




10-1975

Proffitt v. Florida

Lewis F. Powell Jr.

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Hold

DISCUSS

PRELIMINARY MEMO

December 5, 1975 Conference
List 4, Sheet 4

No. 75-5706 CSY

Cert to Fla SC
(Per curiam)

PROFFITT

State/Criminal (Capital Case)

v.

FLORIDA

Timely

Petr was convicted of murder in a jury trial. Under Florida's bifurcated sentencing procedure, he was sentenced to death. The Florida Supreme Court affirmed.

In a 41-page petition, petr thoroughly canvasses Florida's post-Furman statute. His sole claim is that imposition of the ultimate penalty runs afoul of the Eighth Amendment.

Hold for
Fowler.

Accordingly, this is a hold for Fowler.

There is a response.

Starr

Op attached to petn

11/24/75

DK

No. 75-5706

vs.

Hold
on
Fauler

[illegible]

In 1972, immediately after the Court's decision in Furman v. Georgia, 408 U.S. 238, the Florida legislature passed new statutes providing for the occasions and the procedures for the imposition of the death penalty. The statutes provide that certain felonies, including first degree murder,^{1/} constitute "capital felonies," which are punishable by life imprisonment unless it is determined in the special punishment proceeding that the offender shall be punished by death.^{2/}

^{1/} The murder statute under which petitioner was convicted reads as follows:

Fla. Stat. Ann. § 782.04 (1973)
Murder

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

(b) In all cases under this section, the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

^{2/}

Fla. Stat. Ann. § 775.082 (1973)
Penalties for felonies and misdemeanors

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in

section 921.141 results in findings by the Court that such person shall be punished by death, and in the latter event such person shall be punished by death."

The proceeding which determines whether or not the death penalty should be imposed is held after the defendant has been convicted of the capital felony.^{3/} This separate proceeding is conducted by the trial judge before the same jury which determined the defendant's guilt.^{4/} Evidence may be presented on any matter the judge deems relevant to sentences and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the state and the defense may present argument on whether the death penalty shall be imposed.

After the evidence and argument have been presented, the jury must decide whether or not it will recommend that the death penalty be imposed. In deliberating on this question, the jury is to follow what is essentially a three stage process. First, it must decide whether there exist sufficient statutory aggravating circumstances to justify imposing the death penalty.^{5/} The jury

^{3/} Fla. Stat. Ann. § 921.141 (1973).

^{4/} Either the trial jury or the punishment jury, or both, may be waived by the defendant.

^{5/} The aggravating and mitigating circumstances are set out in Fla. Stat. Ann. § 921.141 (5) and (6) (1973):

“(5) *Aggravating circumstances.*—Aggravating circumstances shall be limited to the following:

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

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

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

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

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

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

must then decide whether there are sufficient mitigating circumstances to outweigh the aggravating circumstances. And finally, based on these considerations, the jury must decide whether the defendant should be sentenced to death or to life imprisonment. When a majority of the jury has agreed, the jury's advisory verdict is returned.

The Court is not bound by the jury's verdict. It must itself weigh the aggravating and mitigating circumstances, and decide what sentence it will impose. If the Court imposes a sentence of death, it must make specific written findings concerning the sufficient aggravating circumstances and the insufficient mitigating circumstances.

The judgment of conviction and sentence of death is subject to automatic review by the Supreme Court of Florida.^{6/} This review is intended to ensure that the decision between death and life imprisonment is made rationally, not arbitrarily. As the

5/ (Continued)

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

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

(6) *Mitigating circumstances.*—Mitigating circumstances shall be the following:

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

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

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

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

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

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

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

6/ Fla. Stat. Ann. § 921.141(4) (1973).

Supreme Court of Florida said in State v. Dixon, _____ Fla. _____, 283 So. 2d 1, 10 (1973), "Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great."

It was under this statute that petitioner was tried, found guilty and sentenced to death for the first degree murder of Joel Ronnie Medgebow. The circumstances surrounding the murder itself were testified to by Patricia Medgebow, the decedent's wife, who was present at the time of the murder.^{7/} She and her husband had gone to sleep in the bedroom of their apartment, but Mrs. Medgebow had wakened several times during the night. She wakened again around 5:00 a.m. to find her husband sitting up in bed, moaning. He was holding what she took to be a ruler. Just then a third person jumped up and hit her several times in the face, knocking her to the floor. The intruder then ran out through the living room. Mrs. Medgebow was not able to identify the attacker, although she was able to give a description of his clothing.^{8/} After the intruder left, Mrs. Medgebow turned on the light and saw that her husband had been stabbed. She attempted to give him artificial respiration and cardiac massage, then ran across the hall and wakened a neighbor. Later the police and an ambulance were called.

^{7/} The murder occurred on July 10, 1973.

^{8/} She described the attacker as wearing light pants and a pin stripe shirt with long sleeves rolled up to the elbow. She also stated that the attacker was a medium sized male.

The post-mortem examination showed that Medgebow had been killed by a single stab wound into the heart, causing shock and compression of the heart as the pericardium filled with blood.

Petitioner was connected to the crime as a result of a telephone call to the police made by his wife later in the morning of July 10. She testified that on the night before the murder, petitioner had gone to work dressed in a ^{short-sleeved} white shirt, with his company's name on it, and gray pants. He returned at about 5:15 a.m. dressed in the same shirt and pants but with no shoes. Petitioner had some conversation with his wife at this time, packed his clothes and left. He was later arrested in Connecticut.

A young woman, Mary Bassett, and her infant daughter were boarding with the Bassetts. From her bedroom, Mrs. Bassett overheard parts of petitioner's conversation with his wife. She testified that petitioner said he had stabbed and killed a man with a butcher knife while he was burglarizing a place, and that he had beaten a woman.

Small amounts of human blood were found on the petitioner's Maas Brothers shirt, but the quantity was too small to type. No fingerprints were found on the murder weapon.

A co-worker of petitioner testified that they had been drinking together until 3:30 or 3:45 a.m., that petitioner had driven him home, had conversed with him briefly, and left. Petitioner at this time was wearing the same gray pants and white shirt he wore back to his mobile home at 5:15.

The jury found the defendant guilty as charged. During the punishment phase of the bifurcated proceeding, it was shown that the defendant had one prior conviction, a 1967 charge of breaking and entering without permission. The State also introduced the

NO. 75-5700

evidence of Dr. James Crumbley, the doctor at the jail where petitioner was held pending trial. Dr. Crumbley testified that petitioner had come to him as a physician, and told him that he (the petitioner) was concerned that he would do damage to other people in the future, that he had had an uncontrollable desire to kill which had resulted in his killing one man, that he could feel this desire building up again, and that he wanted the doctor to get him some psychiatric help so he would not kill again. The doctor also testified that in his opinion the petitioner was dangerous and would be a danger to his fellow inmates if imprisoned, but petitioner's condition could be treated so that he would no longer be dangerous. Dr. Crumbley also testified that in his opinion the petitioner was under an extreme mental disturbance at the time the crime was committed.

