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An Impermissible Punishment: The Decline of Consistency as a Constitutional Goal in Capital Sentencing

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Notes and Comments

An Impermissible Punishment: The Decline of Consistency as a Constitutional Goal in Capital Sentencing

I. Introduction

In *Furman v. Georgia*,[1] the Supreme Court struck down state statutes which had given juries unfettered discretion to impose the death penalty. With *Furman's* declaration that certain methods of imposing the death penalty were unconstitutional, an eighth amendment due process analysis of the death penalty was born.[2] In subsequent cases, the Supreme Court has struggled to formulate and accommodate two requirements of a constitutional capital sentencing process: measured consistent application of the death penalty, and individualized consideration of the accused. The result has been a bifurcated due process analysis. To assure consistency, the Court has traditionally relied upon statutory aggravating factors which limit and guide sentencer discretion.[3] To satisfy the goal of individualization, the Court has focused upon sentencer consideration of all mitigating factors.[4]

The Supreme Court has repeatedly stated that constitutional sentencing decisions require consistency and individualization. Recent cases, however, reveal that the Court is placing decreasing emphasis upon consistency as a constitutional goal, while upholding procedures that diminish the chance that consistency can ever be achieved. Part II of this article traces the

1. 408 U.S. 238 (1972) (per curiam).

2. *See* Note, *The Bitter Fruit of* McGautha: Eddings v. Oklahoma *and the Need for Weighing Method Articulation in Capital Sentencing*, 20 AM. CRIM. L. REV. 63 (1982).

3. *See infra* text accompanying notes 25-52.

4. *See infra* notes 53-65 and accompanying text.

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Court's due process analysis of capital punishment, focusing on the Court's concern with the goals of consistency and individualization. Part III examines the decline of consistency both as a goal and as a possibility in the application of the death penalty. Section A of Part III presents the Court's introduction of individualization in the composition of aggravating factors. This new element of individualization requires sentencer discretion on the aggravating side of the sentencing equation, and cannot be reconciled with the Court's mandate that aggravating factors be consistently applied. Section B of Part III explores the Court's approval of using nonstatutory aggravating factors in the sentencing proceeding. These factors further reduce the likelihood that the death penalty can be meted out with consistency. Finally, Section C of Part III analyzes the confusing overlap of aggravating and mitigating factors. This is a problem that has occupied little of the Court's attention, although it injects yet another element of arbitrariness into the sentencing procedure. Part IV concludes that the Court has allowed its concern for individualization to engulf the requirement of consistency, and that without this constitutionally mandated requirement of consistency, death is an impermissible punishment.

II. The Supreme Court's Eighth Amendment Due Process Analysis

A. Furman v. Georgia

In 1971, in *McGautha v. California*,[5] the Supreme Court rejected a fourteenth amendment due process challenge to capital punishment. The Court refused to find that standardless jury discretion resulted in the capricious and arbitrary imposition of death. The Court noted the enormous difficulty in establishing definitive standards and held that the untrammelled discretion of the jury was not constitutionally intolerable.[6]

Despite *McGautha's* rejection of a fourteenth amendment due process challenge to the death penalty, not all procedural arguments were to be dismissed. One year later in *Furman v.*

5. 402 U.S. 183 (1971).
6. *Id.* at 207.

Georgia,[7] the Court, relying on the eighth amendment, struck down state death penalty statutes that gave juries unfettered discretion.[8] Each of the nine justices submitted a separate opinion. While two justices held that the eighth amendment prohibited the death penalty altogether,[9] three justices were unwilling to hold the death penalty unconstitutional per se, and instead filed process-oriented critiques of the death penalty statutes before them. Justice Douglas ruled that the discretionary statutes were "unconstitutional in their operation. They are pregnant with discrimination."[10] Justice Stewart, after emphasizing the uniqueness and irrevocability of death, described the discretionary statutes as "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[11] He concluded 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 so freakishly imposed."[12] Justice White found the discretionary sentence invalid because it imposed the death penalty both infrequently and inconsistently, thereby reducing its deterrent effect.

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7. 408 U.S. 238 (1972) (per curiam).

8. The statutes at issue gave juries absolute discretion to determine whether the penalty for murder or rape would be death or a lesser punishment.

9. *Id.* at 305-06 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring).

10. *Id.* at 256-57 (Douglas, J., concurring). Justice Douglas noted that under discretionary statutes, juries and judges "have practically untrammeled discretion to let an accused live or insist that he die." *Id.* at 248. Justice Douglas concluded that such untrammeled sentencer discretion violated the due process clause of the fourteenth amendment, and the eighth amendment, because it resulted in arbitrary application of the death penalty. He also felt that the death penalty was meted out in a discriminatory fashion: "One searches our chronicles in vain for the execution of any member of the affluent strata of this society." *Id.* at 251-52. This discriminatory process could not be upheld: "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 punishment.'" *Id.* at 257.

11. *Id.* at 309 (Stewart, J., concurring).

12. *Id.* at 310. Although Justice Stewart was unwilling to rule capital punishment unconstitutional per se, he felt that the discretionary statutes before him were invalid for several reasons. In the first place, he saw the sentences as "cruel" under the eighth amendment because they went beyond the state legislatures' determination of what was necessary. Secondly, the sentences were "unusual" because infrequently imposed for murder and rarely for rape. Finally, the sentences were both "cruel and unusual" because they were inconsistently applied. Although many others had been convicted of rapes and murders in 1967 and 1968, the petitioners were among "a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.* at 309-10.

"[T]here is no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not."[13] The opinions of the concurring justices indicate that death can be a cruel and unusual *process* when meted out discriminatorily, arbitrarily and capriciously. In *Furman v. Georgia*, an eighth amendment due process analysis of capital punishment was born.

In his dissent, Chief Justice Burger resisted the Court's eighth amendment due process approach. The eighth amendment, he stressed, "is not concerned with the process by which a State determines that a particular punishment is to be imposed";[14] in fact, "[t]he approach of these concurring opinions has no antecedent in the Eighth Amendment cases."[15] Although Chief Justice Burger accused the Court of overruling *McGautha* "in the guise of an Eighth Amendment adjudication,"[16] *McGautha* in fact has never been explicitly reconsidered by the Court.[17] Thus the ghost of *McGautha* denies capital defendants the traditional tools of due process analysis,[18] while encouraging the Court to expand its formulation of an alternative eighth amendment due process doctrine.[19]

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13. *Id.* at 313 (White, J., concurring). Justice White reasoned that an infrequently imposed death penalty could not be justified by reference to its deterrent effect: "I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.*

14. *Id.* at 397 (Burger, J., dissenting). The Chief Justice argued that concern about the process of imposing the death penalty finds its source not in the eighth amendment, but in the fourteenth amendment, under a procedural due process argument. And such an argument, Chief Justice Burger concluded, had been foreclosed by the Supreme Court's earlier decision in *McGautha*. *Id. See supra* notes 5 and accompanying text.

15. *Furman*, 408 U.S. at 399 (Burger, J., dissenting). Chief Justice Burger argued that "[t]he Eighth Amendment was included in the Bill of Rights to assure that certain types of punishment would never be imposed, not to channelize the sentencing process." *Id.*

16. *Id.* at 400.

17. *See* Note, *supra* note 2 at 66 (concluding that the constitution requires the articulation of the weighing methods used by the sentencer in capital cases, and suggesting guidelines and procedures for appellate court review).

