,[132] Florida trial judges have imposed the death penalty after the jury recommended life imprisonment in eighty-three cases.[133]

Justice Stevens concluded that the appropriateness of a death sentence depends upon the retributive justification.[134] Thus, the death sentence rests on an ethical, not a legal, judgment because the "moral guilt"[135] of the defendant is an essential element of retribu-

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3c (West 1982); N.M. STAT. ANN. § 31-20A-3 (Supp. 1983); N.C. GEN. STAT. § 15A-2000 (1983); OHIO REV. CODE ANN. § 2929.024(D)(2) (Supp. 1983); OKLA. STAT. tit., 21 § 701.11 (1983); 42 PA. CONS. STAT. § 9711(f) (1982); S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1983); S.D. COMP. LAWS ANN. § 23A-27A-4 (1979); TENN. CODE ANN. § 32-2-203 (1982); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981 & Supp. 1984); UTAH CODE ANN. § 3-207 (Supp. 1984); VA. CODE § 19.2-264.4 (Supp. 1983); WASH. REV. CODE ANN. § 10.95.030 (Supp. 1984); WYO. STAT. § 6-2-102 (1983). In Nevada, although the jury has responsibility to impose the sentence in capital cases, a panel of judges may impose the sentence if the jury cannot agree. NEV. REV. STAT. §§ 175.554, 175.556 (1981). In four states, the penalty determination is made by a judge. *See* ARIZ. REV. STAT. ANN. § 13-703 (1982); IDAHO CODE § 19-2515 (1979); MONT. CODE ANN. § 46-18-301 (1983); NEB. REV. STAT. § 29-2520 (1979). In only three states may a judge overrule a jury's recommendation of life. *See* ALA. CODE § 13A-5-46 (1982); FLA. STAT. ANN. § 921.141 (West 1977); IND. CODE ANN. § 35-50-2-9 (West Supp. 1984).

129 *Spaziano*, 104 S. Ct. at 3169 (Stevens, J., concurring in part and dissenting in part). Justice Stevens also pointed out that in Florida, a judge has overridden a jury's recommended sentence of life imprisonment in 82 other cases. *Id.* at 3167. Alabama and Indiana are the other two states that allow a jury override. *See supra* note 128.

130 *Id.* at 3170 (Stevens, J., concurring in part and dissenting in part) (citing Furman v. Georgia, 408 U.S. 238 (1972)).

131 *Spaziano*, 104 S. Ct. at 3170-71 (Stevens, J., concurring in part and dissenting in part).

132 *Id.* at 3171 (Stevens, J., concurring in part and dissenting in part). *See also supra* note 124.

133 At the time the case was heard before the Supreme Court, there had been eighty-one cases in which the jury's decision of life imprisonment was disregarded by the trial court that imposed the death sentence. In thirty-nine of these eighty-one cases, the Florida Supreme Court either changed the sentence to life imprisonment or ordered a new sentence of life imprisonment; in twenty-one cases, the Florida Supreme Court upheld the lower court's death sentence; sixteen cases are still pending; and in three, other outcomes occurred. Petitioner's Brief, Appendix B, Spaziano v. Florida, 104 S. Ct. 3154 (1984).

134 *Spaziano*, 104 S. Ct. at 3174 (Stevens, J., concurring in part and dissenting in part).

135 The Court attempted to define "moral guilt" in Enmund v. Florida, 458 U.S. 782

tion.[136] Justice Stevens found that only a jury, representing a cross-section of the community, can adequately assess the moral guilt of a defendant.[137]

Justice Stevens explained this conclusion by stressing the importance of tying a death sentence to community values.[138] After reviewing the evolution of the death penalty, Justice Stevens determined that historically, under the eighth amendment, the jury has ensured that capital punishment is imposed in a decent manner, consistent with current community values.[139] In addition, Justice Stevens observed that the Court previously had refused to allow mandatory death sentences because such sentences lack an adequate infusion of community values into the sentencing process.[140] The jury, which is composed of a cross-section of the community, must be more representative of that community's values than an individual.[141] Moreover, because juries and judges make significantly different capital sentencing decisions, a risk exists that a judicial decision will not be consistent with community values.[142]

Thus, Justice Stevens found that the jury constitutes an essential element of capital punishment procedure by infusing the community's values into the decision. When a state does not convince a jury that death is the appropriate punishment, a judge should not have the ability to disregard the jury's opinion.[143] To do so, concluded the dissent, violates the eighth and fourteenth amendments.[144]

V. ANALYSIS

The Court's approval of Florida's capital punishment procedure, which allows a judge to disregard a jury's advisory opinion, departs from principles established by the Supreme Court in its review of states' capital punishment statutes. In previous decisions, the Court accorded great weight to the procedures and laws adopted by a majority of the states in determining whether a particular state's death penalty statute satisfied the eighth amendment.