The jury returned an advisory verdict recommending that the sentence of death be imposed. The judge ordered an independent psychiatric evaluation of petitioner, the results of which indicated that the petitioner was not, then or at the time of the murder, mentally impaired. The trial judge then sentenced petitioner to death. In his written findings in support of the sentence, the judge found as aggravating circumstances (1) that the murder was premeditated and occurred in the course of a felony (burglary); (2) that the petitioner has the propensity to commit murder; (3) that the murder was especially heinous, atrocious, and cruel; and (4) that the defendant knowingly through his intentional act created a great risk of serious bodily harm and death to many persons. The trial judge also specifically found that none of the enumerated mitigating circumstances existed in this case. The Supreme Court of Florida affirmed. Proffitt v. State, 315 So. 2d 461 (Fla. 1975).

April 1, 1976

No. 75-5706 PROFFITT v. FLORIDA

Capital Case - The Florida Statute

The Florida statute like the federal and Texas statutes, authorizes capital punishment only after consideration of both "aggravating" and "mitigating" circumstances. But the Florida system is not as carefully structured. It allows the jury to "balance" factors on both sides and permits a recommendation of death even when there is a "mitigating" factor.

The bifurcated system operates with the same judge and jury. Any relevant evidence, even if otherwise inadmissible, may be introduced during the sentencing phase. The jury may consider eight "aggravating" and seven "mitigating" circumstances similar to those found in Texas.

The jury must decide (i) whether there are sufficient aggravating circumstances, (ii) whether there are sufficient mitigating circumstances to outweigh the aggravating circumstances; and (iii) whether life imprisonment or death is the appropriate sentence.

The jury may recommend, but the decision as to sentencing is left to the judge.

As pointed out in State v. Dixon (283 So. 2d 1) (the first decision by the Supreme Court of Florida under the new statute), the trial judge must justify his sentence in writing:

Sally - True in
information & correct
I believe we have the
general file on last
General case, being in order
5 Captured in it, being in order
Put them
or later.

"The fourth step required by Fla. Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute." 283 So. 2d 1 at 8.

In Dixon, addressing whether the death sentence would be imposed in one situation and not in another, the Court said:

"... Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." 283 So. 2d at 10.

Capitol Cases - Conference

4/2/76

~~C.J.~~

General discussion, subject to further analyses of particular statutes - if derived by any federal

C.J. - { Same view as in 1972
{ Affirm all cases.

Brennan - { Will never change 1972 view.
{ Reverse all

Stewart - More to be said against Brennan's ^{view} today than in 1972. In light of what 35 states have done since ~~the~~ 1972, can no longer argue that C/P is incompatible with "evolving standards of decency". These standards - in their context - should be det. by legislature rather than jud. branch.

Cannot agree that C/P is invalid under 8th & 14th Amend in ~~the~~ any & all circumstances. As matter of const. law, can't say ~~that~~ C/P is invalid.

Thought it was invalid in 1972 only because of the sporadic & discriminatory way in which C/P was carried out. Jurors had no standards to guide them & jury verdicts could not be reviewed in any intelligent way. Opportunity for discrimination was large.

Stewart (cont)

Ga & Fla have clearly devised valid systems. The crimes are specified & only after conviction - in a separate trial - does the jury address the penalty.

In Ga. jury sentence is binding upon judge but not in Fla. This makes no diff.

In both states appellate review is carefully structured.

Each step in process is designed to minimize error & afford opportunity for review.

Can't "buy" Amsterdam's view (also Charlie Black's) as to the wrongness of the opportunity for discretion. There must be discretion.

Texas statute is close. Not at rest as to its validity.

N.C. doesn't really change pre-Furman. Is invalid.

La - allowing lesser offense conviction is bad - invalid.

Potter thinks neither N.C. nor La avoids his Furman objections. Potter then thinks both 8th & 14th Amendments are relevant. There is a "race" implication as "rape" is included.

Potter added that bifurcated trial is not required. He thinks N.C. & La statutes are not mandatory, limited to specific offenders.

3

White - affirm all fair

Agree with much of what Potter said generally.

In 1972 there was a high level of "disproportionately" (sp?). Statutes not evenly enforced.

As far as Furman goes (what Byrnes said there), he thinks ~~that~~ all 5 of these states have met its standards. ~~These~~ These are very different from pre-Furman statutes.

(Both Byrnes & Potter recognize "tension" bet. McGauthers & Furman)

See no difference of const. dimension bet. N.C. & La and the statutes of other states.

None of these cases involved rape. Reserves judgment as to C/P for rape (as would I expect under most aggravated circumstances)

after discussion
- Harry asked if to
marked "pending" on N.C.

Marshall - Revenue all - stands
by 1972 op.

Blackmun - Affirm all.

Views have not changed.

Attack on "discretion" is
an attack on our entire system.

Rape may be different.

(See my notes on separate sheet)

Rehnquist - Affirm all -

Stevens - Affirm - Ga, Fla & Tex
Revenue - N.C. & La (?)

Accepts Furman as controlling.

Has no doubt that C/P is a
permissible penalty under the Court.
Can't agree that "standards" have yet
evolved as Amsterdam urges.

When only issue is 8th amended,
it may be unusual to make a
procedural analysis. But this seems
to be the basis of the Stewart/White
rationale, & so he accepts this type of
analysis.

If we had a rape case, would
feel different*. No suggestion of
racial bias in three of these
states. May be some in N.C. & La
statutes.

* Rape C/P for rape is disproportional

5

Stevens (cont.)

If a rapist knows he may get death for rape then he has an incentive to kill the victim (remove the witness).

Now only 5 or 6 states make rape a C/offense.

③

Affirm in Ga, Fla & Tex.

Reverse, tentatively, in N.C. & La

N.C. statute results in ~~to~~ more executions than pre-Furman (altho this accords with Byron's view. Byron was not as concerned with "discretion" as was Stewart. Byron was concerned primarily with infrequency of imposition)

N.C. has no separate sentencing hearing. Also, jury has too much discretion to find lesser offense. (If I write, I need to talk to John - as I don't understand all of his objections to N.C.)

As to Texas, does it mind jury not having standards for jury in trial or guilt so long as there is separate hearing on sentence - with standards.

6

Powell { Affirm Ga, Fla & Texas
Possibly affirm La
Passed in N.C. - probably Reverse

I accept Furman as precedent.

Also, fair to say that result of Furman has been wholesome in prompting states to focus on problems.

The 5 states have endeavored to meet the views of Stewart & White.

If a procedural type of analysis is ~~the~~ appropriate under Furman, I think Ga, Fla & Tex have devised careful systems - with standards & procedures designed to minimize if not eliminate most of Furman concerns. Also types of offenses narrowed substantially & carefully identified.

La statute, on its face, is one of best. But it does not have bifurcated trial. Then not essential but is a safeguard. Effect of allowing "lesser offense" convictions not clear to me. I'll consider them further.

N.C. codifies pre-Furman law & practice. For reasons others have stated I'm quite doubtful as to its validity under Furman.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 29, 1976

Re: No. 75-5706 - Proffitt v. Florida

Dear Byron:

Please join me in your concurring opinion.

Sincerely,

WW

Mr. Justice White

Copies to the Conference

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 6/29/76

Recirculated: _____

No. 75-5706 - Proffitt v. Florida

MR. JUSTICE BLACKMUN, concurring.

I concur in the result. See Furman v. Georgia, 408 U.S.

238, 405-414 (1972) (Blackmun, J., dissenting), and id., at 375,

414 and 465.