18. *Id.*

19. The Court or controlling plurality has adhered to its eighth amendment process analysis except in a few cases which do not raise critical capital sentencing issues. *See* Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 10-11, n.37 (1980). The cases which do not employ an eighth amendment process rationale are Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion) (due process right to know information relied upon by sentenc-

B. *The 1976 Death Penalty Cases and Their Legacy*

The legislatures of thirty-five states responded to *Furman's* ban on complete discretion in sentencing procedures by drafting new statutes that sought to incorporate the procedural criteria suggested in the concurring opinions of *Furman.*[20] However, because of the plethora of opinions in *Furman* the resulting statutes differed widely. Generally, the statutes took one of two forms: (1) a mandatory death penalty statute, imposing death for a certain specified category of crimes with no sentencer discretion, or (2) a guided discretion statute, giving the sentencer discretion in imposing death but guiding such discretion through the consideration of various aggravating and mitigating factors.[21]

Four years after *Furman*, in a group of decisions known collectively as the 1976 death penalty cases, the Supreme Court expanded its eighth amendment process analysis and addressed constitutional issues raised by five of the post-*Furman* death penalty statutes.[22] The Court upheld the guided discretion statutes of Georgia, Florida and Texas, but struck down the mandatory statutes of North Carolina and Louisiana. The Court determined that the process used to impose death must comport with " 'the evolving standards of decency that mark the progress of a maturing society,' "[23] standards which the Court saw re-

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ing judge); Dobbert v. Florida, 432 U.S. 282 (1977) (death penalty challenge based on ex post facto and equal protection clause); Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (invalidating hearsay rule exclusion of mitigating evidence); and Adams v. Texas, 448 U.S 38 (1980) (invalidating death sentence because jurors were selected improperly).

20. For details of the laws of the 35 states, see MODEL PENAL CODE AND COMMENTARIES, Part II, Comment to § 210.6 at 156-57 and nn. 144-48 (1980).

21. Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Captial Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317, 319-20 (1981).

22. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion) (upholding Georgia's guided discretion sentencing statute for the death penalty); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion) (upholding Florida's guided discretion sentencing statute in which aggravating circumstances are weighed against mitigating circumstances by the sentencer); Jurek v. Texas, 428 U.S. 262 (1976) (upholding Texas' guided discretion death penalty statute requiring the jury to find one statutory aggravating factor before death could be imposed); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion) (invalidating North Carolina's statute making death mandatory for first degree murderers); Roberts v. Louisiana, 428 U.S. 325 (1976) (invalidating Louisiana's statute making death mandatory for first degree murderers).

23. *Gregg*, 428 U.S. at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958).

flected in the decisions of legislatures and juries.[24] The Court then embarked upon a bifurcated due process analysis to establish and accommodate two crucial, and seemingly contradictory, procedural goals: consistent application of the death penalty and individualized consideration of the accused.

1. *The Quest for Consistency*

The Court upheld the constitutionality of the guided discretion statutes at issue in *Gregg v. Georgia*,[25] *Proffit v. Florida*,[26] and *Jurek v. Texas*.[27] *Gregg* is the principal case. In *Gregg*, the defendant was charged with committing armed robbery and murder. The Georgia statute upheld in *Gregg* retained the death penalty for six crimes: murder, armed robbery, rape, treason, aircraft hijacking, and kidnapping for ransom or where the victim is harmed.[28] The trials were bifurcated;[29] they had a sepa-

24. "[T]he constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards." *Id.* at 175. The Court further noted that "[t]he jury also is a significant and reliable objective index of contemporary values." *Id.* at 181.

25. 428 U.S. 153 (1976) (plurality opinion).

26. 428 U.S. 242 (1976) (plurality opinion).

27. 428 U.S. 262 (1976) (plurality opinion).

28. The sections of the Georgia statute applicable to the defendant in *Gregg* were as follows:

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

§ 1, 1968 Ga. Laws 1249 (current version at GA. CODE ANN. § 16-5-1 (1984)). *See also Gregg*, 428 U.S. at 162 n.4.

> A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years.

§ 1, 1969 Ga. Laws 810 (current version at GA. CODE ANN. § 16-8-41 (1984)). *See also Gregg*, 428 U.S. at 163 n.5.

29. A bifurcated trial, one in which the question of sentence is not considered until

rate guilt and penalty phase. The death penalty could not be imposed unless one of the ten aggravating circumstances specified in the statute[30] was found applicable to the defendant beyond a reasonable doubt.[31] In addition, the sentencer was to

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the determination of guilt has been made, appears to be constitutionally mandated in capital cases. As the Supreme Court has noted, a bifurcated trial enables the jury to hear information relevant to the question of penalty in order to impose a rational sentence without prejudicing the defendant on the question of guilt. *See Gregg*, 428 U.S. at 191. Such a "system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*." *Id.* at 192.

30. The aggravating factors as provided in the statute were:

> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
>
> (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
>
> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
>
> (8) The offense of murder was commited against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
>
> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
>
> (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Act of March 28, 1973, No. 74, § 3, 1973 Ga. Laws 159, 164-65 (current version at GA. CODE ANN. § 17-10-30 (1982)). *See also Gregg*, 428 U.S. at 165 n.9.

31. The statute also provided:

> (c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least

consider additional nonstatutory evidence presented in extenuation, mitigation and aggravation of punishment.[32]

In *Gregg*, the jury was given instructions about three of the statutory aggravating circumstances:

> One—That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery.
>
> Two—That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> Three—The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of [the] mind of the defendant.[33]

The jury found the petitioner guilty of the first and second circumstances and returned a verdict of death.[34]

The petitioner attacked the statute on several grounds. First, he claimed that the statute was broad and vague, allowing for arbitrary and capricious infliction of the death penalty. Specifically, the petitioner cited the seventh statutory aggravating circumstance that authorized death if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."[35] The Court disagreed that such language was overly broad or vague. It expressed confidence that the Georgia courts would interpret the statute narrowly. The Court stated: "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme

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> one of the statutory aggravating circumstances enumerated in subsection (b) of this code section is so found, the death penalty shall not be imposed.

Id.

32. Act of March 20, 1974, No. 854, § 7, 1974 Ga. Laws 352, 357 (current version at GA. CODE ANN. § 17-10-2 (1982)). The statute provided that the evidence could include

> the record of any prior criminal convictions and pleas of guilt or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible.

Id.

33. *Gregg*, 428 U.S. at 161.

34. *Id.*

35. *Id.* at 201.

Court of Georgia will adopt such an open-ended construction."[36]

The petitioner also objected to the discretion retained by the sentencing body under the Georgia statute, arguing that the requirements of *Furman* were not satisfied because the jury retained the power to decline to impose the death penalty even if statutory aggravating circumstances were found.[37] The Court, however, saw no inconsistency between the *Furman* rule against arbitrary sentencer discretion and the discretion retained by the sentencing body under the Georgia statute. Instead, the Court stated that the petitioner "misinterpreted" *Furman*:[38] *Furman* dealt with the decision to *impose* the death penalty. By contrast, *Gregg* dealt with the decision to *remove* a defendant from consideration as a candidate for the death penalty.[39] Although the decision to impose death required the sentencer to be guided by specific standards, sentencer discretion was constitutionally permissible in the decision to impose mercy: "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."[40] Thus consistent application of the death penalty was not to be a primary goal when considering mitigating factors.