(1982). The Court stated that "moral guilt" depends upon the defendant's intentions, expectations, and actions at the time of the crime. *Id.* at 800.

136 *Spaziano*, 104 S. Ct. at 3174 (Stevens, J., concurring in part and dissenting in part).

137 *Id.*

138 *Id.* at 3175 (Stevens, J., concurring in part and dissenting in part).

139 *Id.* at 3175-76 (Stevens, J., concurring in part and dissenting in part).

140 *Id.* at 3177 (Stevens, J., concurring in part and dissenting in part).

141 *Id.*

142 *Id.* at 3177-78 (Stevens, J., concurring in part and dissenting in part).

143 *Id.* at 3179 (Stevens, J., concurring in part and dissenting in part).

144 *Id.*

The Court had found it important to uncover a national attitude toward a penalty as extreme as death, before finding it, or the procedures imposing it, constitutional.[145] In *Spaziano*, however, the Court virtually ignored the fact that a majority of states leave the imposition of the death penalty solely to the jury.[146] Moreover, the Court overlooked its previous mode of analysis used in death penalty cases and minimized important policy considerations[147] and empirical data[148] supporting the jury as the final arbiter of the death penalty.

The Court also ignored the important constitutional protections of the eighth and fourteenth amendments in its affirmance of Florida's capital punishment statute. These protections include: (1) "That the State's power to punish 'be exercised within the limits of civilized standards' ";[149] (2) "that capital punishment be administered consistently with community values";[150] and (3) that the punishment not be "cruel and unusual."[151] Had the Supreme Court completed a full review of precedent, it should have concluded that only a jury can adequately achieve the eighth amendment protections guaranteed a person convicted of a capital crime.

A. THE IMPORTANCE OF THE INFUSION OF COMMUNITY VALUES IN THE CAPITAL SENTENCING PROCESS

1. The Court Disregarded The National Opinion of The Death Penalty

Previously, the Court has stressed that the death penalty is something that deserves uniform treatment in accord with national norms because of the inclusion of evolving standards of human decency in all capital sentences.[152] Thus, in prior decisions, the Court looked to the statutory schemes adopted by a majority of the states.[153] Although in *Spaziano*, the Court pointed out that Florida's statutory scheme was not the norm,[154] the Court concluded that Florida did not have to follow a practice adopted by a majority of states because the Court determines the constitutionality of a law.[155]

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145 *See supra* notes 14-19 and accompanying text.

146 *See supra* note 128.

147 *See supra* notes 23-29 and accompanying text.

148 *See infra* notes 170-76 and accompanying text.

149 *Spaziano*, 104 S. Ct. at 3177 (Stevens, J., concurring in part and dissenting in part) (quoting Woodson v. North Carolina, 428 U.S. 280, 301 (1975) (footnote omitted) (citation omitted)).

150 *Spaziano*, 104 S. Ct. at 3177-78.

151 *Id.* at 3172.

152 Gregg v. Georgia, 428 U.S. 153, 179-82 (1976) (plurality opinion).

153 *See, e.g.*, *Coker*, 433 U.S. at 594-96.

154 *Spaziano*, 104 S. Ct. at 3164-65. *See also supra* note 128.

155 *Spaziano*, 104 S. Ct. at 3165.

The Court did not analyze the rationale behind looking to the laws of other states nor did it acknowledge its past reasons for recognizing the need for uniformity of capital punishment laws.

In the past, the Court determined that the death penalty was not a state issue, but a national issue.[156] The Court had reasoned that the constitutionality of the death penalty required it to be consistent with community values and evolving standards of decency.[157] Community values were defined as the view of the country as a whole, which can be inferred from state statutes as well as jury decisions.[158] Moreover, although the majority in *Spaziano* refused to give much weight to the prevailing viewpoint, Justice Stevens in his dissent recognized that the "logical starting point" for the analysis of the determination of the constitutionality of Florida's death sentence was an examination of what the public, through its legislative representatives, has concluded the law should be.[159] The Court's failure to fully examine the law adopted by a majority of the states caused the Court to retreat from its past acknowledgement of the importance of community input into a retributive punishment.[160] The Court gave little weight to overall community values.