This case, here on certiorari to the Supreme Court of Florida, presents the challenge to the capital punishment statute of that state.

As the Justices who have preceded me have stated, the threshold question - the fundamental one - presented in all five of these cases is as follows:

Whether the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution?

If we had answered this question in the affirmative, it would be unnecessary to consider the statutes and procedures in the five states. [As has been indicated,] ~~however~~, Seven members of the Court ~~however~~ have concluded that capital punishment is not unconstitutional per se.

Mr. Justice White, speaking for the Chief Justice and Mr. Justice Rehnquist, has summarized his reasons for agreeing with this conclusion.

I now speak for Justices Stewart, Stevens and myself. In our joint opinion in Gregg v. Georgia, p. 11-30, we ~~state the reasons for our conclusion in this respect.~~

elaborate on our reasons for concluding reaching the same conclusion.

We incorporate these reasons, by reference,

We incorporate by reference these reasons in the joint opinions filed by the three of us in each of the other four cases.

The precedents of this Court, extending over many years, ^{the} establish guiding principles: The Eighth Amendment is not a static concept. ⁹⁴ ~~but~~ draws its meaning from "the evolving standards of decency that mark the progress of a maturing society". A penalty must not involve the unnecessary and wanton infliction of pain. Nor can it be substantially out of proportion to the severity of the crime. As long as the penalty specified by the legislature comports with these criteria, we must defer to the judgment of the elected representatives of the people ^{on the basic issue.}

No one can doubt that the death penalty was contemplated when the Constitution was adopted. It was a traditional penalty both in the colonies and in England. The text of the Fifth Amendment, reiterated in part in the Fourteenth Amendment, ^{75 years later.} makes clear the acceptance of capital punishment. And, in the nearly two centuries of our national existence until 1972 - this Court - repeatedly, and often expressly, recognized that capital punishment is not invalid per se.

In Trop v Dulles

Reverend
In Trop v. Dulles, 19⁵⁸, Chief Justice Warren - in the same opinion in which he spoke of "evolving standards of decency" - noted:

"... the death penalty has been employed throughout our history, and in a day/when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

The first major challenge to the per se validity of capital punishment reached this Court in 1972 in Furman v. Georgia. *and while* [As Mr. Justice Stewart has indicated,] although the issue was there strongly presented, it was not resolved by the Court. [Four Justices would have held that capital punishment is not invalid; two would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed.]

The principal argument/presented by petitioners in Furman/was that standards of decency had evolved to the point/where capital punishment was no longer tolerated. It was said then/that the Eighth Amendment must be construed finally/as prohibiting capital punishment for any crime - regardless of its depravity/and impact on society.

*Petitioners in the case
here today*

^{noted}
Petitioners in the five cases today/renewed the
"standard of decency argument". But developments during
the four years since Furman have undercut substantially/
the assumptions upon which that argument was advanced.

Objective criteria demonstrate that prevailing
standards in our country/do not reject capital punishment,
at least as a sanction in some cases.

The most marked indication/of society's endorsement
of the death penalty for murder/is the legislative response
to Furman. The legislatures of at least 35 states,/and
the Congress of the United States,/have enacted new statutes
that provide for this penalty - at least for some murders.

The jury/also is a reliable objective index of
contemporary values, ^{because I have a fearful responsibility} ~~because~~ it is so directly involved. ^{city, and}
Since Furman,/and under the new statutes,/juries have
imposed the death penalty in more than 400 cases.

But the Eighth Amendment demands more/than a finding
that a challenged punishment/is acceptable to contemporary
society. As noted above, a penalty may not be substantially
out of proportion/to the severity of the crime; nor may
it be totally without penological justification,/in that
~~it would result in gratuitous infliction of suffering.~~

*We cannot say that
the infliction of
death*

5.

We cannot say that the infliction of death/as a punishment for murder/is without justification. In part, capital punishment is an expression of society's belief/that certain crimes are so grievous an affront to humanity/that the only adequate remedy/is the penalty of death.

In part, /capital punishment also reflects a legislative judgment/that the sanction is necessary to deter capital crimes. There is no conclusive empiric data/ either proving or disproving/ the value of the penalty as a deterrent. We may assume that there are murders,/ such as those committed in the heat of passion,/ for which the threat of death/ has little or no deterrent effect. But there are others,/ e.g., those that are deliberately planned in advance,/ where the penalty may well be/ a deterring factor. And, in some cases - such as murder by a life prisoner - there is no other adequate sanction.

The evaluation of the unresolved debate concerning deterrence/ properly rests with the legislatures. They have a flexibility/ ^{a capacity to ascertain the facts,} and ~~an insight~~ unavailable to the judiciary.

It is well to remember/ that we are concerned in these cases/ only with the imposition of capital punishment

*for the crime of
murder.*

for the crime of murder.

We conclude/when a life has been taken deliberately/
that the punishment of death/is not invariably disproportionate
to that crime. It is an extreme sanction,/suitable/for the
most extreme of crimes.

* * * *

I come now, briefly, to the Florida case. I will
not state the facts/beyond saying that petitioner - in
the course of an unlawful entry into a home at night -
stabbed to death his sleeping victim - and beat the victim's
wife. ¶ The Florida statute, in all material respects/provides
the same safeguards as the Georgia statute/described by Mr.
Justice Stewart.

There is a bifurcated procedure. After the jury
found petitioner guilty, a separate hearing was held/to
determine whether the sentence should be death/or life
imprisonment. The Florida statute requires consideration
of specified aggravating/and mitigating circumstances.
Acting in light of these,/the jury recommended the sentence
of death. The trial judge then imposed that sentence,
identifying in writing four of the statutory aggravating
circumstances.

Again as in Georgia, automatic review by the Florida
Supreme Court is required by statute,/and that court

reviews & evaluates

reviews &
^ evaluates the sentence / to insure consistency among
similar cases.

For reasons more fully stated in our opinion, we
conclude that these safeguards / provide the procedural
protection / that prevent the "wanton" and "freakish"
imposition of capital punishment / that ^{was held} we found unconstitu-
tional in Furman v. Georgia.

Accordingly, ~~we~~ ^{we} affirm the judgment of the Supreme
Court of Florida.

* * * *

~~Mr. Justice White has announced the concurrences.~~

Mr. Justice Brennan and Mr. Justice Marshall have
filed dissenting opinions.

Accordingly, Mr J. Stewart, ~~Stevens~~ & I would affirm
the judg. of S/Ct of Fla.

As four of the C. J. and
three other Justices concur
in the result, ^{this is} ~~I announce~~
the judgment of Court

Mr J. Brennan & Mr J. Marshall
have filed dissenting ops.

Printed
1st DRAFT

Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
✓ Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 75-5706

Recirculated: 6-30-76

Charles William Proffitt,
Petitioner,
v.
State of Florida.

On Writ of Certiorari to the
Supreme Court of Florida.

[June —, 1976]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE
and MR. JUSTICE REHNQUIST join, concurring in the
judgment.

