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Constitutional Law - Eighth Amendment - Capital Punishment - State Death Penalty Statutes - Procedural Safeguards

Scott T. Redman

Recent Decisions

CONSTITUTIONAL LAW—EIGHTH AMENDMENT—CAPITAL PUNISHMENT—STATE DEATH PENALTY STATUTES—PROCEDURAL SAFEGUARDS—The Supreme Court of the United States has held that the Alabama death penalty statute which prohibited a jury instruction of lesser included offenses in a capital case is unconstitutional because it diminishes the reliability of the guilt determination process, leading to an arbitrary and irrational imposition of the death penalty.

Beck v. Alabama, 447 U.S. 625 (1980).

In June, 1977, Gilbert Franklin Beck was convicted in an Alabama circuit court for the capital offense of intentional murder committed during the course of a robbery, and sentenced to death under the Alabama death penalty statute.[1] At trial, Beck testified on his own behalf that he and an accomplice went to the home of an eighty-year-old man to rob him, but that during the robbery his accomplice unexpectedly struck and killed the victim with a knife.[2] The defendant admitted his intent to rob, but not to murder the victim.[3] The state conceded that, absent a statutory prohibition, this testimony would have entitled Beck to a lesser included offense instruction on felony murder.[4] However, the Alabama death penalty statute prevented a jury instruction which would have allowed a conviction for the lesser included offense of felony murder.[5] On automatic appeal to the

1. Beck v. Alabama, 447 U.S. 625, 630 (1980). The Alabama death penalty statute, ALA. CODE § 13-11-2(a) (1975), provides in pertinent part:

> If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses.

The statute lists fourteen capital offenses. Beck was convicted of "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant." 447 U.S. at 627. *See* ALA. CODE § 13-11-2(a)(2) (1975).

2. Beck v. State, 365 So. 2d 985, 995 (Ala. Crim. App.), *aff'd*, 365 So. 2d 1006 (Ala. 1978), *rev'd*, 447 U.S. 625 (1980).

3. *Id.*

4. 447 U.S. at 630. Noncapital defendants in Alabama are entitled to a lesser included offense instruction if reasonably supported by the evidence. *Id.* at 630 n.5 (citing Fulghum v. State, 291 Ala. 71, 76, 277 So. 2d 886, 890 (1973)). Under this standard the parties agreed that petitioner would have been entitled to lesser included offense instructions, but disagreed on the extent of such instructions. 447 U.S. at 630 n.5.

5. *See* note 1 *supra*. According to the *Beck* majority, the Alabama Supreme Court has consistently construed § 13-11-2(a) to preclude a jury instruction of lesser included offenses in a capital case. 447 U.S. at 628-29 n.3 (citing Jacobs v. State, 361 So. 2d 640, 646

Alabama Court of Criminal Appeals[6] the verdict and sentence were affirmed.[7] Likewise, after granting certiorari, the Alabama Supreme Court affirmed the verdict and sentence.[8]

The Supreme Court of the United States granted certiorari[9] and reversed both the verdict and sentence.[10] The Court held that a sentence of death may not be constitutionally imposed after a jury verdict of guilt for a capital offense when the jury is not permitted to consider guilt for a lesser included noncapital offense which is warranted by the evidence.[11]

(Ala. 1978) (Torbert, C.J., concurring in part and dissenting in part), *cert. denied*, 439 U.S. 1122 (1979)). Thus, the Alabama statute allows the jury only the choice of convicting a defendant of the capital crime for which he is charged, or alternatively, acquitting him and thereby allowing a defendant to go unpunished for any participation in the crime. In *Beck* the trial judge instructed the jury that if they acquitted Beck he "must be discharged" and that "he can never be tried for anything he ever did to [the victim]." 447 U.S. at 630.

6. ALA. CODE § 13-11-5 (1975) provides that a conviction and sentence of the death penalty shall be subject to automatic review. *See also* ALA. CODE § 12-22-150 (1975) (trial judge has a duty in a capital case to enter an appeal immediately after the imposition of the death penalty which has the effect of automatically staying execution of the sentence).

7. Beck v. State, 365 So. 2d 985, 1005 (Ala. Crim. App.), *aff'd*, 365 So. 2d 1006 (Ala. 1978), *rev'd*, 447 U.S. 625 (1980). The court rejected the defendant's argument that the prohibition of lesser included offense instructions renders the Alabama statute constitutionally indistinguishable from the mandatory death penalty statutes struck down in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976). The court maintained that the jury's only function is to determine guilt or innocence, and found that the death sentence which the jury is required to impose after a finding of guilt is merely advisory because the trial judge is the actual sentencing authority. 447 U.S. at 630-32. *See* ALA. CODE § 13-11-4 (1975).

8. Beck v. State, 365 So. 2d 1006, 1007 (Ala. 1978), *rev'd*, 447 U.S. 625 (1980). In its brief opinion, the Alabama Supreme Court relied on Jacobs v. State, 361 So. 2d 640 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979), in which the Alabama Supreme Court upheld the constitutionality of the Alabama death penalty statute against a similar challenge. In the United States Supreme Court's decision in *Beck*, Justice Stevens noted that the Alabama Supreme Court only referred to certain state constitutional issues raised by the petitioner Beck. According to Justice Stevens, the United States Supreme Court is not prevented from deciding the federal constitutional issues which were not recognized by the Alabama court. He noted that as long as the petitioner presented his claims in some fashion before the Alabama Supreme Court the issues are sufficiently preserved for decision in the United States Supreme Court. In addition, Justice Stevens pointed out that Alabama did not challenge the Court's jurisdiction in its brief in opposition to the petition for certiorari. Although Justice Stevens also noted that the parties cannot by their actions confer jurisdiction on the Court, he concluded that the technicality should not be dispositive, especially when the death penalty was imposed in a plainly unconstitutional manner. 447 U.S. at 630-31 n.6. Justice Rehnquist took the opposite view in his dissenting opinion in *Beck*. *Id.* at 646 (Rehnquist, J., dissenting). *See* notes 39-41 and accompanying text *infra*.