2. *Retribution Is A Jury's Domain*

Satisfying the need for retribution is one of the purposes behind the imposition of the death penalty.[161] One commentator has concluded that the retributive motive is composed of two elements: an idea of revenge by the victim or his family, and a statement by society of its displeasure with the defendant's actions.[162] The Court has approved both these factors when upholding either a death sentence or a death penalty statute.[163] Specifically, in *Gregg v. Georgia*,[164] the Court relied upon the need for retribution in justifying

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156 *See supra* notes 18-24 and accompanying text.

157 *See Furman*, 408 U.S. at 242.

158 *Enmund*, 458 U.S. at 794.

159 104 S. Ct. at 3169 (Stevens, J., concurring in part and dissenting in part). Justice Stevens noted that " 'legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency.' " *Id.* (quoting Woodson v. North Carolina, 428 U.S. 280, 294 (1976) (plurality opinion)).

160 *See Gregg*, 428 U.S. at 183-84.

161 *Spaziano*, 104 S. Ct. at 3164.

162 Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 54-55 (1980).

163 *See Furman*, 408 U.S. at 454 (Powell, J., dissenting).

164 428 U.S. 153 (1976) (plurality opinion). In *Gregg*, the plurality (Stewart, Powell, and Stevens, JJ.) held that the death penalty could not be viewed in all cases as disproportionate and, thus, as "cruel and unusual" punishment under the eighth and fourteenth amendments. The Court, therefore, held that because Georgia's statute provided the sentencing authority with information and guidance that eliminates arbitrary and capricious imposition, it was constitutional. *Id.* at 207.

the death penalty. The plurality held that "capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."[165] Thus, the Court has recognized that states impose the death penalty to effectuate the needs of the individuals victimized by crime, the community interests that are affected by crime, and the need of the State to maintain the confidence of its citizens by punishing criminals; in short, to vent this "moral outrage." Because the jury is constitutionally required to represent a cross-section of the population,[166] the jury, and not a single judge, is best able to gauge this "moral outrage" and act upon it.

In *Gregg*, the Supreme Court recognized the important role served by jury sentencing for capital crimes when it determined that "[j]ury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect the "evolving standards of decency that mark the progress of a maturing society." ' "[167] The Court's recognition of the jury's importance also was evidenced in *Witherspoon v. Illinois*,[168] where the Court concluded that "[a] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."[169] It is clear that the Court's emphasis on community input along with the societal basis of retribution calls for imposition of capital punishment by a jury—"the voice of the community."

Although a judge is to some degree also a representative of the

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165 *Id.* at 183.

166 Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). The Court in *Thiel* determined that "[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community." *Id.* at 220 (citing Smith v. Texas, 311 U.S. 128 (1940)). In addition, the Court held that "juries must be indiscriminately selected without systematic and intentional exclusion of any . . . substantial portion of the community . . . that cannot be . . . excluded in whole or in part without doing violence to the democratic nature of the jury system." *Id.* at 220-23. *See also* United States v. Olson, 473 F.2d 686, 688 (8th Cir. 1973).

167 *Gregg*, 428 U.S. at 190 (plurality opinion) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))).

168 391 U.S. 510 (1968). In *Witherspoon*, the Court held that because potential jurors were excused for cause when they expressed doubts of imposing the death penalty, the petitioner was denied an impartial trial guaranteed by the sixth and fourteenth amendments. *Id.* at 518.