There is no need to repeat the statement of the facts
of this case and of the statutory procedure under which
the death penalty was imposed, both of which are de-
scribed in detail in the opinion of MR. JUSTICE STEWART,
MR. JUSTICE POWELL, and MR. JUSTICE STEVENS (here-
inafter the plurality). I agree with the plurality, see
Part 2 (a) and (b), *ante*, at —, that although the stat-
utory aggravating and mitigating circumstances are not
susceptible to mechanical application they are by no
means so vague and overbroad as to leave the discretion
of the sentencing authority unfettered. Under Florida
law, the sentencing judge is *required* to impose the death
penalty on all first-degree murderers as to whom the
statutory aggravating factors outweigh the mitigating
factors. There is good reason to anticipate, then, that
as to certain categories of murderers, the penalty will not
be imposed freakishly or rarely but will be imposed with
regularity; and consequently it cannot be said that the
death penalty in Florida as to those categories has
ceased "to be a credible deterrent or measurably to con-
tribute to any other end of punishment in the criminal
justice system." *Furman v. Georgia*, 408 U. S., at 311

(concurring opinion). Accordingly, the Florida statutory scheme for imposing the death penalty does not run afoul of this Court's holding in *Furman v. Georgia*, *supra*.

For the reasons set forth in my concurring opinion in *Gregg v. Georgia*, *ante*, at —, this conclusion is not undercut by the possibility that some murderers may escape the death penalty solely through exercise of prosecutorial discretion or executive clemency. For the reasons set forth in my dissenting opinion in *Roberts v. Louisiana*, *post*, at —, I also reject petitioner's argument that under the Eighth Amendment the death penalty may never be imposed under any circumstances.

I concur in the judgment of affirmance.

CHAMBERS OF
JUSTICE POTTER STEWART

June 30, 1976

Dear Chief,

Can the Conference tomorrow be at 2:30 p.m.
instead of 2:00 p.m.? I have a luncheon engagement
that will make it difficult for me to be back in the build-
ing before 2:30 p.m.

Sincerely yours,

P.S.
/

The Chief Justice

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Souter
Mr. Justice Stevens

1st DRAFT
SUPREME COURT OF THE UNITED STATES

No. 75-5706

From: Mr. Justice Stewart

Circulated: _____

Charles William Proffitt,
Petitioner,
v.
State of Florida.

On Writ of Certiorari to the
Supreme Court of Florida.

Received JUN 30 1976

[July 2, 1976]

Opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL,
and MR. JUSTICE STEVENS announcing the judgment of
the Court, delivered by MR. JUSTICE POWELL.

The issue presented by this case is whether the imposi-
tion of the sentence of death for the crime of murder
under the law of Florida violates the Eighth and Four-
teenth Amendments.

I

The petitioner, Charles William Proffitt, was tried,
found guilty, and sentenced to death for the first-degree
murder of Joel Medgebow. The circumstances surround-
ing the murder were testified to by the decedent's wife,
who was present at the time it was committed. On
July 10, 1973, Mrs. Medgebow awakened around 5 a. m.
in the bedroom of her apartment to find her husband
sitting up in bed, moaning. He was holding what she
took to be a ruler.¹ Just then a third person jumped
up, hit her several times with his fist, knocked her to
the floor, and ran out of the house. It soon appeared
that Medgebow had been fatally stabbed with a butcher
knife. Mrs. Medgebow was not able to identify the at-

¹ It appears that the "ruler" was actually the murder weapon
which Medgebow had pulled from his own chest.

tacker, although she was able to give a description of him.²

The petitioner's wife testified that on the night before the murder the petitioner had gone to work dressed in a white shirt and gray pants, and that he had returned at about 5:15 a. m. dressed in the same clothing but without shoes. She said that after a short conversation the petitioner had packed his clothes and departed. A young woman boarder, who overheard parts of the petitioner's conversation with his wife, testified that the petitioner had told his wife that he had stabbed and killed a man with a butcher knife while he was burglarizing a place, and that he had beaten a woman. One of the petitioner's coworkers testified that they had been drinking together until 3:30 or 3:45 a. m. on the morning of the murder and that the petitioner had then driven him home. He said that the petitioner at this time was wearing gray pants and a white shirt.

The jury found the defendant guilty as charged. Subsequently, as provided by Florida law, a separate hearing was held to determine whether the petitioner should be sentenced to death or to life imprisonment. Under the state law that decision turned on whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist.³ At that hearing it was shown that the petitioner had one prior conviction, a 1967 charge of breaking and entering. The State also introduced the testimony of the physician at the jail where the petitioner had been held pending trial, Dr. Crumbley. He testified that the petitioner had come to him as a physician, and told him that he was concerned that he would harm other people

² She described the attacker as wearing light pants and a pin-striped shirt with long sleeves rolled up to the elbow. She also stated that the attacker was a medium-sized white male.

³ See pp. 5-7, *infra*.

in the future, that he had had an uncontrollable desire to kill that had already resulted in his killing one man, that this desire was building up again, and that he wanted psychiatric help so he would not kill again. Dr. Crumbley also testified that, in his opinion, the petitioner was dangerous and would be a danger to his fellow inmates if imprisoned, but that his condition could be treated successfully.

The jury returned an advisory verdict recommending the sentence of death. The trial judge ordered an independent psychiatric evaluation of the petitioner, the results of which indicated that the petitioner was not, then or at the time of the murder, mentally impaired. The judge then sentenced the petitioner to death. In his written findings supporting the sentence, the judge found as aggravating circumstances that (1) the murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious, and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious bodily harm and death to many persons. The judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed. *Proffitt v. State*, 315 So. 2d 461 (1975). We granted certiorari, — U. S. —, to consider whether the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

II

The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in *Gregg v. Georgia*, ante, pp. 11-30.

III

A

In response to *Furman v. Georgia*, 408 U. S. 238 (1972), the Florida Legislature adopted new statutes that authorize the imposition of the death penalty on those convicted of first-degree murder. Fla. Stat. Ann. § 782.04 (1) (Supp. 1976-1977).⁴ At the same time Florida adopted a new capital-sentencing procedure, patterned in large part on the Model Penal Code. See § 921.141 (Supp. 1976-1977).⁵ Under the new statute, if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems relevant to sentencing

⁴ The murder statute under which petitioner was convicted reads as follows:

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

"(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment." Fla. Stat. Ann. § 782.04 (Supp. 1976-1977).

Another Florida statute authorizes imposition of the death penalty upon conviction of sexual battery of a child under 12 years of age. Fla. Stat. Ann. § 794.011 (2) (Supp. 1976-1977). We do not in this opinion consider the constitutionality of the death penalty for any offense other than first-degree murder.

⁵ Compare Model Penal Code § 210.6 (Proposed Official Draft, 1962) (set out in *Gregg v. Georgia*, ante, p. 36 n. 42).

and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present argument on whether the death penalty shall be imposed.

At the conclusion of the hearing the jury is directed to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh aggravating circumstances found to exist; and . . . [b]ased on those considerations, whether the defendant should be sentenced to life [imprisonment] or death." §§ 921.141 (2)(b)-(c) (Supp. 1976-1977).⁶ The jury's verdict is determined by ma-

⁶ The aggravating circumstances are:

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

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

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

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

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

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

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

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

The mitigating circumstances are:

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

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

[Footnote 6 is continued on p. 6]

jority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (1975). Accord, *Thompson v. State*, 328 So. 2d 1, 5 (1976). Cf. *Spinkellink v. State*, 313 So. 2d 666, 671 (1975).⁷

The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient

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

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

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

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

"(g) The age of the defendant at the time of the crime." § 921.141 (6) (Supp. 1976-1977).