9. 444 U.S. 897 (1979).

10. 447 U.S. at 646.

11. *Id.* at 627.

The petitioner contended that the prohibition of lesser included offense instructions in capital cases violates both the eighth amendment[12] and the due process clause of the fourteenth amendment[13] by substantially increasing the risk of error in the fact-finding process. He argued that in a case in which a defendant is clearly guilty of a serious noncapital crime such as felony murder, forcing the jury to choose between conviction on the capital offense and acquittal creates the danger that the jury will resolve any doubts in favor of conviction.[14]

Alabama argued that the prohibition of lesser included offense instructions does not impair the reliability of the fact-finding process or prejudice the defendant in any way. Rather, Alabama contended that the jury will be more prone to acquit in a doubtful case, and where the jury has doubts but is unwilling to acquit, the jury's ability to force a mistrial is a viable third option. In addition, the state contended that the prohibition of lesser included offense instructions is a reasonable way of assuring that the death penalty is not imposed arbitrarily and capriciously as a result of compromise verdicts. Finally, Alabama argued that any error in the jury's imposition of the death penalty can be cured by the judge in a hearing on aggravating and mitigating circumstances.[15]

In delivering the opinion of the Court, Justice Stevens[16] noted that at common law the jury was permitted to find a defendant guilty of any lesser offense necessarily included in the offense charged. Although the rule originally developed as an aid to the prosecution when the proof failed to establish some element of the crime charged, the majority recognized that it can also be beneficial to the defendant because it gives the jury a less drastic alternative than conviction of the offense charged.[17] Although the Court recognized that in a criminal proceeding a defendant is not entitled to a lesser included offense instruction as a matter of constitutional due process, the majority concluded that it is an important procedural safeguard both widely and

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

13. The fourteenth amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

14. 447 U.S. at 632.

15. *Id.* at 633.

16. Chief Justice Burger and Justices Brennan, Stewart, Blackmun, and Powell joined in the majority opinion. Justice Brennan filed a separate concurrence. Justice Marshall concurred only in the judgment of the Court and filed a separate opinion. Justice Rehnquist dissented and filed an opinion joined in by Justice White.

17. 447 U.S. at 633. *See* Keeble v. United States, 412 U.S. 205 (1973).

firmly established.[18] The Court stated that disallowing the jury to convict for a lesser included offense in a capital case creates the danger of an unwarranted conviction which cannot be tolerated in a case in which the defendant's life is at stake.[19] The Court noted that because there is a significant difference between the death penalty and lesser punishments, any decision to impose the death sentence must be based on reason rather than on caprice or emotion.[20] Thus, according to the Court, procedural rules that tend to diminish the reliability of the guilt determination, as well as the sentencing determination, must be invalidated.[21]

Justice Stevens rejected Alabama's contention that the prohibition of lesser included offense jury instructions in a capital case enhances rather than diminishes the reliability of the guilt determination process.[22] He noted that Alabama has misread the Court's prior cases striking down mandatory death penalty statutes. Justice Stevens stated that in *Furman v. Georgia*[23] the state's death penalty statute was held unconstitutional because it vested the jury with complete and unguided discretion in the imposition of capital punishment.[24] In *Woodson v. North Carolina*[25] the state's attempt to withdraw all discretion from the jury by making the death penalty automatic on a jury verdict of guilt of a capital offense did little to prevent a jury from making its own personal decision about whether a defendant should be put to death.[26] The statutory defect recognized by the Court in both *Furman* and *Woodson* is that juries might be free to acquit or convict based on their own particular feelings of whether a specific defendant should die for his crime. Therefore, without an established procedure to control this unbridled discretion, the death penalty would be imposed on a case-by-case basis in an arbitrary and capricious manner.[27] The *Beck* Court maintained that Alabama's death penalty statute makes the guilt determination depend, at least in part, on a jury's feelings about

18. 447 U.S. at 637. The Court noted that except in Alabama the federal and state courts have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it. *Id.* at 635-37.

19. *Id.* at 637.

20. *Id.* (quoting Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, J.)).

21. 447 U.S. at 638.

22. *Id.* at 639. The state argued that because the jury is led to believe that a death sentence will be automatic upon a finding of guilt, it will be more likely to acquit than to convict whenever it has anything approaching a reasonable doubt. *Id.*

23. 408 U.S. 238, 239 (1972).

24. 447 U.S. at 639 (citing 408 U.S. at 310 (Stewart, J., concurring)).

25. 428 U.S. 280, 302 (1976).

26. 447 U.S. at 639-40.

27. *Id.*

whether a defendant should die, without providing any standards to guide their determination.[28]

Justice Stevens rejected the rationale of *Jacobs v. State*[29] in which the Alabama Supreme Court attempted to distinguish the Alabama death penalty statute from the North Carolina statute in *Woodson*.[30] The court in *Jacobs* suggested that because juries are reluctant to acquit a defendant who is clearly guilty of some serious crime, they will be unlikely to disregard their oaths and acquit a defendant simply because of their abhorrence of the death penalty. Rather, because the death penalty is mandatory, the jury will be careful to accord the defendant the full benefit of the reasonable doubt standard. According to the *Jacobs* court, the end result is a balance of competing emotional pressures that ensures a reliable and rational imposition of the death penalty.[31] The *Beck* majority wholly rejected this argument as speculative and unsupported by practice.[32]

In its final analysis, the Court stated that Alabama's prohibition of lesser included offense instructions in a capital case diverts the jury's attention from the central issue of the defendant's guilt. The Court recognized that without the option of such an instruction a defendant may be convicted of a capital offense, even though guilty of a noncapital offense. Conversely, a defendant may be acquitted when guilty of a serious noncapital crime. The Court maintained that in either case, the unavailability of a third option introduces a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case.[33]

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28. *Id.* at 640.

29. 361 So. 2d 640, 643 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979).

30. 447 U.S. at 640-41.

31. *Id.* The *Beck* Court noted that whether the preclusion of lesser included offense instructions reduces the risk of arbitrariness in the imposition of the death penalty depends on the nature of the death penalty statute. In a statute requiring that guilt be determined separately from punishment, the risk is low that a jury will take punishment into account in its decision of guilt. Thus, under these statutes, the preclusion of lesser included offense instructions does not reduce the risk of arbitrariness in the imposition of the death penalty. Only under statutes such as Alabama's where the death penalty is mandatory after a finding of guilt, could the argument be made that the preclusion of lesser included offense instructions reduces the risk of arbitrariness in the death penalty's imposition. *Id.* at 641 n.17.

32. *Id.* at 641. The Court noted that the 96% conviction rate achieved by prosecutors under the Alabama death penalty statute hardly supports the state's theory, despite the state's argument that prosecutors only indict for capital offenses in clear cases of guilt. *Id.* at 641 & n.18. The majority cited the dissent of Justice Shores in *Jacobs* as portraying the more realistic view of a jury's reaction when faced with the all-or-nothing dilemma under the Alabama death penalty statute. *Id.* at 642 (quoting 361 So. 2d at 651-52 (Shores, J., dissenting)).

33. 447 U.S. at 642-43.

The Court refuted Alabama's argument that the jury's option to create a mistrial by refusing to return any verdict is an adequate substitute for an instruction on lesser included offenses.[34] Similarly, the Court was not convinced that Alabama's post-trial sentencing procedure compensates for the risk of an erroneous conviction.[35]

Justice Brennan joined in the Court's opinion, but wrote separately to reaffirm his belief that the death penalty is, in all circumstances, contrary to the eighth amendment's prohibition of cruel and unusual punishments.[36] Justice Marshall concurred only in the judgment of the Court, stating that the death penalty is cruel and unusual punishment prohibited by the eighth and fourteenth amendments.[37] He agreed with the Court that the prohibition of lesser included offenses in a capital case is unconstitutional because it substantially increases the risk of error in the fact-finding process, but refused to join in the Court's underlying assumption that the death penalty may ever be imposed without violating the eighth amendment.[38]

Writing in dissent, Justice Rehnquist, joined by Justice White, asserted that the Court had no jurisdiction to decide the case because the issues before the Court were not raised in the Alabama Supreme Court.[39] Under 28 U.S.C. § 1257(3),[40] the United States Supreme Court

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34. *Id.* at 643-45. The Court rejected the argument for three reasons. First, the jury may not understand the full implications of a mistrial, thus having no assurance that a second trial will end in the conviction of the defendant on a lesser included offense. Second, by acquitting a defendant believed to be guilty of some crime other than a capital crime, the jurors would be forced to violate their oaths to acquit only in a proper case. Finally, the traditional inclusion of lesser included offense instructions, despite the availability of the mistrial option, indicates that such instructions provide a necessary additional measure of protection for the defendant. *Id.*

35. *Id.* at 645-46. *See* ALA. CODE §§ 13-11-3, -4, -6, -7 (1975). The Court concluded that if a fully instructed jury would find the defendant guilty only of a lesser, noncapital offense the judge would not have the opportunity to impose the death sentence. Further, the Court noted that a judge ordinarily conforms his sentence to the sentence previously imposed by the jury. 447 U.S. at 645 & n.22.

36. 447 U.S. at 646 (Brennan, J., concurring) (citing Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting)).

37. 447 U.S. at 646. (Marshall, J., concurring in the judgment) (citing Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring)).

38. 447 U.S. at 646 (Marshall, J., concurring in the judgment) (citing Lockett v. Ohio, 438 U.S. 586, 621 (1978) (Marshall, J., concurring in the judgment)).

39. 447 U.S. at 646 (Rehnquist, J., dissenting). Justice Rehnquist pointed out that the Alabama Supreme Court stated that petitioner Beck raised only one issue in that court. That issue dealt with a question of state constitutional law and was unrelated to issues raised by the petitioner in the United States Supreme Court. *Id.* at 647. *See* note 8 *supra.*

40. 28 U.S.C. § 1257 (1976) provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> . . . .
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> (3) By writ of certiorari . . . where the validity of a State statute is drawn in

can review only a final decree by the highest state court finding that a state statute violates the United States Constitution. Justice Rehnquist argued that because the Alabama Supreme Court, which is the highest state court in Alabama in which a decision could be had, was not asked by petitioner to decide the same questions raised by the petitioner in the United States Supreme Court, the Court had no jurisdiction to decide the case.[41]

The United States Supreme Court first examined the constitutionality of the death penalty in *McGautha v. California*.[42] In cases prior to *McGautha* the Court assumed that capital punishment was constitutional and addressed only whether specific forms of execution were cruel and unusual under the eighth amendment.[43] The *McGautha* Court did not focus on whether the death penalty was cruel and unusual under the eighth amendment, but whether the death penalty could be constitutionally imposed by leaving the decision to impose capital punishment to the unguided discretion of a jury. The majority held that standardless jury discretion in a capital case does not violate any provision of the United States Constitution.[44] The Court reasoned that it would be beyond human wisdom to set standards for the death penalty's imposition and that such matters should be left to each jury's individual consideration.[45] Foreshadowing *Furman v. Georgia*,[46] the dissenters argued that standardless jury discretion in a capital case is constitutionally impermissible.[47] Furthermore, according to the dissenters, standards for the imposition of capital punishment can and

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question on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

Id.

41. 447 U.S. at 647 (citing Street v. New York, 394 U.S. 576, 582 (1969); Hulbert v. City of Chicago, 202 U.S. 275, 280 (1906)). Justice Rehnquist adopted the *Street* standard that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. Justice Rehnquist concluded that such a showing was not made by the petitioner Beck. 447 U.S. at 647-48.

42. 402 U.S. 183 (1971). The Court also decided the companion case of Crampton v. Ohio. *Id.*

43. *See, e.g.*, Louisiana v. Resweber, 329 U.S. 459, 464 (1947) (a second electrocution attempt on the same person after the first failed was not cruel and unusual punishment because a punishment is judged cruel and unusual by its method, not by the suffering caused in its imposition); *In re* Kemmler, 136 U.S. 436, 446-47 (1890) (electrocution is a form of execution permissible under the eighth amendment).

44. 402 U.S. at 207. Justice Harlan wrote the majority opinion joined in by Chief Justice Burger and Justices Stewart, White, and Blackmun.

45. *Id.* at 208.

46. 408 U.S. 238 (1972).

47. *See* 402 U.S. at 245 (Douglas, J., joined by Brennan, J., and Marshall, J., dissenting); *id.* at 252 (Brennan, J., joined by Douglas, J., and Marshall, J., dissenting).

should be drawn to ensure a defendant's rights under the fourteenth amendment.[48]

One year later, in *Furman v. Georgia*, the Court fully examined the nature and history of the death penalty in an attempt to resolve the controversial question of its constitutionality.[49] Implicitly overruling *McGautha*,[50] the Court held per curiam that state death penalty statutes that provide no guidelines to control jury discretion violate the eighth and fourteenth amendments to the United States Constitution.[51] For the first time, a majority of the Court[52] held that the imposition of the death penalty in an arbitrary manner constituted cruel and unusual punishment prohibited by the eighth amendment as applied to the states through the fourteenth amendment.[53] However, the five separate opinions that constituted the majority revealed a split in constitutional reasoning that has persisted. Three of the Justices adopted a procedural approach to the constitutionality of the death penalty and two argued that the death penalty is unconstitutional per se. Justices Douglas, Stewart, and White adopted the procedural approach, essentially arguing that a procedure which insures a rational and nondiscriminatory imposition of the death penalty would comport with the eighth amendment.[54] Justices Brennan and Marshall argued that

48. *Id.* at 245-48 (Douglas, J., dissenting); *id.* at 285-86 (Brennan, J., dissenting).

49. *See generally Furman to Gregg: The Judicial and Legislative History*, 22 How. L.J. 53 (1979) (review and analysis of recent judicial and legislative history of the capital punishment abolitionist movement in the United States) [hereinafter cited as *Furman to Gregg*]; *see also* M. Meltsner, Cruel and Unusual, The Supreme Court and Capital Punishment (1973) (account of the 1960's and early 1970's death penalty litigation).

50. After its decision in *Furman*, the Court granted a petition for rehearing in *Crampton*, the companion case to *McGautha*. *See* note 42 *supra*. The Court vacated its decision in *Crampton*, because after *Furman* the Ohio death penalty statute was unconstitutional. Crampton v. Ohio, 408 U.S. 941, 941-42 (1972).

51. 408 U.S. at 239-40.

52. The five Justices who formed the majority, Douglas, Brennan, Stewart, White, and Marshall, all filed separate concurring opinions.

53. 408 U.S. at 239-40. The eighth amendment was not always considered to apply to the states. The Court in *In re* Kemmler, 136 U.S. 436 (1890), held that the eighth amendment did not apply to the states. However, in 1947, the Court in Louisiana v. Resweber, 329 U.S. 459 (1947), assumed that the eighth amendment is applicable to the states. The Court first expressly applied the eighth amendment to the states in Robinson v. California, 370 U.S. 660 (1962), in which it held criminal penalties for narcotic addiction to be cruel and unusual punishment. *See* J. Nowak, R. Rotunda, & J.N. Young, Handbook on Constitutional Law 376-78, 411-16 (1978).

54. Justice White stated: "I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment." 408 U.S. at 310-11 (White, J., concurring).

Justice Douglas stated:

> [W]e 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

capital punishment is in all cases substantively unconstitutional and should be abolished. Justice Brennan reasoned that capital punishment is degrading to human dignity and therefore cruel and unusual.[55] Justice Marshall believed the death penalty to be cruel and unusual because it is excessive, unnecessary to achieve accepted societal aims, and abhorrent to currently existing moral values.[56] The four dissenting Justices[57] in *Furman* were united by one basic theme, deference to the will of state legislatures. All argued that the abolition of the death penalty is a legislative matter with which the judiciary should not interfere.[58]

The response by state legislatures to *Furman* varied. Primarily, the states attempted to draft statutes which would reduce jury discretion.[59] Litigation developed in response to the varied post-*Furman* death penalty legislation. The Court again addressed the con-

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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.

Id. at 255 (Douglas, J., concurring). He wrote further, "[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Id.* at 256-57 (Douglas, J., concurring). Yet Justice Douglas believed that if a death penalty statute could remedy these problems, the statute would not be unconstitutional. *Id.* at 256 (Douglas, J., concurring).

Justice Stewart stated: "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." *Id.* at 310 (Stewart, J., concurring).

55. *Id.* at 291 (Brennan, J., concurring).

56. *Id.* at 332-33 (Marshall, J., concurring).

57. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist each filed a dissenting opinion.

58. *See* 408 U.S. at 384 (Burger, C.J., dissenting); *id.* at 410 (Blackmun, J., dissenting); *id.* at 463-65 (Powell, J., dissenting); and *id.* at 465-70 (Rehnquist, J., dissenting).

59. *See Furman to Gregg, supra* note 49, at 84-95 (discussion of states' responses to Furman). Four basic statutory schemes emerged: (1) aggravating circumstances (sentencer provided with a list of aggravating circumstances, one of which must be found before death can be imposed), *id.* at 86-87; (2) aggravating-mitigating circumstances (sentencer must determine if sufficient aggravating circumstances exist to justify sentence of death, and if so whether sufficient mitigating circumstances exist to justify a sentence other than death, *id.* at 87-89; (3) quasi-mandatory statutes (capital punishment required when aggravating and no mitigating circumstances are found: in all other cases capital punishment forbidden), *id.* at 89-90; and (4) mandatory statutes (removes all discretion from sentencer, requires sentence of death for those convicted of a limited number of crimes); *id.* at 90-91. *See* Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZ. L. REV. 651 (1974) (analysis of the post-*Furman* death penalty statutes). *See also Furman to Gregg, supra* note 49, at 93-95 (post-*Furman* statutes dealt only with sentencing discretion and not prosecutorial or executive discretion in the death penalty area).

stitutionality of the death penalty and attempted to refine *Furman* in *Gregg v. Georgia*[60] and its companion cases.[61]

Gregg v. Georgia was the initial judicial response to the legislative aftermath of *Furman*. The Court, by a 7-2 vote,[62] upheld the Georgia death penalty statute as constitutional under the eighth and fourteenth amendments because it addressed the concerns of *Furman*.[63] The *Gregg* Court noted that the statute required specific jury findings as to the circumstances of the crime or the character of the defendant before the death penalty could be imposed. That requirement, together with state supreme court review of the proportionality of each death sentence with sentences imposed on similarly situated defendants, was held to be a sufficient check against the random and arbitrary imposition of the death penalty.[64]

The Court also upheld as constitutional the respective state death penalty statutes in *Proffitt v. Florida*[65] and *Jurek v. Texas*[66] because

60. 428 U.S. 153 (1976) (statute which provides for death penalty's imposition in a bifurcated proceeding in which sentencer considers certain statutory aggravating and mitigating circumstances held constitutional under eighth and fourteenth amendments).

61. Proffitt v. Florida, 428 U.S. 243 (1976) (statute with bifurcated proceeding where judge determines sentence of death by weighing enumerated circumstances and receives advisory verdict from jury held constitutional); Jurek v. Texas, 428 U.S. 262 (1976) (statute which provides for death sentence in bifurcated proceeding when jury finds that defendant deliberately caused death of victim and there exists the probability that defendant would commit criminal acts of violence constituting a continuing threat to society held constitutional); Woodson v. North Carolina, 428 U.S. 280 (1976) (death penalty statutes which make capital punishment mandatory for a conviction of first degree murder held unconstitutional); Roberts v. Louisiana, 428 U.S. 325 (1976).

62. In *Gregg*, *Proffitt*, and *Jurek* the nucleus of the majority was the plurality opinions of Justices Stewart, Powell, and Stevens. In *Gregg* Justice White, joined by Chief Justice Burger and Justice Rehnquist, filed an opinion concurring in the judgment in which he differed with the plurality's interpretation of *Furman* that the imposition of the death penalty must be fair and rational in every case. Instead, Justice White reasoned that *Furman* mandated reasonable consistency in the imposition of the death penalty which would remedy the problem of its arbitrary and irrational imposition. 428 U.S. at 222 (White, J., concurring in the judgment). *See* text accompanying notes 100-102 *infra*. Chief Justice Burger and Justice Rehnquist also filed a statement concurring in the judgment in which they expressed agreement with the reasoning of Justice White. 428 U.S. at 226 (Burger, C.J., and Rehnquist, J., concurring). Justice Blackmun also filed a statement concurring in the judgment, citing his dissenting opinion in *Furman*. *Id.* at 227 (Blackmun, J., concurring) (citing Furman v. Georgia, 408 U.S. 238, 405-14 (1972) (Blackmun, J., dissenting)). Justices Brennan and Marshall each filed dissenting opinions. 428 U.S. at 227 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

63. 428 U.S. at 206-07.

64. *Id.*

65. 428 U.S. 242 (1976).

66. 428 U.S. 262 (1976). In both *Proffitt* and *Jurek* Justice White, joined by Chief Justice Burger and Justice Rehnquist, filed an opinion concurring in the judgment, citing the reasoning of his concurring opinion in *Gregg*. 428 U.S. at 260-61 (White, J., concurring

they too remedied the constitutional deficiencies identified in *Furman*. In *Proffitt* the Court noted that the Florida statutory requirement giving trial judges specific and detailed guidance in deciding whether to impose the death penalty, and the appellate review available to ensure that the sentence comports with other sentences imposed under similar circumstances guaranteed a fair and rational imposition of capital punishment.[67] Similarly, in *Jurek* the Court noted that because the Texas statutory capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death, it has eliminated arbitrariness and caprice in the death penalty's imposition.[68]

However, the Court in *Woodson v. North Carolina*[69] and *Roberts v. Louisiana*[70] struck down as unconstitutional the respective state death penalty statutes because they were improper responses to *Furman's* rejection of unbridled jury discretion in the imposition of capital punishment.[71] In *Woodson* the Court reasoned that because the North Carolina statute made the death penalty mandatory upon a conviction of first degree murder and provided no standards to guide the jury in their determination of guilt, the decision to impose the death penalty was left to the personal feelings of jurors. The Court noted that the constitutional deficiencies recognized in *Furman* are not eliminated by the mere formal removal of all sentencing power from juries in capital

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in the judgment); 428 U.S. at 277-78 (White, J., concurring in the judgment). In both cases Justice Blackmun filed a statement concurring in the judgment. 428 U.S. at 261 (Blackmun, J., concurring in the judgment); 428 U.S. at 279 (Blackmun, J., concurring in the judgment). Justices Brennan and Marshall dissented in both cases. 428 U.S. at 227 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

67. 428 U.S. at 259-60.

68. 428 U.S. at 276.

69. 428 U.S. 280 (1976).

70. 428 U.S. 325 (1976).

71. In *Woodson* and *Roberts* the vote was 5-4, and again the plurality of Justices Stewart, Powell, and Stevens formed the nucleus of the majority. In *Woodson* Justices Brennan and Marshall filed statements concurring in the judgment. 428 U.S. at 305 (Brennan, J., concurring in the judgment); *id.* at 306 (Marshall, J., concurring in the judgment). Justice White filed a dissenting opinion, joined by Chief Justice Burger and Justice Rehnquist, in which he again advanced his interpretation of *Furman*. *Id.* at 306 (White, J., dissenting). Justice Blackmun filed a dissenting statement and Justice Rehnquist filed a dissenting opinion. *Id.* at 307 (Blackmun, J., dissenting); *id.* at 308 (Rehnquist, J., dissenting). In *Roberts* Justices Brennan and Marshall filed statements concurring in the judgment. 428 U.S. at 336 (Brennan, J., concurring in the judgment); *id.* at 336 (Marshall, J., concurring in the judgment). Chief Justice Burger filed a dissenting statement. *Id.* at 337 (Burger, C.J., dissenting). Justice White filed a dissenting opinion joined by Chief Justice Burger and Justices Blackmun and Rehnquist, and Justice Blackmun filed a dissenting statement. *Id.* at 337 (White, J., dissenting); *id.* at 363 (Blackmun, J., dissenting).

cases.[72] Similarly, in *Roberts* the Court reasoned that, even though the Louisiana statute had a narrower definition of capital murder than the North Carolina statute, it still suffered from the same defects noted in *Woodson*. These statutes plainly invite jurors to disregard their oaths and convict on a lesser offense if they feel the death penalty is inappropriate, which, the Court noted, still invites the arbitrary and capricious imposition of the death penalty condemned in *Furman*.[73]

The plurality opinions in *Gregg* and its companion cases adopt the underlying assumption that capital punishment is not unconstitutional per se, but only cruel and unusual if imposed in an arbitrary and discriminatory manner.[74] Only Justices Brennan and Marshall dissented from that assumption.[75]

After *Gregg* the Court again examined the constitutionality of a death penalty statute in *Lockett v. Ohio*.[76] In *Lockett* the Court held the Ohio death penalty statute to be unconstitutional because it precluded the sentencing authority from considering those individualized mitigating factors required by the eighth and fourteenth amendments. The Court noted that some discretion in a death penalty statute may not be enough to ensure the fair and rational imposition of the death penalty.[77] The Court's holding in *Lockett* indicated a further refine-

72. 428 U.S. at 302-03.

73. 428 U.S. at 331-36.

74. The *Gregg* plurality stated: "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." 428 U.S. at 187. In reaching this conclusion the *Gregg* plurality employed a normative approach to death penalty analysis. *See* 428 U.S. at 168. *See also* text accompanying notes 83-89 *infra*.

75. Justices Brennan and Marshall both believe that the death penalty is unconstitutional per se. *See* Furman v. Georgia, 408 U.S. at 257 (Brennan, J., concurring); *id.* at 370 (Marshall, J., concurring).

76. 438 U.S. 586 (1978).

77. *Id.* at 604-08. Chief Justice Burger wrote a three part opinion. The first two parts, which dealt with other aspects of criminal law involved in the case, constituted an opinion of the Court joined in by Justices Stewart, White, Blackmun, Powell, Rehnquist, and Stevens. *Id.* at 588. Part three of the opinion, in which the Chief Justice adopted the approach of the *Gregg* plurality to death penalty analysis, was joined in only by Justices, Stewart, Powell, and Stevens. *Id.* at 597. Justice Blackmun filed an opinion concurring in the first two parts of Chief Justice Burger's opinion and concurring in the judgment in which he offered different reasons for vacating the petitioner's death sentence. *Id.* at 613 (Blackmun, J., concurring in part and concurring in the judgment). *See* text accompanying notes 120 & 121 *infra*. Justice Marshall filed an opinion concurring in the judgment. 438 U.S. at 619 (Marshall, J., concurring in the judgment). Justice White filed an opinion concurring in the judgment, and concurring in part and dissenting in part from part three of Chief Justice Burger's opinion. *Id.* at 621 (White, J., concurring in part and dissenting in part, and concurring in the judgment). *See* text accompanying notes 100-104 *infra*. Justice Rehnquist filed an opinion concurring in part and dissenting in part. 438 U.S. at 628 (Rehnquist, J., concurring in part and dissenting in part). Justice Brennan did not participate in the decision. *Id.* at 588.

ment of the procedural approach advocated first in *Furman* and then in *Gregg*.[78]

Shortly before *Lockett*, in *Coker v. Georgia*[79] the Court held that the sentence of death for the crime of rape is grossly disproportionate and excessive punishment forbidden by the eighth amendment as cruel and unusual punishment.[80] The difference between *Coker* and the other death penalty cases is that in *Coker* the Court did not assume that the death penalty for rape is per se constitutional, whereas for certain kinds of murder the death penalty is now assumed to be constitutional per se.[81] Thus, *Coker* and *Lockett* reveal the Court's further refinement of death penalty statutes to ensure that capital punishment is only imposed for a limited class of crimes and only after the observance of rigorous procedural guidelines.[82] *Beck* embodies the continuation of this refinement process.

Two lines of death penalty analysis have emerged from *Furman*: the

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78. *See* 16 AM. CRIM. L. REV. 317 (1979) (analysis of the refinements in *Lockett* and how other previously constitutional death penalty statutes could be considered to be unconstitutional based on the holding in *Lockett*). *See also* Black, *The Death Penalty Now*, 51 TUL. L. REV. 429 (1977) (detailed account of the facts in the *Lockett* case).

79. 433 U.S. 584 (1977).

80. *Id.* at 592-600. Justice White delivered an opinion joined in by Justices Stewart, Blackmun, and Stevens. *Id.* at 586. Justices Brennan and Marshall each filed a statement concurring in the judgment. *Id.* at 600 (Brennan, J., concurring in the judgment); *id.* at 600 (Marshall, J., concurring in the judgment). Justice Powell filed an opinion concurring in the judgment in part and dissenting in part. *Id.* at 601 (Powell, J., concurring in the judgment in part and dissenting in part). Chief Justice Burger, joined by Justice Rehnquist, filed a dissenting opinion. *Id.* at 604 (Burger, C.J., dissenting).

81. *See* note 74 *supra*.

82. In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court by a 6-3 vote held that the Georgia death penalty statute which provided that a person convicted of murder may be sentenced to death if it is found beyond a reasonable doubt that the offense was "outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim" was unconstitutionally construed too broadly and vaguely by the Georgia Supreme Court. *Id.* at 432-33. In an opinion joined in by Justices Blackmun, Powell, and Stevens, Justice Stewart reaffirmed the Court's trend toward refinement of death penalty statutes. Justice Stewart asserted that:

> [I]f a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. [The state must] define the crimes for which death may be the sentence in a way that obviates standardless [sentencing] discretion.

Id. at 428. Justice Marshall, joined by Justice Brennan wrote an opinion concurring in the judgment. *Id.* at 433 (Marshall, J., concurring). Chief Justice Burger filed a dissenting opinion which sharply criticized the Court for embarking on a misguided case-by-case analysis to tell states which of their murderers may be given the death penalty. *Id.* at 442 (Burger, C.J., dissenting). Justice White, joined by Justice Rehnquist, dissented on the ground that the Georgia Supreme Court committed no error in its review function. *Id.* at 447 (White, J., dissenting).

normative approach and the analytic approach.[83] The normative approach is derived from *Weems v. United States*[84] and *Trop v. Dulles*[85] in which the Court asserted that the eighth amendment is an independent proscription against inhumane punishments.[86] Under the normative approach, the eighth amendment's ban on cruel and unusual punishment is interpreted in light of the evolving standards of decency in society.[87] This analysis was adopted by Justices Brennan and Marshall in *Furman* when they maintained that the death penalty is cruel and unusual per se under the eighth amendment,[88] and was also adopted by a plurality of the Court in *Coker* when it held that the imposition of death as punishment for the crime of rape of an adult woman is per se cruel and unusual under the eighth amendment.[89]

According to the analytic approach, the eighth amendment derives its meaning from other explicit constitutional guarantees such as due process and equal protection.[90] This approach requires that personal guarantees found elsewhere in the text of the Constitution be applied with particular exactitude when severe punishments are involved.[91] Justices Douglas, Stewart, and White adopted this approach in *Furman*,[92] recognizing that the death penalty may be imposed for certain crimes but only in a procedurally fair and rational manner. A plurality of the Court in *Gregg* also followed this analysis, holding that a state death penalty statute must provide for guided sentencing discretion to avoid an arbitrary and irrational imposition of the death penalty.[93] The Court, by a plurality in *Lockett*, further interpreted this approach to define how much guided sentencing discretion is necessary for a state

83. *See* Manheim, *The Capital Punishment Cases: A Criticism of Judicial Method*, 12 LOY. L.A.L. REV. 85, 87-92 (1978) [hereinafter cited as Manheim].

84. 217 U.S. 349 (1910) (Phillipine punishment of *cadena temporal* held cruel and unusual under the eighth amendment).

85. 356 U.S. 86 (1958) (expatriation as a punishment for wartime desertion held cruel and unusual under the eighth amendment).

86. *See* Manheim, *supra* note 83, at 90-92.

87. *Id.* Chief Justice Warren, writing the plurality opinion in *Trop*, adopted the approach of *Weems*, stating: "[T]he words of the [eighth] Amendment are not precise, and ... their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 100-01.

88. *See* notes 55 & 56 and accompanying text *supra*.

89. *See* notes 79 & 80 and accompanying text *supra*.

90. *See* Manheim, *supra* note 83, at 87. The fourteenth amendment provides: "No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

91. *See* Manheim, *supra* note 83, at 87.

92. *See* 408 U.S. at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

93. *See* 428 U.S. at 189.

death penalty statute to be constitutional.[94] This analytic, or procedural, approach allows the Court to scrutinize the constitutionality of state death penalty statutes without disturbing the basic assumption that the death penalty is not unconstitutional per se.[95]

The Court in *Beck* implicitly adopted the holding in *Gregg* that the death penalty is not unconstitutional per se.[96] Indeed, the Court's formulation of the issue on which they granted certiorari assumes the per se constitutionality of the death penalty and only questions whether there is a particular procedural defect in the Alabama death penalty statute.[97] Thus, the *Beck* Court followed the analytic approach, holding that although the death penalty is not unconstitutional per se, a state must scrupulously follow rigorous procedural guidelines in imposing the death penalty.[98] The Court recognized that a jury instruction on lesser included offenses, while not a due process right, is an important procedural safeguard that ensures a fair and rational imposition of the death penalty.[99] This is consistent with the notion underlying the analytic approach that capital cases require more procedural protections and a stricter application of those protections.

Although the Court in *Lockett* and *Beck* has maintained that a certain amount of guided jury discretion is required to prevent an arbitrary and irrational imposition of the death penalty, it is not clear how much jury discretion would defeat this purpose and result in the irrational and arbitrary imposition of capital punishment. Justice White, in his separate opinion in *Lockett*,[100] criticized the *Lockett* plurality's mandate that state death penalty statutes provide greater individualization in the imposition of capital punishment by requiring full consideration in each case of the factors mitigating against it.[101] Justice White maintained that this approach fosters the erratic imposition of the death penalty because a jury can refuse to impose capital punishment in any case as long as it can cite factors mitigating against the imposition of death.[102] Justice White's criticism stems from his belief that *Furman* mandated that the death penalty be imposed with a definite degree of certainty to prevent the arbitrary and irrational im-

94. *See* 438 U.S. at 604-08. *See* text accompanying note 77 *supra*.

95. *See* Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261, 288-89 (1976). *See also* Manheim, *supra* note 83, at 133.

96. *See* note 74 *supra*.

97. 447 U.S. at 627.

98. *See id.* at 637-38.

99. *Id.* at 637.

100. 438 U.S. at 621 (White, J., concurring in part, dissenting in part, and concurring in the judgments).

101. *See* note 77 and accompanying text *supra*.

102. 438 U.S. at 623.

position of capital punishment caused by unlimited jury discretion.[103] According to Justice White, certainty requires that capital defendants similarly situated not be treated differently.[104] Because Justice White dissented from the majority opinion in *Beck* on jurisdictional grounds,[105] it is not clear whether he perceives *Beck*, like *Lockett*, as fostering an erratic imposition of the death penalty.

The majority's approach in *Beck* and the plurality's approach in *Lockett* reflect a different interpretation of *Furman* than that held by Justice White. The plurality in *Lockett* adopted the *Gregg* plurality's interpretation of *Furman* which is not primarily concerned with certainty or regularity of punishment, but rather with the fair and rational imposition of capital punishment in every case. The *Lockett* plurality accepted the *Gregg* plurality's interpretation of *Furman* which is that *Furman* condemned unlimited jury discretion that allows a jury to base its decision to impose the death penalty on its own personal feelings about whether the defendant deserves to be executed.[106] The *Beck* Court also accepted this interpretation of *Furman* when it determined that Alabama's failure to allow the jury to convict a capital defendant of a lesser included noncapital offense might cause the jury to base its decision to impose the death penalty on its own personal feelings. The Court revealed its concern that in each case adequate alternatives be available to the jury to ensure that the imposition of the death penalty is not the result of irrational decision-making influenced by personal feelings.[107]

Beck is the first modern death penalty case in which one opinion was able to command a majority of the Court. Six Justices, including Justice Brennan, joined in the *Beck* opinion.[108] In *Beck* the *Gregg* plurality of Justices Stewart, Powell, and Stevens was joined by Chief Justice Burger and Justice Blackmun. The implication of this majority can be understood only by examining the evolution of Chief Justice Burger's and Justice Blackmun's death penalty analyses.

In *Furman* Chief Justice Burger dissented,[109] maintaining that the approach taken by Justices Stewart and White emphasizing the rationality of the sentencing process fundamentally misconceived the nature of the eighth amendment's guarantee against cruel and unusual punishment. He also maintained that such an approach was without

103. *See* Palmer, *Two Perspectives on Structuring Discretion: Justices Stewart and White on the Death Penalty*, 70 J. CRIM. L. & CRIMINOLOGY 194, 198-99 (1979).

104. *Id.*

105. *See* notes 39-41 and accompanying text *supra*.

106. *See* note 77 and accompanying text *supra*.

107. 447 U.S. at 640.

108. *See* note 16 *supra*.

109. *See* note 57 and text accompanying notes 57 & 58 *supra*.

precedent.[110] In *Gregg* the Chief Justice joined in the concurring opinion of Justice White, agreeing with Justice White's requirement of regularity and certainty in the imposition of the death penalty.[111] However, in part III of his *Lockett* opinion the Chief Justice cited the approach of the *Gregg* plurality, indicating that this was the approach to be utilized in death penalty cases.[112] Justice White, with whom the Chief Justice had agreed in *Gregg*, dissented from the reasoning of the Chief Justice's opinion in *Lockett*, reaffirming the approach he followed in *Gregg*.[113] Immediately prior to *Beck*, in *Godfrey v. Georgia*,[114] Chief Justice Burger dissented from the plurality opinion of Justice Stewart because he believed that the Court in *Godfrey* was telling the states which of its intentional murderers may be given the death penalty.[115] However, the Chief Justice did reaffirm his support of the analytic approach to death penalty analysis.[116]

Justice Blackmun dissented in *Furman*.[117] Although he noted his personal opposition to the death penalty, he maintained that the Court must defer to the states in criminal matters involving it.[118] In *Gregg* Justice Blackmun concurred in the judgment of the Court, citing his *Furman* dissent.[119] In *Lockett* Justice Blackmun concurred only in the judgment of the Court, offering a different rationale for the reversal.[120] He believed that the petitioner's death sentence should have been vacated on the grounds that the Ohio death penalty statute did not allow consideration of the extent of the petitioner's involvement in the crime for which she was charged; and that the Ohio rule of criminal procedural that gives the sentencing court the discretion to bar the death penalty if defendant pleads guilty, but no such discretion if defendant goes to trial, creates unconstitutional disparity of sentencing

110. 408 U.S. at 396-97 (Burger, C.J., dissenting).

111. *See* text accompanying note 62 *supra*. In addition to joining in Justice White's opinion, Chief Justice Burger and Justice Rehnquist filed a statement in which they concurred in the analysis of Justice White. 428 U.S. at 226 (Burger, C.J., and Rehnquist, J., concurring).

112. *See* 438 U.S. at 597-609.

113. 438 U.S. at 621 (White, J., concurring in part, dissenting in part, and concurring in the judgment). *See* text accompanying notes 100-102 *supra*.

114. 446 U.S. 420 (1980). *See* note 82 *supra*.

115. 446 U.S. at 443-44 (Burger, C.J., dissenting).

116. *Id.* at 443 (Burger, C.J., dissenting). The Chief Justice noted that the Court must ensure that the rights of a capital defendant are scrupulously protected and that the jury performs its sentencing task with meticulous care. *Id.*

117. 408 U.S. at 405 (Blackmun, J., dissenting). *See* note 57 and text accompanying notes 57 & 58 *supra*.

118. 408 U.S. at 410.

119. 428 U.S. at 227 (Blackmun, J., concurring in the judgment) (citing Furman v. Georgia, 408 U.S. at 405 (Blackmun, J., dissenting)). *See* note 62 *supra*.

120. 438 U.S. at 613 (Blackmun, J., concurring in part and concurring in the judgment).

procedures.[121] However, in *Godfrey* Justice Blackmun joined Justices Stewart, Powell, and Stevens in the plurality opinion asserting that death penalty statutes must be tailored and applied to avoid the arbitrary and capricious imposition of death.[122]

Now, in *Beck*, Chief Justice Burger and Justice Blackmun have joined in Justice Stevens' majority opinion. Thus, both of the Justices now agree with the interpretation of *Furman* by the *Gregg* plurality which maintains that the imposition of capital punishment be fair and rational in every case. Only future death penalty cases will reveal the nature and extent of the agreement between the Justices who joined in the *Beck* majority opinion.

Scott T. Redman

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121. *Id.*
122. 446 U.S. at 422. *See* note 82 *supra.*