169 *Id.* at 519 (footnote omitted).

community, as a single representative he cannot provide the same breadth of viewpoints as twelve people on a jury. One commentator has concluded:

> [Juries] are more likely to accurately express community values than are individual state trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood and because trial judges collectively do not represent—by race, sex, or economic or social class—the communities from which they come.[170]

In an in-depth study of juries and the relationship between juries and judges, Kalven and Ziesel[171] concluded that many jury/judge disagreements result from the fact that juries will take into account sentiments[172] about the individual defendant that a judge will fail to weigh as heavily.[173] They base this conclusion on the rationale that "the judge presumably does not draw the jury's distinction . . . in . . . cases because the formal law does not draw it, and he is bound by tradition and role to stay within the sentiments of the formal law."[174] Likewise, in the capital punishment process, a judge probably will feel more bound to strictly apply the statutorily defined aggravating and mitigating factors,[175] while a jury may tend to use the factors more as guidelines. For example, Kalven and Ziesel have found that

> in the instance of the indecent exposure cases we have a sentiment that must be felt very differently by different parts of the community. There will be some people who completely share the law's view that

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170 Gillers, *supra* note 162, at 163. The Supreme Court also noted:

> Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. Contrary to the dissent's suggestions, . . . we do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

Solem, 103 S. Ct. at 3009 (footnote omitted).

171 H. KALVEN & H. ZIESEL, THE AMERICAN JURY 55 (1966). Kalven and Ziesel found that the variation between jury and judge convictions was related to the type of crime. A great variation existed for the crimes of game law violations, indecent exposure, and murder, while little variation was seen for the crimes of nonsupport, narcotics, disorderly conduct, and arson. *Id.* at 76.

172 The sentiments included personal characteristics of defendants, such as their family, their court appearance, social status, and occupational record. *Id.* at 105.

173 *Id.*

174 *Id.* at 86.

175 *See supra* notes 44-45.

> indecent exposure is a crime irrespective of the maturity of the victim; there will be some people who think it a ridiculous crime under all circumstances; and, finally, there will be a considerable number who see an important difference between exposure to adults and to children. Since the juries are drawn from this population, they will reflect in various combinations these differing sentiments.[176]

Similarly, in the death sentencing process, differing viewpoints must be represented, or at least have the possibility of being represented, to achieve full expression of the community's "moral outrage." Only a jury drawn from a cross-section of the community adequately can achieve this goal.

B. SENTENCING DECISIONS MADE BY JUDGES WILL INCREASE THE ARBITRARINESS AND INCONSISTENCY OF DEATH SENTENCES

In *Spaziano*, the Court neglected to consider the full impact of the arbitrariness problem when a judge is left with the ultimate capital sentencing decision. Justice Douglas in *Furman* observed:

> We know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[177]

In *Proffitt v. Florida*,[178] the Court upheld Florida's capital punishment statute because it addressed the constitutional deficiencies identified in *Furman* by having the sentencer balance the legislatively prescribed aggravating and mitigating factors against one another,[179] which ideally should eliminate most prejudices.

The plurality in *Proffitt* argued that judicial sentencing would lead to a more consistent imposition of the death penalty because judges have sentencing experience from previous capital cases.[180] In 1980, however, it was determined that in Florida, the average trial judge has made only three capital sentencing decisions in the seven and one-half years since *Furman*.[181] Three decisions over seven and one-half years hardly qualifies judges as the experienced sentencers the Court envisioned in *Proffitt*. Thus, the Court's argument in *Proffitt* that previous judicial sentencing experience leads to

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176 H. KALVEN & H. ZIESEL, *supra* note 171, at 102.

177 *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

178 428 U.S. 242 (1975) (plurality opinion).

179 *Id.* at 252.

180 *Id.*

181 Gillers, *supra* note 162, at 59.

greater sentencing consistency fails, because judges have not had numerous opportunities to make capital sentences.

Moreover, the effect of prejudice in the sentencing decision concerned the Court in *Furman*.[182] While a judge is only one individual, a jury is a cross-section of the community. When a jury of twelve individuals combine to make a sentencing decision, the prejudices of each juror are diffused among the prejudices of the others. But when a single judge determines the death penalty, the judge's prejudices impact on the sentencing decision undiluted.

In *Barclay v. Florida*,[183] *Dobbert v. Florida*,[184] and *Proffitt v. Florida*,[185] however, the Court concluded that Florida's death penalty statute was not arbitrary or discriminatory.[186] The Court noted that the Florida Supreme Court had adopted exacting standards in *Tedder v. State*[187] that provided the only means for a jury's recommendation of a life sentence to be overridden by the trial judge. In *Tedder*, the Florida court held that "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."[188] In spite of this exacting stan-

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182 *See* 408 U.S. at 249-57 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 314 (White, J., concurring); *id.* at 364-66 (Marshall, J., concurring).

183 103 S. Ct. 3418 (1983).