⁷ *Tedder* has not always been cited when the Florida Court has considered a judge-imposed death sentence following a jury recommendation of life imprisonment. See, e. g., *Thompson v. State*, 328 So. 2d 1 (1976); *Douglas v. State*, 328 So. 2d 18 (1976); *Dobbert v. State*, 328 So. 2d 433 (1976). But in the latter case two judges relied on *Tedder* in separate opinions, one in support of reversing the death sentence and one in support of affirming it.

[statutory] mitigating circumstances . . . to outweigh the aggravating circumstances." § 921.141 (a) (Supp. 1976-1977).⁸

The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141 (4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to "guarantee . . . that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." *State v. Dixon*, 283 So. 2d 1, 10 (1973).

On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in *Furman*. The sentencing authority in

⁸ In one case the Florida Court upheld a death sentence where the trial judge had simply listed six aggravating factors as justification for the sentence he imposed. *Sawyer v. State*, 313 So. 2d 680 (1975). Since there were no mitigating factors, and since some of these aggravating factors arguably fell within the statutory categories, it is unclear whether the Florida Court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so, since the capital-sentencing statute explicitly provides that "[a]ggravating circumstances shall be limited to the following [eight specified factors.]" § 921.141 (5) (Supp. 1976-1977). (Emphasis added.) There is no such limiting language introducing the list of statutory mitigating factors. See § 921.141 (6) (Supp. 1976-1977). See also n. 14, *infra*.

Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must, *inter alia*, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike those considered by a Georgia sentencing jury, compare *Gregg v. State*, *ante*, p. 40, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury.⁹ This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois*, 391 U. S. 510, 519 n. 15, but it

⁹ Because the trial judge imposes sentence, the Florida court has ruled that he may order preparation of a presentence investigation report to assist him in determining the appropriate sentence. See *Swan v. State*, 322 So. 2d 485, 488-489 (1975); *Songer v. State*, 322 So. 2d 481, 484 (1975). These reports frequently contain much information relevant to sentencing. See *Gregg v. Georgia*, *ante*, p. 32 n. 37.

has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.¹⁰

The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." *Songer v. State*, 322 So. 2d 481, 484 (1975). See also *Sullivan v. State*, 303 So. 2d 632, 637 (1974). The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated eight of the 21 death sentences that it has reviewed to date. See *Taylor v. State*, 294 So. 2d 648 (1974); *La-Madline v. State*, 303 So. 2d 17 (1974); *Slater v. State*, 316 So. 2d 539 (1974); *Swan v. State*, 322 So. 2d 485 (1975); *Tedder v. State*, 322 So. 2d 908 (1975); *Halli-*

¹⁰ See ABA Standards Relating to Sentencing Alternatives & Procedures § 1.1, Commentary, pp. 43-48; President's Comm'n on Law Enforcement & Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts 26 (1967). See also *Gregg v. Georgia*, ante, pp. 51-52. In the words of the Florida Court, "a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants." *State v. Dixon*, 283 So. 2d, at 8.

well v. State, 323 So. 2d 557 (1975); *Thompson v. State*, 328 So. 2d 1 (1976); *Messer v. State*, 330 So. 2d 137 (1976).

Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases where it is not." *Gregg v. Georgia*, ante, p. 31, quoting *Furman v. Georgia*, 408 U. S., at 313 (WHITE, J., concurring). On its face the Florida system thus satisfies the constitutional deficiencies identified in *Furman*.

B

As in *Gregg*, the petitioner contends, however, that, while perhaps facially acceptable, the new sentencing procedures in actual effect are merely cosmetic, and that arbitrariness and caprice still pervade the system under which Florida imposes the death penalty.

(1)

The petitioner first argues that arbitrariness is inherent in the Florida criminal justice system because it allows discretion to be exercised at each stage of a criminal proceeding—the prosecutor's decision whether to charge a capital offense in the first place, his decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, and, after conviction and unsuccessful appeal, the Executive's decision whether to commute a death sentence. As we noted in *Gregg*, this argument is based on a fundamental misinterpretation

of *Furman*, and we reject it for the reasons expressed in *Gregg*. See *ante*, pp. 41-42.

(2)

The petitioner next argues that the new Florida sentencing procedures in reality do not eliminate the arbitrary infliction of death that was condemned in *Furman*. Basically he contends that the statutory aggravating and mitigating circumstances are vague and overbroad,¹¹ and that the statute gives no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case.

(a)

Initially the petitioner asserts that the enumerated aggravating and mitigating circumstances are so vague and so broad that "virtually any first degree murder convict [is] a candidate for a death sentence." In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorize the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons." § 921.141 (5)(h), (c) (Supp. 1976-1977). These provisions must be considered as they have been construed by the Supreme Court of Florida.

That Court has recognized that while it is arguable "that all killings are atrocious, . . . [s]till we believe that the Legislature intended something 'especially' heinous, atrocious, or cruel when it authorized the death

¹¹ As in *Gregg*, we examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the Florida capital-sentencing system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty. See *Gregg v. Georgia*, *ante*, p. 43 n. 51.

penalty for first degree murder." *Tedder v. State*, 322 So. 2d 908, 910 (1975). As a consequence, the Court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So. 2d 1, 9 (1973). See also *Alford v. State*, 307 So. 2d 433, 445 (1975); *Halliwell v. State*, 323 So. 2d 557, 561 (1975).¹² We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See *Gregg v. Georgia*, *ante*, pp. 43-44.

In the only case, except for the instant case, in which the third aggravating factor—"the defendant knowingly created a great risk of death to many persons"—was found, *Alvord v. State*, 322 So. 2d 533 (1975), the State Supreme Court held that the defendant created a great risk of death because he "obviously murdered two of the victims in order to avoid a surviving witness to the [first] murder." 322 So. 2d, at 540.¹³ As construed by

¹² The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was "pitiless" or "torturous to the victim." See, *e. g.*, *Hallman v. State*, 305 So. 2d 180 (1974) (victim's throat slit with broken bottle); *Spinkellink v. State*, 313 So. 2d 666 (1975) ("career criminal" shot sleeping traveling companion); *Gardner v. State*, 315 So. 2d 675 (1975) (brutal beating and murder); *Alvord v. State*, 322 So. 2d 533 (1975) (three women killed by strangulation, one raped); *Douglas v. State*, 328 So. 2d 18 (1976) (depraved murder); *Henry v. State*, 328 So. 2d 430 (1976) (torture murder); *Dobbert v. State*, 328 So. 2d 433 (1976) (torture and killing of two children). But the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that the Florida Court has abandoned the definition that it announced in *Dixon* and applied in *Alford*, *Tedder*, and *Halliwell*.

¹³ While it might be argued that this case broadens that construction, since only one person other than the victim was attacked at

the Supreme Court of Florida these provisions are not impermissibly vague.¹⁴

(b)

The petitioner next attacks the imprecision of the mitigating circumstances. He argues that whether a defendant acted "under the influence of extreme mental or emotional disturbance," whether a defendant's capacity "to conform his conduct to the requirements of law was substantially impaired," or whether a defendant's participation as an accomplice in a capital felony was "relatively minor," are questions beyond the capacity of a jury or judge to determine. See §§ 921.141 (6)(b), (f), (d) (Supp. 1976-1977).