2. *The Legislative Role*

Gregg upheld a statutory scheme in which the death penalty was prohibited unless at least one of the aggravating circumstances specified in the statute was applicable to the defendant.[41] The Court emphasized the importance of the legislature in the determination of aggravating factors. The legislature was to act as a crucial limit on the discretion of the jury: "No longer can a jury wantonly and freakishly impose the death penalty; it is always circumscribed by the legislative guidelines."[42]

A subsequent case, *Godfrey v. Georgia*,[43] seemed to reinforce *Gregg's* insistence on the legislative role in determining ag-

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36. *Id.*
37. *Id.* at 203.
38. *Id.*
39. *Id.* at 187
40. *Id.* at 199.
41. *Id.* at 162-66. For a list of the 10 aggravating factors, see *supra* note 30.
42. *Id.* at 206-07.
43. 446 U.S. 420 (1980) (plurality opinion).

gravating factors. *Godfrey* involved the same Georgia statute upheld in *Gregg*. In *Godfrey*, the petitioner murdered his wife and mother-in-law and injured his fleeing daughter. The petitioner had acknowledged when caught: "I've done a hideous crime."[44] At the sentencing hearing the jury imposed the sentence of death for both of the murder convictions, specifying that the aggravating circumstance for each conviction was "that the offense of murder was outrageously or wantonly vile, horrible and inhuman."[45] The Supreme Court reversed, noting that under the statute, the circumstance only applied to cases which demonstrated "torture, depravity of mind or an aggravated battery to the victim."[46] Although the Georgia court had appropriately limited the statute's application in *Gregg v. Georgia*, it failed to do so in *Godfrey*. The prosecutor in *Godfrey* had stated three times during the sentencing proceeding that "the case involved no allegation of 'torture' or of an 'aggravated battery.'"[47] The Supreme Court itself concluded that the petitioner's crimes could not be said to reflect "a consciousness materially more 'depraved' than that of any other person capable of murder."[48] The Court did not hold the statutory aggravating factor invalid per se, but merely reversed the lower state court's overly broad and vague interpretation of the factor. Left without an applicable statutory aggravating factor to support the sentence of death, the Court vacated the sentence.[49]

As several commentators have noted, the Court's analysis in *Godfrey* suggests that in the absence of specific statutory aggravating circumstances, the death sentence may not be imposed without a degree of arbitrariness unacceptable under *Furman* and *Gregg*.[50] Taken together, *Gregg* and *Godfrey* seem to establish a constitutional imperative for finding at least one legislatively determined aggravating factor. This constitutional imperative stems both from the legislative role as an indicator of the

44. *Id.* at 426.
45. *Id.*
46. *Id.* at 431. For the full text of this aggravating factor, see *supra* note 30.
47. *Id.* at 426.
48. *Id.* at 433.
49. *Id.* at 429-33.
50. These commentators are listed in Note, *supra* note 2, at 73 n.113.

"evolving standards of decency,"[51] and from the eighth amendment's procedural requirement that the death penalty be applied consistently.[52]

3. *The Importance of Individualization*

In *Woodson v. North Carolina*[53] and *Roberts v. Louisiana*,[54] the Supreme Court struck down mandatory death sentences for

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51. Trop v. Dulles, 356 U.S. 86, 101 (1958).

52. This eighth amendment procedural requirement was first identified in Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

53. 428 U.S. 280 (1976). In *Woodson*, the defendants had been convicted of first degree murder for their participation in an armed robbery that caused death. The North Carolina statute authorized mandatory death for all first degree murderers and provided:

> Murder in the first and second degree defined; punishment. -A [sic] murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

Woodson, 428 U.S. at 285 n.4 (quoting N.C. GEN. STAT. § 14-17 (1975)).

54. 428 U.S. 325 (1976). In *Roberts*, the defendants had been convicted of first degree murder for a killing which occurred during an armed robbery and were sentenced to death under a mandatory statute. The Louisiana statute provided:

> First degree murder is the killing of a human being:
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> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
>
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
>
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
>
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]
>
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
>
> For the purposes of Paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorney's investigator.
>
> Whoever commits the crime of first degree murder shall be punished by death.

first degree murderers. The Court rested its decision on a number of grounds. The Court considered the consistency requirement of *Furman* and *Gregg*. It acknowledged that mandatory statutes enacted in response to *Furman* attempted to sever standardless discretionary sentencing procedures from death penalty statutes. The Court nevertheless concluded that mandatory statutes themselves resulted in an absence of standards, leading to arbitrary and wanton jury discretion in the imposition of death.[55] Mandatory statutes could not fulfill "*Furman's* basic requirement" for consistency.

In both *Woodson* and *Roberts*, the Court held that a process of individualization, which considered mitigating factors, was constitutionally required.[56] In *Woodson*, the Court noted that death is a punishment different from all others in its irrevocability. The Court emphasized the importance of a process that accords significance to considerations of individual "compassionate or mitigating factors stemming from the diverse frailties of humankind."[57] These mitigating factors could not be ignored. Otherwise, as Justice Stewart eloquently lamented, defendants would become "members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death,"[58] without chance of mercy. Citing the "fundamental respect for humanity underlying the Eighth Amendment," the Court stated that "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death."[59] Individualization was raised to the level of a constitutional requirement.

4. *The Role of the Sentencer*

Woodson did not specify whether the authority to determine and consider mitigating factors lay with the legislature or with the sentencing body. Two years later, this question was an-

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LA. REV. STAT. ANN. § 14:30 (1983).

55. *Woodson*, 428 U.S. at 303; *Roberts*, 428 U.S. at 334-35.

56. *Woodson*, 428 U.S. at 304; *Roberts*, 428 U.S. at 333.

57. *Woodson*, 428 U.S. at 304.

58. *Id.*

59. *Id.*

swered by *Lockett v. Ohio.*[60] In *Lockett*, the petitioner had been convicted of aggravated murder. She challenged the Ohio statute because it did not permit the sentencing judge to consider, "as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime."[61] The Ohio statute was limited to the consideration of three specific mitigating factors: whether the victim facilitated the offense, whether the offender was under duress, coercion or strong provocation, and whether the offender suffered from mental deficiencies.[62] Drawing upon *Woodson's* reasoning, the

60. 438 U.S. 586 (1978) (plurality opinion).

61. *Id.* at 597.

62. *Id.* at 589. The challenged statute provided:

Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the President of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in § 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a

Court in *Lockett* concluded that the consideration of mitigating factors could not be limited by statute:

> [T]he Eighth and Fourteenth amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[63]

Once again, the Court stressed the importance of individualization, noting that "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."[64] Thus, it is for the trial judge and jury to consider mitigating evidence. This rule finds its roots in the constitutionally compelled goal of individualization and in the sentencer's position as an index of contemporary values.[65]

III. The Decline of Consistency as a Constitutional Goal

The examination of sentencer discretion in *Lockett* led Justice White, in his dissent, to comment that "[t]he Court has now completed its about-face since *Furman v. Georgia*."[66] *Furman* held that unfettered sentencer discretion in capital punishment

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> prepondence [sic] of the evidence:
>
> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Act of Jan. 1, 1974, § 2929.04, 134 Ohio Laws 1866, 1979-81 (current version at OHIO REV. CODE ANN. § 2929.04 (1982)).

63. *Lockett*, 438 U.S. at 604 (emphasis in original).

64. *Id.* at 605.