184 432 U.S. 282 (1977).

185 428 U.S. 242 (1976) (plurality opinion).

186 It is also important to examine the development of Florida's capital sentencing statute and to note that until 1972, Florida required the jury to make the death penalty decision. *Spaziano*, 104 S. Ct. at 3170 (Stevens, J., concurring in part and dissenting in part). Florida did not change its law until 1972 in an attempt to comply with the Court's decision in *Furman* that held unconstitutional a capital punishment statute because it achieved arbitrary results. *Id.* Prior to 1972, death was automatic for the capital offenses of murder and sexual battery, absent a jury recommendation of mercy. In *Dobbert v. Florida*, the Court reviewed Florida's statute and concluded that the new statute gave more protection to a defendant than did the old statute. 432 U.S. at 295. The statute provided:

> (1) Recommendation to mercy.—A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by the jury. When the verdict includes a recommendation to mercy by the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death when a jury is waived shall be sentenced by the court to death or life imprisonment.

FLA. STAT. ANN. § 921.141(1) (West 1973) (amended by FLA. STAT. ANN. § 921.141 (West 1983)). It can be argued, however, that Florida provides statutory guidelines that minimize the amount of arbitrariness in a decision. *See supra* notes 44-45.

187 322 So. 2d 908 (Fla. 1975). See *supra* note 124 for an explanation of the *Tedder* standard.

188 322 So. 2d at 910. It seems odd that in 83 cases, a jury determined that the standards did not call for death, while the judge concluded that death was appropriate. *Spaziano*, 104 S. Ct. at 3167 (Stevens, J., concurring in part and dissenting in part). Of

dard, authors of a recent article on Florida's capital punishment system found that the Florida Supreme Court has affirmed only a little over one-half of the death penalty cases it reviewed because it found serious flaws or errors in the other one-half.[189] Moreover, the authors determined that racial prejudice exists to some degree in Florida death sentences.[190] Further, when reviewing death sentences on automatic appeal, the Florida Supreme Court has tended to follow a jury recommendation of life imprisonment more than judicial overrides imposing the death penalty.[191] The Florida Supreme Court has upheld only twenty-one (33%) of the judges' override decisions.[192] Thus, the Florida Supreme Court has found less occasion to overturn jury decisions than judge decisions.[193]

Because of the statutory guidelines,[194] the exacting *Tedder* standard, automatic appeal, and the Florida Supreme Court's scrutiny of the sentences, Florida's death penalty statute assures retrospective guarantee of nonarbitrariness through consistent application. This

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the 83 cases, only twenty have been affirmed and five of those were subsequently vacated on other grounds. The inmates whose life terms were overridden died by suicide. Brief for Petitioner at 31 n.31, Spaziano v. Florida, 104 S. Ct. 3154 (1984). The other two states that provide for jury overrides, Indiana and Alabama, have exercised this discretion only six times. *See also* Murry v. State, 3 Div. No. 604 (Ala. Crim. App.) (affirming jury override), Appeal No. 82-743 (Ala.); Lindsey v. State, 1 Div. No. 483 (Ala. Crim. App.) (affirming jury override); Neeley v. State, 7 Div. No. 145; Jones v. State, 1 Div. No. 377 (both pending in Alabama Court of Criminal Appeals); Shiro v. State, 451 N.E.2d 1047 (Ind. 1983) (Indiana Supreme Court affirming jury override); Jay Thompson v. State, Indiana Supreme Court No. 822-§ 303 (Harrison County No. 81-562, sentenced on March 18, 1972) (still pending).

189 Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 922 (1983).

190 *Id.* at 921-22.

191 *Id.* at 923.

192 Brief for Petitioner, Appendix B, Spaziano v. Florida, 104 S. Ct. 3154 (1984). In Gorham v. Florida, No. 62,882, slip op. (Fla. 1984), the Florida Supreme Court upheld the sentence of death, and in Cave v. Florida, 445 So. 2d 341 (Fla. 1984), the Florida Supreme Court also upheld the death sentence.

193 It would seem implausible that all 83 cases in which a Florida judge overrode the jury's advisory opinion of life could withstand the court-approved scrutiny that virtually no reasonable person could differ. By the very standard itself, most overrides should fail because in every such case at least seven jurors, "reasonable people," concluded that the death penalty should not have been imposed. The Florida Supreme Court has obviously agreed because in over 67% of the cases it reviewed, the defendant received life imprisonment.