He also argues that neither a jury nor a judge is ca-

all and then only by being hit with a fist, this would be to read more into the State Supreme Court's opinion than is actually there. That Court considered 11 claims of error advanced by the petitioner, including the trial judge's finding that none of the statutory mitigating circumstances existed. It did not, however, consider whether the findings as to each of the statutory aggravating circumstances were supported by the evidence. If only one aggravating circumstance had been found, or if some mitigating circumstance had been found to exist but not to outweigh the aggravating circumstances, we would be justified in concluding that the State Supreme Court had necessarily decided this point even though it had not expressly done so. However, in the circumstances of this case, when four separate aggravating circumstances were found and where each mitigating circumstance was expressly found *not* to exist, no such holding on the part of the State Supreme Court can be implied.

¹⁴ The petitioner notes further that Florida's sentencing system fails to channel jury or judge discretion because it allows for consideration of nonstatutory aggravating factors. In the only case to approve such a practice, *Sawyer v. State*, 313 So. 2d 680 (1975), the Florida Court recast the trial court's six nonstatutory aggravating factors into four aggravating circumstances—two of them statutory. As noted earlier, it is unclear that the Florida Court would ever approve a death sentence based entirely on nonstatutory aggravating circumstances. See n. 8, *supra*.

pable of deciding how to weigh a defendant's age or determining whether he had a "significant history of prior criminal activity." See §§ 921.141 (6)(g), (a) (Supp. 1976-1977). In a similar vein the petitioner argues that it is not possible to make a rational determination whether there are "sufficient" aggravating circumstances that are not outweighed by the mitigating circumstances, since the state law assigns no specific weight to any of the various circumstances to be considered. See § 921.141 (Supp. 1976-1977).

While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

(c)

Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed

on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.¹⁵

Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that Court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida Court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. See, e. g., *Alford v. State*, 307 So. 2d 433, 445 (1975); *Alvord v. State*, 322 So. 2d 533, 540-541 (1975). By following this procedure the Florida Court has in effect adopted the type of proportionality review mandated by the Georgia statute. Cf. *Gregg v. Georgia*, ante, pp. 47-49. And any suggestion that the Florida Court engages in only cursory or rubber stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it. See pp. 9-10, *supra*.¹⁶

¹⁵ *State v. Dixon*, 283 So. 2d, at 10.

¹⁶ The petitioner also argues that since the Florida Court does not review sentences of life imprisonment imposed in capital cases or sentences imposed in cases where a capital crime was charged but where the jury convicted of a lesser offense, it will have an unbalanced view of the way that the typical jury treats a murder case and it will affirm death sentences under circumstances where the vast majority of judges would have imposed a sentence of life

IV

Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system assures that sentences of death will not be "wanton" or "freakishly" imposed. See *Furman v. Georgia*, 408 U. S., at 310 (STEWART, J., concurring). Accordingly, the judgment before us is affirmed.

series to

It is so ordered.

imprisonment. As we noted in *Gregg v. Georgia*, ante, p. 47 n. 56, this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty.

To: File

Date: July 12, 1976

From: Chris Whitman

CAPITAL CASES -- 1975 TERM

In these cases, our primary responsibility was for Parts I, II, and III in No. 74-6257, Gregg v. Georgia.

The development of the analysis for all five opinions, however, was a joint effort of the Powell, Stewart, and Stevens chambers. Justice Stewart's chambers took primary responsibility for Part IV of Gregg and Part III in the other four cases. Justice Stevens took primary responsibility for Part I in the four non-Gregg cases. Substantial editing was done by all three chambers on all parts of the five opinions.

NB

Powell announced
Proffitt

Proffitt = Gregg
except that Fla. had
judge determine sentence
on rec. by jury.

I have talked to
J. Stewart, & am content
for this to go to print.

Mr. Justice Stewart
Mr. Justice Powell
Mr. Justice Stevens
7 JP

NO. 75-5706, PROFFITT v. FLORIDA

From: Mr. Justice Stewart
Circulated: JUN 8 1976
Recirculated: _____

MR. JUSTICE STEWART, MR. JUSTICE POWELL,
and MR. JUSTICE STEVENS:

16

The issue presented by this case is whether the im-
position of the sentence of death for the crime
of murder under the law of Florida violates the Eighth and Four-
teenth Amendments.

I

The petitioner, Charles William Proffitt, was tried,
found guilty and sentenced to death for the first degree murder
by stabbing of Joel Medgebow. The circumstances surrounding
the murder itself were testified to by the decedent's wife, who
was present at the time of the murder. ^{1/} Mrs. Medgebow
wakened around 5:00 a.m. to find her husband sitting up in bed,
moaning. Just then a third person jumped up, hit her several
times, knocked her to the floor, and then ran out of the house.
Mrs. Medgebow was not able to identify the attacker, although she
was able to give a description of his clothing. ^{2/}

The petitioner was connected to the crime as a result of a telephone call to the police made by his wife later in the morning of July 10. She testified that on the night before the murder, the petitioner had gone to work dressed in a short-sleeved white shirt, with his company's name on it, and gray pants. He returned at about 5:15 a.m. dressed in the same shirt and pants but with no shoes. The petitioner had some conversation with his wife at this time, packed his clothes, and left. He was later arrested in Connecticut.

A young woman who was boarding with the Proffitts overheard parts of the petitioner's conversation with his wife. The woman testified that the petitioner told his wife that he had stabbed and killed a man with a butcher knife while he was burglarizing a place, and that he had beaten a woman.

Small amounts of human blood were found on the petitioner's Maas Brothers shirt, but the quantity was too small for a determination of the blood type. No fingerprints were found on the murder weapon.

One of the petitioner's co-worker's testified that they had been drinking together until 3:30 or 3:45 a.m., that the petitioner had driven him home, had conversed with him briefly, and left. The petitioner at this time was wearing the same gray pants and white shirt he wore back to his mobile home at 5:15 a.m.

The jury found the defendant guilty as charged. Subsequently, as provided by Florida law^{3/} a separate hearing was held to determine whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist^{4/} such that the petitioner should be sentenced to death rather than life imprisonment. At that hearing it was shown that the petitioner had one prior conviction, a 1967 charge of breaking and entering without permission. The State also introduced the evidence of the doctor at the jail where the petitioner was held pending trial. The doctor testified that the petitioner had come to him as a physician, and told him that he (the petitioner) was concerned that he would do damage to other people in the future, that he had had an uncontrollable desire to kill which had resulted in his killing one man, that he could feel this desire building up again, and that he wanted the doctor to get him some psychiatric help so he would not kill again. The doctor also testified that in his opinion the petitioner was dangerous and would be a danger to his fellow inmates if imprisoned, but that the petitioner's condition could be treated so that he would no longer be dangerous. Dr. Crumbley also testified that in his opinion the petitioner was under an extreme mental disturbance at the time the crime was committed.