65. Several commentators have interpreted *Lockett* as suggesting that the defendant is entitled to a jury trial on the grounds that the jury is a better index of "evolving standards of decency" and contemporary values than is the trial judge. *See Death Penalty, The Supreme Court, 1977 Term*, 92 HARV. L. REV. 99, 108 (1978); Gillers, *supra* note 19, at 40-41. But, in Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court noted that jury sentencing is not constitutionally required and that the trial judge yields more consistent sentencing results. *Id.* at 252.

66. *Lockett*, 438 U.S. at 622 (White, J., dissenting). *See also supra* notes 7-15 and accompanying text.

was unconstitutional. Yet *Lockett* seemed to be requiring complete sentencer discretion, compelling a "restoration of the state of affairs at the time *Furman* was decided."[67] Recently, a commentator agreed with Justice White's dissent, noting that "[t]he jurisprudence of death has come almost full circle."[68] Other commentators, however, find no inherent contradictions in the Court's bifurcated analysis, reasoning that the eighth amendment requires "reliability and guided discretion in the decision to impose death, but not in the decision to afford mercy by imposing a noncapital sentence."[69] They argue that *Lockett* is "entirely consistent with *Furman* . . . because it grants broad sentencer discretion only on the mitigating and not on the aggravating side of the sentencing equation."[70]

The argument that *Lockett* is consistent with *Furman* has a superficial soundness. It assumes, however, that there are two separate and distinct endeavors: (1) the quest to achieve consistent application of aggravating factors, and (2) the drive toward individualization through the consideration of mitigating factors. Such is not the case. An examination of the composition of aggravating and mitigating factors suggests that the Court is injecting a new element of individualization into the definition and purpose of aggravating factors. Clearly, the Court is granting sentencer discretion on the *aggravating* side of the sentencing equation, thereby reducing the likelihood that these aggravating factors can be consistently applied. The use of nonstatutory aggravating factors, and the frequent overlap and confusion of aggravating and mitigating factors, further blur the distinction between the drives toward consistency and individualization. The blurring of this distinction undercuts the probability of achieving reliability and guided discretion in the decision to impose death. Without reliability and guided discretion, there does indeed seem to be "a restoration of the state of affairs at the time *Furman* was decided."[71] Without consistent application of the death penalty, capital punishment becomes an impermissible

67. *Lockett*, 438 U.S. at 623 (White, J., dissenting).

68. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1154 (1980).

69. Hertz & Weisberg, *supra* note 21, at 376.

70. *Id.* at 374.

71. *Lockett*, 438 U.S. at 623 (White, J., dissenting).

punishment.

A. *Individualization as a Constitutional Goal in the Formation and Application of Aggravating Factors*

The Supreme Court has upheld guided discretion statutes that require the sentencing body to consider relevant mitigating and aggravating factors to determine an appropriate penalty.[72] The Court has defined mitigating factors as those that address some aspect of the defendant's character, prior record, or the circumstances of his offense.[73] The Court, however, has not examined the composition of aggravating factors closely; it has not placed many constitutional limits on what may be considered an aggravating factor. The Court appears to have given the legislature a free hand in deciding the content and relevance of aggravating factors. In *Gregg v. Georgia*,[74] the Court extolled the legislative authority to determine aggravating factors, noting that the jury should be given guidance regarding the factors, which the state legislature, "representing organized society, deems particularly relevant to the sentencing decision."[75] Perhaps only one traditional judicial mandate for statutory aggravating factors is clear: they must be applied with consistency.[76]

Despite the traditional reluctance of the Court to define aggravating factors, recent Supreme Court cases appear to do just that. In *Enmund v. Florida*,[77] *California v. Ramos*,[78] and *Zant v. Stephens*,[79] the Supreme Court ties the content of aggravating factors to individualized consideration of the defendant, his

72. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262 (1976).

73. *See* Lockett v. Ohio, 438 U.S. 586 (1976); Eddings v. Oklahoma, 455 U.S. 104 (1982).

74. 428 U.S. 153 (1976).

75. *Gregg*, 428 U.S. at 192.

76. Even here, however, one commentator feels that the Court has interpreted "consistency" broadly, not taking problems of facial statutory overbreadth or vagueness too seriously. *See* Radin, *supra* note 68, at 1153. For example, in Jurek v. Texas, 428 U.S. 262 (1976), where the defendant was sentenced to death for the rape and strangulation of a young girl, the Court allowed as an aggravating factor the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Radin finds this factor vague and speculative.

77. 458 U.S. 782 (1982).

78. 463 U.S. 992 (1983).

79. 462 U.S. 862 (1983).

background, and the circumstances of his offense. By incorporating this new element of individualization into the definition of aggravating factors, the Supreme Court seems to have all but abandoned its oft-asserted goal of consistent application of the death penalty.

1. Enmund v. Florida

In *Enmund v. Florida*,[80] the Supreme Court held that the death penalty was a disproportionate penalty when inflicted on a mere accomplice to a murder who had not actually killed nor intended to kill.[81] Enmund had been tried for the robbery and fatal shooting of two elderly people. At the sentencing hearing, the trial judge expressly found that "the armed robbery was planned ahead of time by the defendant Enmund . . . and that he had shot each of the victims while they lay prone in order to eliminate them as witnesses."[82] In addition, the court found that Enmund had actively participated in an attempt to avoid detection by disposing of the murder weapons.[83] The judge concluded that there were no mitigating factors and four statutory aggravating factors applicable: (1) the capital felonies were committed while the defendant was engaged in or was an accomplice in the commission of an armed robbery, (2) the felonies were committed for pecuniary gain, (3) the felonies were heinous, atrocious and cruel, and (4) the defendant had been previously convicted of a violent felony.[84] Enmund was sentenced to death.

On appeal, the Florida Supreme Court affirmed the death sentence, although it disagreed with the trial court's finding of the facts. The Florida Supreme Court determined that Enmund had not planned the robbery and did not shoot the victims.[85] Nevertheless, the Florida Supreme Court found that the death penalty was a proper sentence because Enmund's role as driver of the get-away car made him a principal in the second degree. He was " 'constructively present aiding and abetting the com-

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80. 458 U.S. 782 (1982).
81. *Id.* at 786-88.
82. *Id.* at 829 (O'Connor, J., dissenting).
83. *Id.*
84. *Id.* at 785.
85. *See id.* at 786.

mission of the crime of robbery'" at which a killing occurred.[86] The Florida Supreme Court reasoned that the interaction of the law of principals and the felony murder rule serves to impute the lethal acts of a felon to his co-felon.[87] Thus, Enmund was properly convicted of first degree murder, which made him eligible for the death penalty under Florida law.[88] Although the Florida Supreme Court rejected two of the statutory aggravating factors relied upon by the trial judge,[89] it upheld the death sentence because the remaining two statutory aggravating factors applied. The aggravating circumstances relied upon were: (1) the capital felonies were committed while the defendant was an accomplice in an armed robbery; and (2) the defendant had a prior conviction of robbery involving violence.[90]

On appeal, the Supreme Court overturned the Florida Supreme Court. The Court's broad opinion held that the death penalty cannot be imposed on a mere accomplice to a murder if he did not take life nor intend to take life.[91] Although the Court did not directly address the constitutionality of the statutory aggravating factor allowing death to be imposed on a mere accomplice to a robbery, its sweeping opinion can be read as invalidating such a factor, at least if used as the sole basis for a decision to impose capital punishment. After all, the death penalty cannot be imposed on an accomplice under the felony-murder rule who did not himself kill nor intend to kill. How then can we impose death if authorized solely by an aggravating factor speci-

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86. *Id.* (quoting Enmund v. Florida, 399 So. 2d 1362, 1370 (Fla. 1981)).