Because death penalty cases are capital cases, twelve jurors are required by Florida law. FLA. STAT. ANN. § 913.10 (West 1970) ("Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases."). Florida law requires a unanimous jury in order to convict a defendant. FLA. R. CRIM. P. 3.440 (1967). The advisory opinion, however, may reflect the sentencing desires of only a majority of the jury (seven jurors). FLA. STAT. ANN. § 921.141(3) (West 1970).

194 *See supra* notes 44-45.

retrospective posture ignores the real purpose of the eighth amendment protections guaranteed to defendants faced with capital sentences: to avoid arbitrary or inconsistent imposition of the death penalty at the trial level. As the Court noted in *Solem v. Helm*:

> Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits.[195]

Thus, the appellate court is to determine only if the sentence is either arbitrary or inconsistent. To ensure eighth amendment protection at the trial level, defendants must have the right to choose a jury as their sentencer.

In addition, the sixth amendment's guarantee of a jury trial is violated in situations where the jury's recommendation is not followed. Unlike a typical sentencing proceeding, Florida's death penalty statute, like a trial, requires that the sentencer make a determination of the existence of aggravating and mitigating circumstances.[196] In a trial, the sixth amendment guarantees that the jury decide the facts. Likewise, the sixth amendment also must guarantee a defendant the opportunity to have a jury determine the verdict in the sentencing stage of a capital proceeding because it is a fact-finding procedure. Moreover, Florida law prohibits a trial judge from granting a motion to arrest the judgment in criminal trials unless a defendant was unjustly convicted.[197] This statute indicates that Florida considers a jury's guilt or innocence determination final. By analogy, a judge should not be able to dismiss a jury's sentencing decision. The death sentence decision is a fact-finding process for the jury that should be guaranteed by the sixth amendment.

VI. CONCLUSION

The Court's decision in *Spaziano v. Florida* affirming the death

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195 *Solem*, 103 S. Ct. at 3009 n.16.

196 *See supra* notes 44-45.

197 FLA. R. CRIM. P. 3.610 provides:

> (a) The Court shall grant a motion in arrest of judgment only on one or more of the following grounds:
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> (1) That the indictment or information upon which the defendant was tried is so defective that it will not support a judgment of conviction; (2) That the court is without jurisdiction of the cause; (3) That the verdict is so uncertain that it does not appear therefrom that the jurors intended to convict the defendant of an offense of which he could be convicted under the indictment or information under which he was tried; (4) That the defendant was convicted of an offense for which he could not be convicted under the indictment or information under which he was tried.

sentence of the petitioner and the Court's specific affirmance of the constitutionality of Florida's death penalty statute departed from the Court's previous mode of analysis of capital punishment schemes. Moreover, by failing to properly weigh the statutory schemes adopted by a majority of the states, the Court neglected to recognize fully the importance of the infusion of community values, through the jury, in all death sentences. The Court has taken a step backwards in its conclusion that juries are not essential to the death sentencing process because, in prior decisions, the Court emphasized the important role that the community should play in the decision because of the retributive nature of the penalty. After a careful analysis, the best conclusion that can be reached is that the Court should have reversed the petitioner's death sentence because the many flaws in Florida's capital punishment statutory scheme make the statute unconstitutional.[198]

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198 Although constitutional requirements dictate a jury imposition of the death penalty, if a case existed for which the jury override was appropriate, *Spaziano* would probably be it. There is no doubt that the aggravating circumstances in *Spaziano* outweighed the mitigating circumstances. Even so, in most instances, the decision is still left to the jury's discretion. In *Spaziano*, however, the trial judge incorrectly prohibited the jury from using the presentence report that contained information about Spaziano's previous felony convictions in their advisory opinion.

Although the constitutionality of Florida's law is in question, as well as the similar statutes in Alabama and Indiana, *see supra* note 128, four other states—Arizona, Idaho, Montana, and Nebraska—have the death penalty determination made by the judge alone. *See supra* note 128. These statutes suffer to a greater degree from the same constitutional problems as Florida's statute because they preclude any jury participation in the sentencing process. It is enough to say that the death penalty statutes in seven states should be declared unconstitutional because the absence of any "true" community input in the decision, through the jury, violates the eighth amendment's protection against cruel and unusual punishment.