The jury returned an advisory verdict recommending that the sentence of death be imposed. The judge ordered an independent psychiatric evaluation of the petitioner, the results of which indicated that the petitioner was not, then or at the time of the murder, mentally impaired. The trial judge then sentenced the petitioner to death. In his written findings in support of the sentence, the judge found as aggravating circumstances (1) that the murder was premeditated and occurred in the course of a felony (burglary); (2) that the petitioner has the propensity to commit murder; (3) that the murder was especially heinous, atrocious, and cruel; and (4) that the petitioner knowingly through his intentional act created a great risk of serious bodily harm and death to many persons. The trial judge also specifically found that none of the enumerated mitigating circumstances existed in this case. The Supreme Court of Florida affirmed. Proffitt v. State, 315 So.2d 461 (Fla. 1975). We granted certiorari, ____ U.S. ____, to consider whether the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

II

The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in Gregg v. Georgia, ante, pp. 14-43.

III

A

In response to Furman v. Georgia, 408 U.S. 238, the Florida legislature adopted new statutes that authorize the imposition of the death penalty on those convicted of first-degree murder, Fla. Stat. Ann. § 782.04(1) (Supp. 1976-1977).^{5/} At the same time Florida adopted a new capital-sentencing procedure, patterned in large part on the Model Penal Code. See § 921.141 (Supp. 1976-1977).^{6/} Under the new statute, if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems relevant to sentences and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the state and the defense may present argument on whether the death penalty shall be imposed.

At the conclusion of the hearing the jury is directed to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh aggravating circumstances found to exist, and . . . [b]ased on those considerations, whether the defendant should be sentenced to life [imprisonment] or death." Fla. Stat. Ann. § 921.141(2) (1976-1977 Supp.).^{7/} The jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910. Accord, Thompson v. State, 328 So.2d 1, 5. Cf. Spinkellink v. State, 313 So.2d 666, 671.^{8/}

The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its findings upon which the sentence of death is based as to the facts (a) [t]hat sufficient [statutory] aggravating

circumstances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the aggravating circumstances." Fla. Stat. Ann. § 921.141(3) (1976-1977 Supp.).^{9/}

The statute provides for automatic review by the Florida Supreme Court of all cases in which a death sentence has been imposed. Fla. Stat. Ann. § 921.141(4) (1976-1977 Supp.). The statute differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Florida Supreme Court, like its Georgia counterpart, considers its function to be to "guarantee . . . that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10(1973).

On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies, identified in Furman. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty should be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual. He must, inter alia, consider whether the defendant has a prior criminal record,

whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed upon him. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are

not unlike those considered by a Georgia sentencing jury, compare Gregg v. State, ante, pp. _____, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

The basic difference between the Florida system and that of Georgia is that in Florida the sentence is determined by the trial judge rather than by the jury. ^{10/} It would appear that this difference should lead, if anything, to an even greater consistency in the imposition at the trial court level of capital punishment in Florida than in Georgia, since a trial judge has much more experience in sentencing than does a jury and is therefore better able to impose sentences in line with those imposed in analogous ^{11/} cases.

These Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Florida Supreme Court "to determine independently whether the imposition

of the ultimate penalty is warranted." Songer v. State, 322 So. 2d 481, 484. See also Sullivan v. State, 303 So.2d 680. The Florida Supreme Court, like that of Georgia, has not hesitated to vacate death sentences when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date. See Taylor v. State, 294 So.2d 648; LaMadline v. State, 303 So.2d 17; Slater v. State, 316 So.2d 539; Swan v. State, 322 So.2d 485; Tedder v. State, 322 So.2d 908; Halliwell v. State, 323 So.2d 557; Thompson v. State; 328 So.2d 1, Messer v. State, 330 So.2d 137.

Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose capital punishment. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases where it is not." "Gregg v. Georgia, ante, p. _____, quoting Furman v. Georgia, 408 U.S. 213, 313 (White, J., concurring). On its face the

Florida system thus satisfies constitutional deficiencies identified in Furman.

B

As in Gregg, the petitioner contends, however, that, while perhaps facially acceptable, the new sentencing procedures are in actual effect merely cosmetic, and that arbitrariness and caprice still pervade the system under which Florida imposes the death penalty.

(1)

The petitioner first claims that arbitrariness is inherent in the Florida criminal justice system because it allows discretion to be exercised at each stage of a criminal proceeding -- the prosecutor's decision whether to charge a capital offense in the first place, his decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, and, after conviction and unsuccessful appeal, the executive's decision whether to commute a death sentence. As we noted in Gregg, this argument is based on a fundamental misinterpretation of Furman, and we reject it for the reasons expressed in Gregg. See ante, pp. 60-62.

(2)

The petitioner next argues that the new Florida sentencing procedures in reality do not eliminate the arbitrary infliction of death that was condemned in Furman. Basically he contends that the statutory aggravating and mitigating circumstances are vague and overbroad^{12/} and that the statute gives no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case.

(a)

Initially the petitioner asserts that the enumerated aggravating and mitigating circumstances are so vague and so broad that "virtually any first degree murder convict [is] a candidate for a death sentence." In particular, it is argued, the eighth statutory aggravating circumstance which authorizes the death penalty to be imposed if the crime is "especially heinous, atrocious or cruel," is intolerably vague and overbroad. Fla. Stat. Ann. § 921.141(5)(h) (Supp. 1976-1977). The Florida Supreme Court has recognized, however, that while it is arguable "that all killings are atrocious, . . . [s]till we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So.2d 908, 910 (1975). As a

consequence, the Court has indicated that this provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (1973).

See also Alford v. State, 307 So.2d 433, 445 (1975); Halliwell v. State, 323 So.2d 557, 561 (1975).^{13/}

As so construed, we cannot say that the provision provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v. Georgia, ante, pp. 63-64.

The petitioner also claims that the third statutory aggravating factor -- "[t]he defendant knowingly created a great risk of death to many persons" -- is vague. In Dixon the Florida Court indicated "that a man of ordinary intelligence and knowledge easily conceives the concepts involved" in determining whether this statutory aggravating circumstance exists. 283 So.2d, at 9. The only case in which this third aggravating factor was found, except for the instant case, was Alvord v. State, 322 So.2d 533 (1975), where the State Supreme Court found that the defendant created a great risk of death because he "obviously murdered two of the victims in order to avoid a surviving witness to the [first]

murder." 322 So.2d, at 540. In the present case this aggravating circumstance was found, although the defendant attacked only one person other than his murder victim. While as an original matter we might not so construe the word "many," we cannot say that the state courts acted unconstitutionally in doing so. ^{14/}

(b)

The petitioner next attacks the impreciseness of the mitigating circumstances. He argues that whether a defendant acted "under the influence of extreme mental or emotional disturbance," whether a defendant's capacity "to conform his conduct to the requirements of law was seriously impaired," or whether a defendant's participation as an accomplice in a capital felony was "relatively minor," are questions beyond the capacity of a jury or judge to determine. See Fla. Stat. Ann. § § 921.141(6)(b), (f), (d) (Supp. 1976-1977).

He also argues that neither a jury nor a judge is capable of deciding how to weigh a defendant's age or to determine whether he had a "significant history of prior criminal activity." See § § 921.141(6)(g), (a) (Supp. 1976-1977). In a similar vein the petitioner argues that it is not possible to make a rational determination whether there are "sufficient" aggravating circumstances which are not outweighed by the mitigating circumstances,

since the state law assigns no specific weight to any of the various circumstances to be considered. See § 921.141(2) (Supp. 1976-1977).