87. *Id.* Under Florida's felony murder rule, the perpetration or attempted perpetration of and intent to commit a felony during which a murder occurs is sufficient to sustain a murder conviction. *See* FLA. STAT. ANN. § 782.04(1)(a) (West Supp. 1984). The included felonies under Florida law are limited to trafficking, arson, sexual battery, burglary, robbery, kidnapping, escape, aircraft piracy, destructive device or bomb. *Id.* § 782.04(2).

88. *See* FLA. STAT. ANN. § 782.04(1)(a) (West Supp. 1984); *id.* § 775.082(1) (West 1976 and Supp. 1983).

89. *Enmund*, 458 U.S at 787. The Florida Supreme Court felt that the factor, "killing for pecuniary gain" overlapped with the factor of killing during an armed robbery. The court therefore excluded it for repetitiveness. The court also found that the aggravating factor of "heinous, atrocious and cruel" killings was not applicable to Enmund, for he had not in fact been the one to kill the victims. The factor was excluded for overly broad application. *Id.*

90. *Id.* at 785. *See* FLA. STAT. ANN. § 921.141(5)(b),(d),(f),(h) (West Supp. 1984).

91. *Enmund*, 458 U.S. at 801.

fying that the defendant was a mere accomplice to a killing?[92] Thus, in *Enmund*, the Supreme Court essentially dictated guidelines for defining aggravating factors in the capital sentencing process.

The *Enmund* Court adopted an analysis similar to that which the Court had used in *Coker v. Georgia*,[93] when it held that the death penalty was excessive punishment for the crime of rape. In *Enmund*, the Court engaged in a lengthy examination of legislative determinations about the appropriateness of authorizing the death penalty solely for participating in a robbery in which another robber takes a life.[94] Whether the Court conclusively proves a legislative repudiation of the death penalty for one such as Enmund is debatable.[95] Yet, the legislative opin-

92.FLA. STAT. ANN. § 921.141(5)(d).

93. 433 U.S. 584 (1977).

94. *Enmund*, 458 U.S. at 789-94. Of 36 state and federal jurisdictions authorizing the death penalty, the Court noted that only nine jurisdictions authorized the imposition of the death penalty solely for participation in a robbery in which another robber takes life. According to the Court's compiliation, the nine jurisdictions are:California, Florida, Georgia, Mississippi, Nevada, South Carolina, Tennessee, Washington, and Wyoming. *Id.* at 789 n.5.

95. The Court concluded that only nine jurisdictions authorized the death penalty in such a situation, and that legislative decisions weighed "on the side of rejecting capital punishment for the crime at issue." *Id.* at 793. Yet there are several disturbing aspects to the Court's analysis. In the first place, the use of state by state comparisons to strike down a particular statute may be less than convincing if one considers the principle of federalism. Even if only nine of the 36 jurisdictions authorizing the death penalty permit its imposition in a situation like *Enmund*, perhaps these nine jurisdictions should be respected. Secondly, and more importantly, the Court's use of statistics falls far short of demonstrating a national legislative mandate against capital punishment in this case. The Court itself admits that the current legislative judgments are not "as compelling as the legislative judgments considered in *Coker*," *id.*, in which Georgia was the only jurisdiction in the United States to authorize the death penalty if the rape victim was an adult woman. *See Coker*, 433 U.S. at 595-96.

In fact, it is not clear that only nine jurisdictions imposed the death penalty on a defendant who did not commit the homicidal act. Eleven states — not nine — wrote as amici curiae on Florida's behalf before the Supreme Court. They were Arizona, Arkansas, California, Georgia, Mississippi, Missouri, Nebraska, New Mexico, Tennessee, Texas, and Utah. Moreover, Justice O'Connor's dissent cites 20 statutes which permit imposition of the death penalty in this situation. *Enmund*, 458 U.S. at 820 (O'Connor, J., dissenting). The plurality opinion dismisses Justice O'Connor's figures by claiming that these other jurisdictions require an intent to kill before death will be imposed. *Enmund*, 458 U.S. at 789.

Furthermore, the Court's discussion of mitigating circumstances in the various state statutes is somewhat misleading. The Court notes that "six . . . States make it a statutory *mitigating* circumstance that the defendant was an accomplice in a capital felony ions about the appropriateness of death are ultimately not the point. As the Court finally asserts: "It is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty."[96] The Court concludes that the eighth amendment does not permit imposition of the death penalty when the defendant has not himself killed nor intended to kill.

In explaining its decision the Court observes:

> The question before us . . . is the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," . . . which means that we must focus on "relevant facets of the character and record of the individual offender."[97]

Although individualization has been repeatedly cited as the basis for the decision to impose mercy, *Enmund* reveals the Supreme Court holding for the first time that individualization in the formation and application of aggravating factors is a constitutional requirement in the decision to impose *death*.

2. California v. Ramos

This new emphasis on individualization in the formation and application of aggravating factors does not appear to be a passing fancy. *California v. Ramos*,[98] decided a few months after *Enmund*, indicates that the Supreme Court will go to great

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committed by another person and his participation was relatively minor." *Id.* at 791-92 (emphasis in original). The Court then cites the statutes of Connecticut, Indiana, Montana, Nebraska, Arizona, and North Carolina. *Id.* at 792 n.12. Although it is not mentioned, the Florida statute at issue in *Enmund* also allows the defendant's minor participation as an accomplice to a capital felony committed by another person to be considered a statutory mitigating factor. FLA. STAT. ANN. § 921.141(6)(d) (West Supp. 1984). Thus, the mere fact of Enmund's participation would not necessitate the imposition of death if such participation were minor. In fact, it is this statutory mitigating circumstance which constitutes the basis of the dissent's argument to remand the case to the trial Court: "In his erroneous belief that the petitioner had shot both of the victims . . . in order to eliminate them as witnesses, the trial judge necessarily rejected the only argument offered in mitigation, that the petitioner's role in the capital felonies was minor . . . ." *Enmund*, 458 U.S. at 830.

96. *Enmund*, 458 U.S. at 797 (emphasis added).

97. *Id.* at 798 (emphasis in original).

98. 103 S. Ct. 3446 (1983).

lengths to uphold a legislative factor with an aggravating effect precisely because it focuses on the individual. In *Ramos*, the defendant had been convicted of first degree murder. During the penalty phase of the defendant's trial, California law required a jury instruction, known as the Briggs Instruction,[99] to inform the jury that a sentence of life without possibility of parole might in the future be commuted by the governor to permit parole.[100] Coming as the penultimate factor in a list of aggravating and mitigating factors, the instruction in *Ramos* had an aggravating effect. The jury sentenced the defendant to death.

The California Supreme Court concluded that the Briggs Instruction was unconstitutional, for it injected an entirely irrelevant and speculative factor into the sentencing proceedings by focusing on the possible behavior of a present or future governor. In addition, the court found the instruction to be biased, for it told the jurors only "half the story."[101] The instruction did not inform the jury that a death sentence, like a sentence of life without parole, could similarly be commuted or modified by the governor.[102]

On appeal, the Supreme Court reversed.[103] Justice O'Connor's majority opinion explained that the Briggs Instruction did not lead the jury to speculate whether a future governor would commute a life sentence. Instead, the instruction invited the jury to assess whether the defendant was someone whose probable future behavior made it undesirable that he be permitted to return to society.[104] Thus, the jury's deliberation was in a sense "individualized"[105] because it considered this aggravating

99. Named after the senator who supported it, the "Briggs Instruction" was incorporated into the California Penal Code as a result of a 1978 voter initiative popularly known as the Briggs Initiative. *See Ramos*, 103 S. Ct. at 3450 nn.3-4.

100. The judge in *Ramos* delivered the following instruction:

> You are instructed that under the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime. Under this power a governor may in the future commute a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

Ramos, 103 S. Ct. at 3450.

101. People v. Ramos, 30 Cal. 3d 553, 597 (1982).

102. *Id.* at 596.

103. California v. Ramos, 103 S. Ct. 3446 (1983).

104. *See* California v. Ramos, 103 S. Ct. at 3455.

105. *See id.*

information.

Justice Blackmun's dissent characterized the majority opinion as an "intellectual sleight of hand of legal analysis."[106] Regardless of whether we accept Justice O'Connor's interpretation of the Briggs Instruction, it is interesting to note that instead of turning to questions of reliability or consistency — the usual justifications for upholding statutory factors with an aggravating effect — the opinion invokes individualization as the basis for the validity of this aggravating factor. The opinion cites various Supreme Court cases to support its emphasis upon individualization, failing to note that these cases all concern mitigating, not aggravating factors.[107]

3. Zant v. Stephens

The Supreme Court reiterated the role of individualization in the context of aggravating factors in *Zant v. Stephens*.[108] There the defendant had been sentenced to death for murder after the jury found three statutory aggravating factors applicable.[109] One of the factors was subsequently held unconstitution-

106. *Id.* at 3468 (Blackmun, J., dissenting).

107. *Id.* at 3452-53. The Court cites Woodson v. North Carolina, 428 U.S. 280 (1976) and Lockett v. Ohio, 438 U.S. 586 (1978). *Woodson* held that mandatory death penalty statutes were unconstitutional because they prevented the consideration of mitigating factors. In *Lockett*, the Court held that the legislature could not preclude the sentencer from considering mitigating factors. Mitigating evidence was necessary to assure the constitutionally mandated goal of individualized consideration of the defendant. *See supra* notes 53-64 and accompanying text.

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

109. *Id.* at 2738. *See also* Act of March 28, 1973, No. 74, § 3, 1973 Ga. Laws 159, 164-65 (current version at GA. CODE ANN. § 17-10-30 (1982)), which provided, in part:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions. . . .
>
> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. . . .
>
> (9) The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement.

ally vague.[110] Despite the jury's reliance on an unconstitutional statutory aggravating factor, the Supreme Court affirmed the death sentence, emphasizing and lauding specific features of the Georgia sentencing scheme that focused on individualization. The Court noted that the Georgia sentencing scheme did not demand a balancing of aggravating and mitigating factors in which reliance on an additional invalid statutory aggravating factor might tip the scales toward death. Instead, the Georgia sentencing scheme used statutory aggravating factors to "circumscribe the class of persons eligible for the death penalty."[111] After this initial class was selected, all other aggravating factors, whether constitutionally permissible or not, could be considered "in the process of selecting . . . those defendants who will actually be sentenced to death."[112] To identify the goal in this final selection for death, the Court again quoted opinions dealing with mitigating, not aggravating, factors and concluded: "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."[113] Taken together, *Enmund, Ramos* and *Stephens*

The jury in *Stephens* found the aggravating factors set forth in subsection (1) and (9) applicable to the defendant. *Stephens*, 103 S. Ct. at 2738.

110. While the defendant's appeal was pending, the Georgia Supreme Court held, in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), that the aggravating circumstance of "a substantial history of serious assaultive criminal convictions" was unconstitutionally vague. *Id.* at 539-40, 224 S.E.2d 391-92. This language was part of the first factor the jury relied upon in sentencing Stephens. *See supra* note 109.

111. *Stephens*, 103 S. Ct. 2733, at 2743 (1983). In response to a certified question from the Supreme Court on the role of statutory aggravating factors in the Georgia sentencing scheme, the Georgia Supreme Court compared the law of homicide to a pyramid. As the Georgia court explained, all cases of homicide are within the pyramid, but those cases qualifying for the death penalty are contained only in the space below the apex. To reach that category, a case must pass through three planes of division. The first plane separates murder cases from other homicide cases. The second separates from all murder cases those for which the penalty of death is a possible punishment. This plane is established by statutory aggravating factors. No case can rise above this plane in Georgia unless there is at least one statutory aggravating factor. Act of March 28, 1973, No. 74, § 3, 1973 Ga. Laws 159, 164-65 (current version at GA. CODE ANN. § 17-10-30(c) (1982)). The final plane picks out those cases in which death is actually imposed. All evidence is considered here by the sentencer. Zant v. Stephens, 250 Ga. 97, 99-100, 197 S.E.2d 1, 3-4 (1982). *See also* GA. CODE ANN. § 17-10-2, -30 (1982).

112. *Stephens*, 103 S. Ct. at 2743.

113. *Id.* at 2743-44 (emphasis original). In addition to citing Woodson v. North Carolina, 428 U.S. 280 (1976) (pluality opinion), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), the Court also cites Eddings v. Oklahoma 455 U.S. 104 (1982). For a

seem to introduce and applaud a new concern with individualization in the composition and application of aggravating factors.

4. *The Conflict Between Individualization and Consistency in the Context of Aggravating Factors*

At first glance it might seem that there is nothing improper with individualization in the context of aggravating factors. Certainly it cannot be wrong to focus upon specific characteristics of the defendant, his background and his crime, before making a decision as irrevocable as imposing the death penalty. The problem with the Supreme Court's new emphasis upon individualization in the formation and application of aggravating factors is that it is difficult to reconcile this type of individualization with the constitutional requirement that aggravating factors be applied consistently. The Supreme Court is requiring that statutory aggravating factors include individualized criteria. These factors must focus on individual defendants, who vary from case to case, but still must be applied consistently. The question is: "How can this be done"? The Court is merging the goals of individualization and consistency, apparently not realizing that there is an inherent conflict in striving to achieve both these goals in the context of aggravating factors. We cannot simultaneously achieve both individualization and consistency on the aggravating side of the sentencing equation.

In fact, the Supreme Court is not attempting to achieve both goals. Instead, the Court is minimizing the goal of consistency. After all, the individualized consideration of every defendant necessitates a great deal of sentencer discretion. Only when the sentencing body is given flexibility can we ensure that it fully focuses on the relevant characteristics of the defendant and his uniqueness as an individual. Now sentencer discretion is on the *aggravating* side of the sentencing equation. Such a scheme is familiar. It harkens back to the pre-*Furman* days, when discretionary sentencing resulted in the arbitrary and capricious imposition of death, to the days when there was "no meaningful basis for distinguishing the few cases in which death [was] im-

discussion of *Eddings, see infra* notes 130-135 and accompanying text.

posed from the many cases in which it [was] not,"[114] and when it became impossible to impose the death penalty with consistency.

B. *The Effect of Nonstatutory Aggravating Factors upon Consistent Application of the Death Penalty*

Even if the Supreme Court were to reinstate consistency as the primary constitutional goal of aggravating factors, the possibility of achieving consistency would be undercut by the existence and influence of nonstatutory aggravating factors. A recent Supreme Court case, *Barclay v. Florida*,[115] addresses the role of nonstatutory aggravating factors in the sentencing proceeding. In *Barclay*, the petitioner was convicted for a racially motivated murder.[116] Although the jury recommended a sentence of life imprisonment for the petitioner, the trial judge sentenced the petitioner to death.[117] In sentencing the petitioner, the judge found that several statutory aggravating factors were present.[118] The judge declared that no mitigating factors were present because Barclay had an extensive criminal record.[119] The judge found that the petitioner's criminal record was a nonstatutory aggravating circumstance, despite the fact that Florida law prohibited

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114. *Furman*, 408 U.S. at 313. *See supra* notes 7-15 and accompanying text.

115. Barclay v. Florida, 103 S. Ct. 3418 (1983) (plurality opinion).

116. *Id.* at 3420-22.

117. Under Florida law, the jury's verdict is only advisory. The actual sentence is determined by the trial judge. FLA. STAT. ANN. § 921.141(2) (West Supp. 1984). Both jury and judge weigh mitigating factors against aggravating factors to arrive at a sentencing decision. FLA. STAT. ANN. § 921.141(3) (West Supp. 1984). No sentence can be imposed unless "(a) sufficient aggravating circumstances exist . . . and (b) there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." FLA. STAT. ANN. § 921.141(3)(a), (b) (West Supp. 1984). The statute was construed by the Florida Supreme Court to permit consideration of *any* mitigating circumstance, not just statutory mitigating circumstances. Petitioner's motion for rehearing in light of *Lockett* was denied in Songer v. State, 365 So. 2d 696, 700 (Fla. 1978), *cert. denied*, 441 U.S. 956 (1979).

118. *Barclay*, 103 S. Ct. at 3421. The trial judge found that Barclay had knowingly created a great risk of death to many persons, FLA. STAT. ANN. § 921.141(5)(c), had committed the murder while engaged in a kidnapping, *id.* § 921.141(5)(d), had endeavored to disrupt governmental functions and law enforcement, *id.* § 921.141(5)(g), and had been especially heinous, atrocious and cruel. *Id.* § 921.141(5)(h).

119. *Barclay* 103 S. Ct. at 3421. FLA. STAT. ANN. § 921.141(6)(a) (West Supp. 1984), provided that the absence of a significant history of prior criminal activity was a mitigating factor.

considering a defendant's prior criminal record as an aggravating circumstance.[120] The judge also considered racial hatred as a second nonstatutory aggravating factor. He discussed the defendant's racial motive for the killing and compared it to the Nazi atrocities the judge had witnessed during World War II.[121]

The Supreme Court affirmed Barclay's death sentence. It concluded that a sentence based on both statutory and nonstatutory aggravating factors did not impermissibly upset the balancing process established by the Florida statute and suffered no constitutional defect.[122] The Court's conclusion is disturbing.

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120. *Barclay*, 103 S. Ct. at 3422.

121. The judge explained:

> My 28 years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office, a prosecutor for eight and one-half years and a Criminal Court and Circuit Court Judge — Felony Division — for almost 10 years. During these 28 years I have defended, prosecuted and held trial in almost every type of serious crime.
>
> Because of this extensive experience, I believe I have come to know and understand when or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.
>
> My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination.
>
> To attempt to initiate such a race war in this country is too horrible to contemplate for both our black and white citizens. Such an attempt must be dealt with by just and swift legal process and when justified by Jury verdict of guilty — then to terminate and remove permanently from society those who would choose to initiate this diabolical course.
>
> HAD THE DEFENDANT BEEN EXPOSED TO THE CARNAGE OF THE BATTLEFIELDS AND THE HORRORS OF THE CONCENTRATION CAMPS INSTEAD OF MOVIES, TELEVISION PROGRAMS AND REVOLUTIONARY TRACTS GLORIFYING VIOLENCE AND RACIAL STRIFE — THEN PERHAPS HIS THOUGHTS AND ACTIONS WOULD HAVE TAKEN A LESS VIOLENT COURSE.
>
> Having set forth my personal experiences above, it is understandable that I am not easily shocked or moved by tragedy — but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel. The perpetrator thereby forfeits further right to life — for certainly his life is no more sacred than that of the innocent eighteen year old victim, Stephen Anthony Orlando.

Barclay, 103 S. Ct. at 3423 n.6.

122. *Id.* at 3427-28. The Court noted:

> We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing

Nonstatutory aggravating factors add an element of arbitrariness and capriciousness into the sentencing process. Indeed, by their very nature, nonstatutory aggravating factors cannot be consistently applied, because they vary greatly from case to case.[123] As Justice Marshall's dissent in *Barclay* explains:

> Fairness and consistency cannot be achieved if non-statutory aggravating circumstances are randomly introduced into the balance. If one judge follows the law in sentencing a capital defendant but another judge injects into the weighing process any number of non-statutory factors in aggravation, or if the same judge selectively relies on such circumstances, the fate of an individual defendant will inevitably depend on whether on a given day his sentencer happened to respect the constraints imposed by Florida law. The decision to execute a human being surely should not depend on such pot luck.[124]

By approving the use of nonstatutory aggravating factors, the Supreme Court again minimizes the importance of consistency as a constitutional goal in capital sentencing.

A sentence, such as *Barclay's*, based upon both statutory and nonstatutory aggravating factors, does not assure consistent application of the death penalty. Nevertheless, it may provide some sort of legislative guidance to the sentencing body — albeit scant guidance. The Court's line of decisions can be read to imply that a sentence based entirely upon nonstatu-

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> of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, . . . and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.

Id. at 3424 (citation omitted).

123. Perhaps the influence of nonstatutory aggravating factors can perhaps be felt more keenly in situations where a single jury in a bifurcated trial sits at both the guilt and sentencing stages of the trial. All evidence presented in the guilt determination may and will be consciously conjured up and considered by the jury in their sentencing determination. The sentencing determination thus becomes greatly swayed by nonstatutory aggravating evidence, evidence about which the jury has received no sentencing guidance as mandated by *Furman*.

124. *Barclay*, 103 S. Ct. at 3443 (Marshall, J., dissenting).

tory aggravating factors would be declared invalid.[125] At first glance, *Barclay* would seem to support this inference, for the Court asserts that its previous opinions "may properly be read to question the propriety of a sentence based entirely on nonstatutory aggravating factors."[126] The Court's words are not entirely reassuring, however. The Court does not unequivocally state that a sentence based entirely upon nonstatutory aggravating factors would be unconstitutional because it would lack legislative guidance, and thus be devoid of the consistency mandated by *Furman*. Instead, the Court notes that a sentence based upon nonstatutory aggravating factors would only be an "impropriety".[127] The sentence would merely be open to "question". Thus, the Supreme Court has not declared a sentence based entirely upon nonstatutory aggravating factors unconstitutional.[128]

C. *The Overlap of Aggravating and Mitigating Factors*

The bifurcated due process analysis invoked by the Supreme Court assumes that aggravating and mitigating factors can be readily distinguished from one another. Statutory aggravating and mitigating factors might be distinguishable. After all, they are laid out by statute. It is more difficult, however, to separate nonstatutory aggravating factors from mitigating factors. A single circumstance can be characterized as either aggravating or mitigating. Consideration of a nonstatutory aggravating circumstance which may also be interpreted as a mitigating circum-

125. Gillers, *supra* note 19, at 23 n.108.

126. *Barclay*, 103 S. Ct. at 3428. In addition, the Supreme Court in Zant v. Stephens, 103 S. Ct. 2733 (1983), noted approvingly that under the Georgia statute, a defendant could only be eligible for the death penalty if at least one statutory aggravating factor were found. *Id.* at 2742. The Court did not, however, explicitly state that one statutory aggravating factor is always constitutionally compelled before death can be imposed.

127. *See Barclay*, 103 S. Ct. at 3428.

128. *See id. But cf.* Ledowitz, *The New Role of Statutory Aggravating Circumstances*, 22 DUQ. L. REV. 317, 348 (1984). This commentator concludes that a sentence based entirely upon nonstatutory factors would not be allowed. He points to Justice Stevens' statement that "a death sentence may not rest *solely* on a nonstatutory aggravating factor." However, it is important to note that Justice Stevens' statement was not adopted by the plurality. Thus, the Supreme Court has not explicitly condemned a sentence based entirely on nonstatutory aggravating factors.

stance has grave consequences for the consistent application of the death penalty.

Consider one possible scenario: a defense attorney, drawing attention to the "uniqueness of the individual" as mandated by *Woodson* and *Lockett*[129] presents evidence concerning the frequent intoxication and drunken sprees of his client. The attorney hopes this evidence will be considered as a mitigating factor. He may argue, "the defendant had no control over his behavior," or, attempting to be more persuasive, "he was driven to drink by the unbearable circumstances of his unhappy life." The trial judge or jury, however, may view the evidence differently, looking at it as an aggravating factor — as proof of the defendant's low moral character, or as a prediction of his future drunkenness and criminal behavior. Consideration of mitigating evidence as a nonstatutory aggravating factor increases the risk that capital punishment will be imposed inconsistently, arbitrarily and unconstitutionally. This result is contrary to the Supreme Court's stated goal of achieving consistency through the application of aggravating factors.

The treatment of evidence that can be viewed as aggravating or mitigating is further confused by the Supreme Court's decision in *Eddings v. Oklahoma*.[130] In *Eddings*, the Supreme Court addressed the trial court's treatment of mitigating evidence profferred by the defendant. A sixteen-year-old defendant had been convicted of first degree murder for killing a police officer. At the sentencing hearing, defense counsel presented substantial evidence of Eddings' troubled youth. His parents had been divorced when Eddings was five years old. By the time he was fourteen he could no longer be controlled by his mother. He was subjected to physical punishment by his father. In addition, state psychiatrists testified that Eddings was emotionally disturbed.[131]

At the conclusion of the evidence, the trial judge weighed the aggravating and mitigating factors against one another. Considering the evidence that had been offered, the judge found that Eddings' youth was the only mitigating factor of substantial

129. See *supra* notes 53-65 and accompanying text for a discussion of these cases.
130. 455 U.S. 104 (1982).
131. *Id.* at 107.

weight. The judge opined that, in following the law, the court could not consider the fact of this young man's violent background as other potentially mitigating evidence.[132]

Although neither the opinion of the court of appeals nor Eddings' own petition for certiorari discussed the *Lockett* decision, the Supreme Court nonetheless addressed the issue of whether the trial court's apparent dismissal of evidence offered in mitigation was consistent with the *Lockett* ruling.[133] The Supreme Court held that it was not. Instead, the Court concluded that the sentencer — like the legislature in *Lockett* — could not refuse the defendant consideration of any relevant mitigating evidence. The Supreme Court required that the sentencer " 'not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' "[134] In other words, factors *proffered* as mitigating by the defendant must be considered as such by the sentencing body.[135] To do otherwise is to risk an unconstitutional "preclusion" of mitigating factors. Thus, in the "drunkenness" scenario sketched above, the sentencing body would have to disregard its fears that drunkenness bespeaks a dangerous, immoral criminal element. Instead, the sentencer would have to accept the defendant's proposition that his

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132. *Id.* at 109. The statute provided: "In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act." OKLA. STAT., tit. 21, § 701.10 (1980) (current version at OKLA STAT., tit. 21, § 701.10 (West 1983)).

The statute further provided that

> [u]nless at least one of the statutory aggravating circumstances enumerated in this act is [found to exist beyond a reasonable doubt] or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

OKLA. STAT., tit. 21, § 701.11. (1980) (current version at OKLA. STAT., tit. 21, § 701.11 (West 1983)).

133. *Eddings*, 455 U.S. at 113. The *Lockett* Court had ruled that the legislature could not preclude sentencer consideration of mitigating factors by excluding such factors from the statute. *See supra* notes 60-65 and accompanying text.

134. *Eddings*, 455 U.S. at 110 (emphasis in original) (quoting plurality opinion in *Lockett*, 438 U.S. at 604).

135. *See id. But see* Raulerson v. Wainwright, 732 F.2d 803, 806-07 (11th Cir. 1984) (holding that the constitution prescribes only that the sentencer consider all mitigating evidence; and that there is no requirement that the court agree with the defendant's view that the evidence is mitigating).

drunken sprees are a product of an unhappy life, mitigating against imposing a death sentence.

One can even use this interpretation of *Eddings* when the defendant offers mitigating evidence that conflicts with *statutory* aggravating factors. If *Eddings* is taken literally, it would seem that the defendant's interpretation of the factors should prevail. Thus, even if drunkenness were statutorily enshrined as an aggravating factor, it is possible that the defendant's insistence on its mitigating weight would have to be heeded. This result would nullify the effectiveness of statutory aggravating factors in the face of a challenge from the defendant, rendering their consistent application impossible. Thus the overlap of aggravating and mitigating factors thwarts the consistent application of the death penalty in both versions of the scenario.

IV. Conclusion

Since *Furman v. Georgia*,[136] the Supreme Court has maintained that a death sentence may be imposed only if the state follows procedures designed to ensure reliability in the sentencing process. However, it would seem that consistent application of the death penalty cannot be accomplished. By the terms of its own analysis, the Supreme Court has allowed its concern for individualization to engulf its concern for consistency. In *Enmund v. Florida*,[137] *California v. Ramos*,[138] and *Zant v. Stephens*,[139] the Court noted that individualized consideration of aggravating factors is constitutionally required in order to impose the death penalty.[140] The grant of discretion on the aggravating side of the sentencing equation inherent in this requirement leaves the sentencer free to disregard legislative guidance. It returns the capital sentencing process to the arbitrary sentencing of pre-*Furman* days. In addition, the Court's approval of a sentence based upon both statutory and nonstatutory aggravating factors condones the use of nonstatutory aggravating factors in the sentencing proceeding. Nonstatutory aggravating factors further threaten

136. 408 U.S. 238 (1972) (per curium).
137. 458 U.S. 782 (1982).
138. 463 U.S. 992 (1983).
139. 462 U.S. 862 (1983).
140. *See supra* notes 77-114 and accompanying text.

consistent application of the death penalty. Finally, the confusing overlap of aggravating and mitigating factors appears to thwart all hope of achieving consistency. *Eddings v. Oklahoma* can be read to mandate that evidence proffered to mitigate the sentence must be given some weight by the sentencing body. The Court's holding could nullify the effective, consistent application of statutory aggravating factors in the face of a defendant's challenge that these factors should be interpreted as mitigating. Unless the constitutionally mandated goal of consistency is preserved, death becomes an impermissible punishment, "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[141] The Court has come full circle to the state of the law before *Furman* was decided.

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141. Furman v. Georgia, 408 U.S. 238, 309-10 (1972). *See also supra* notes 7-15 and accompanying text.

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