While these questions and decisions may be hard, they require no more line-drawing or hair-splitting than is commonly required of a fact finder in a lawsuit. For example, juries have traditionally decided the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

(c)

But even if it were accepted that one or more of the statutory aggravating or mitigating circumstances is somewhat vague or overbroad, this alone would not render the Florida capital-sentencing procedure unconstitutional so long as there existed some other safeguard to prevent imposition of the death penalty on a capriciously selected group of convicted defendants. Florida law has just such a safeguard in its provision for review by the Florida Supreme Court of each death sentence to ensure "that the reasons present in one case will reach a result similar to that reached under similar circumstances in another case."

Is this correct?

15/

Nonetheless the petitioner attacks the Florida appellate review process because the role of the Florida Supreme Court in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that Court has not chosen to formulate an unvarying objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida Court has responsibly undertaken to perform its function of death sentence review with a maximum of rationality and consistency.

For example, it has several times compared the circumstances of a case under review with those of other previous cases in which it has assessed the imposition of death sentences. See, e.g., Alford v. State, 307 So.2d 433, 445 (1975); Alvord v. State, 322 So.2d 533, 540-541 (1975). By following this procedure the Florida Court has in effect adopted the type of proportionality review mandated by the Georgia statute. Compare Gregg v. Georgia, ante, pp. 67-71. And any suggestion that the Florida Court engages in only cursory or rubber stamp review of death penalty cases is totally controverted by the fact it has vacated over one-third of the death sentences that have come before it. See p. 10, supra.^{16/}

IV

Florida, like Georgia, has enacted legislation in response to Furman that passes constitutional muster. That legislation provides that after a person is convicted of first degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which because of its statewide jurisdiction

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can assure consistency, fairness, and rationality in the even-handed operation of the state law. As in Georgia, this system assures that sentences of death will not be "wantonly" or "freakishly" imposed. See Furman v. Georgia, 408 U.S., at 310 (Stewart, J., concurring). Accordingly, the judgment before us is affirmed.

It is so ordered.

FOOTNOTES

1/ The murder occurred on July 10, 1973.

2/ She described the attacker as wearing light pants and a pin stripe shirt with long sleeves rolled up to the elbow. She also stated that the attacker was a medium-sized male.

3/ See p. ____, infra.

4/ See p. ____, infra.

5/ The murder statute under which petitioner was convicted reads as follows:

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

(b) In all cases under this section, the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment." Fla. Stat. Ann. § 782.04 (1973).

Another Florida statute authorizes imposition of the death penalty upon conviction of sexual battery of a child under twelve years of age. Fla. Stat. Ann. § 794.011(2) (Supp. 1976-1977). We do not in this opinion consider the constitutionality of the death penalty for any offense other than first-degree murder.

6/ Compare Model Penal Code § 210.6 (Proposed Official Draft, 1962) (set out in Gregg v. Georgia, ante, at p. ____, n. 42).

7/ The aggravating circumstances are:

- "(a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel."
Fla. Stat. Ann. § 921.141(5) (Supp. 1976-1977).

The mitigating circumstances are:

"(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime."
Fla. Stat. Ann. § 921.141(6) (Supp. 1976-1977).

8 /

Tedder has not always been cited when the Florida

Court has considered a judge-imposed death sentence following a

jury recommendation of life imprisonment. See, e.g., Thompson

v. State, 328 So.2d 1 (1976); Douglas v. State, 328 So.2d 18

(1976) Dobbert v. State, 328 So.2d 433 (1976). But in the latter case, two judges

relied on Tedder in separate opinions, one in support of reversing

the death sentence and one in support of affirming it.

9/

In one case the Florida Court upheld a death sentence where the trial judge had simply listed six aggravating factors as justification for the sentence he imposed. Sawyer v. State, 313 So.2d 680 (1975). Since there were no mitigating factors, and since some of these aggravating factors arguably fell within the statutory categories, it is unclear whether the Florida Court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so, since the capital-sentencing statute explicitly provides that "[a]ggravating circumstances shall be limited to the following[eight specified factors.]" Fla. Stat. Ann. § 921.141(5) (Supp. 1976-1977). (emphasis added). There is no such limiting language introducing the list of statutory mitigating factors. See § 921.141(6) (Supp. 1976-1977). See also n. 14 infra.

10/

Because the trial judge imposes sentence, the Florida court has ruled that he may order preparation of a pre-sentence investigation report to assist him in determining the appropriate sentence. See Swan v. State, 322 So.2d 485, 488-489 (1975); Songer v. State, 322 So.2d 481, 484 (1975). These reports, of course, contain much information relevant to sentencing. See Gregg v. Georgia, ante, p. _____, n. 35.

11/

See ABA Standards Relating to Sentencing Alternatives & Procedures § 1.1(b), Commentary, pp. 45-46; President's Commn. on Law Enforcement & Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts, 26 (1967). See also Gregg v. Georgia, ante, pp. 51-52. In the words of the Florida Court, "[A] trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants." State v. Dixon, 283 So.2d, at 8.

12/

As in Gregg, we examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the Florida capital-sentencing system, when viewed in its entirety, will result in the random and arbitrary imposition of the death penalty. See Gregg v. Georgia, ante, p. ____, n. 50.

13/

The Florida Supreme Court has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically

stating that the homicide was "pitiless" or "torturous to the victim." See, e.g., Hallman v. State, 305 So.2d 180 (1974) (victim's throat slit with broken bottle); Spinkellink v. State, 313 So.2d 666 (1975) ("career criminal" shot sleeping traveling companion); Gardner v. State, 313 So.2d 675 (1975) (brutal beating and murder); Alvord v. State, 322 So.2d 533 (1975) (three women killed by strangulation, one raped); Douglas v. State, 328 So.2d 18 (1976) (depraved murder); Henry v. State, 328 So.2d 430 (1976) (torture murder); Dobbert v. State, 328 So.2d 433 (1976) (torture and killing of two children). But the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that the Florida Court has abandoned the definition that it announced in Dixon and applied in Alford, Tedder, and Halliwell.

14/

The petitioner notes further that Florida's sentencing system fails to channel jury or judge discretion because it allows for consideration of nonstatutory aggravating factors. In the only case to approve such a practice, Sawyer v. State, 313 So.2d 680 (1975), the Florida Court recast the trial court's six nonstatutory aggravating factors into four aggravating circumstances -- two of them statutory. As noted earlier, it is unclear that the Florida

Court would ever approve a death sentence based entirely on non-statutory aggravating circumstances. See n. 9, supra.

15/ State v. Dixon, 283 So.2d, at 10.

16/ The petitioner also argues that since the Florida Court does not review sentences of life imprisonment imposed in capital cases or sentences imposed in cases where a capital crime was charged but where the jury convicted of a lesser offense, it will have an unbalanced view of the way that the typical jury treats a murder case and it will affirm death sentences under circumstances where the vast majority of juries would have returned a verdict of life imprisonment. As we noted in Gregg v. Georgia, ante, p. ____, n. 55, this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty.