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The authors discuss the Florida capital felony sentencing law, as amended in response to the decision of the Supreme Court of the United States in Furman v. Georgia. *They examine developments in the construction and application of the statutory provisions for sentencing and appellate review, with a particular emphasis on the "aggravating circumstances" that the statute provides as standards to guide and control the imposition of the death sentence.*

I. INTRODUCTION

The issues of whether the state may, and whether it should, inflict the penalty of death continue to be debated with great en-

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ergy and emotion.[1] From the standpoint of what the United States Constitution demands or forbids,[2] the question of whether the state *may* ever inflict capital punishment is settled for the time being.[3] The legislative question of whether the state *should* use such a penalty also is settled, for the time being, in Florida.[4] Constitutional litigation about capital punishment recently has focused not on whether the state may or should invoke this severe sanction, but rather on *when* it may and when it should use the death penalty, and by what process.[5] This article examines developments in the application and construction of the Florida capital felony sentencing law,[6] with a discussion of sentencing and appellate re-

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1. *See, e.g.*, H. BEDAU, THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT (1977) (reflections on the capital punishment controversy in the decade between 1967 and 1977, during which no executions took place, and a tracing of the development of the constitutional challenge to the death penalty); C. BLACK, CAPITAL PUNISHMENT, THE INEVITABILITY OF CAPRICE AND MISTAKE (1974) (opposes reinstatement of the death penalty by arguing that most state statutes authorizing its use enacted since *Furman* have not succeeded in circumventing the faults *Furman* condemned); CAPITAL PUNISHMENT IN THE UNITED STATES (H. Bedau ed. 1976) (presents the research results of over two dozen scientific inquiries regarding the death penalty); Bedau, *The Death Penalty: Social Policy and Social Justice*, 1977 ARIZ. ST. L.J. 767 (1978) (advocates abolition of the death penalty by examining the constitutional, ethical, and philosophical underpinnings of this most severe sanction); Black, *Reflections on Opposing the Penalty of Death*, 10 ST. MARY'S L.J. 1 (1978) (states the contemporary post-*Furman* argument against the death penalty); van den Haag, *A Response to Bedau*, 1977 ARIZ. ST. L.J. 797 (1978) (a brief rejoinder to Bedau's argument for the abolition of the death penalty).

2. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); U.S. CONST. amend. XIV, § 1 ("No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). The ban on cruel and unusual punishments applies to the states by virtue of its incorporation into the due process clause of the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962).

3. Gregg v. Georgia, 428 U.S. 153 (1976) (the punishment of death does not, under all circumstances, violate the eighth and fourteenth amendments if not imposed arbitrarily or capriciously and if the sentencing authority is given adequate information and guidance).

4. FLA. STAT. § 775.082(1) (1979). This section provides that:

> 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 25 years before becoming eligible for parole unless the proceeding held to determine sentence . . . results in findings by the court that such person shall be punished by death.

See also Proffitt v. Florida, 428 U.S. 242 (1976); Alford v. State, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912 (1976); State v. Dixon, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

5. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977); Roberts v. Louisiana, 431 U.S. 633 (1977); Gardner v. Florida, 430 U.S. 349 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Alford v. State, 307 So. 2d 433 (Fla. 1973), *cert. denied*, 428 U.S. 912 (1976).

6. FLA. STAT. § 921.141 (1979).

view processes. The article also discusses the "aggravating circumstances" set forth in the statute as standards to guide and control the decision whether to impose the punishment of death.[7]

A. *Pre*-Furman *Florida Law*

Before the decision of the Supreme Court of the United States in *Furman v. Georgia*,[8] Florida law recognized a number of crimes as capital, most notably first-degree murder and rape.[9] Like many other American jurisdictions, Florida had divided murder into degrees.[10] The device of gradation of murder into degrees developed as a way of ameliorating the harshness of the common law mandatory penalty of death for murder,[11] which had contributed to the hesitancy of juries to convict in some cases.[12] Gradation attempted to differentiate in advance those murders that warranted the extreme penalty from those that did not.[13]

In addition to limiting the use of the death penalty by dividing murder into degrees, pre-*Furman* Florida law further restricted its use by providing for discretionary sentencing.[14] The discretion was placed in the hands of the jury unless the defendant pleaded

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7. State v. Dixon, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

8. 408 U.S. 238 (1972).

9. In addition to premeditated murder and rape of a female aged ten years or more, FLA. STAT. §§ 782.04(1), 794.01 (1971), capital crimes included certain felony murders, bombing or machine-gunning in public places, homicide caused by a destructive device, carnal knowledge and abuse of a female under the age of ten, and kidnapping for ransom. FLA. STAT. §§ 782.04(1), 790.16(1), 790.161(1), 794.01, 805.02 (1971).

10. 1868 Fla. Laws ch. 1637 (current version at FLA. STAT. 782.04 (1979)).

11. *See* Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949). The now classic division of murder into degrees is widely used in the United States, but not in England. The 1953 Report of the Royal Commission on Capital Punishment explained this as due to the difficulty of defining the most culpable murders. Bedau, *General Introduction* to THE DEATH PENALTY IN AMERICA 25 (H. Bedau ed. 1964). But the English Homicide Act of 1957 did attempt a similar distinction by changing the definitions of murder and manslaughter. H. HART, *Murder and the Principles of Punishment: England and the United States*, in PUNISHMENT AND RESPONSIBILITY 54, 60 (1968).

12. Comment, *Capital Punishment: Death for Murder Only*, 69 J. CRIM. L.C. & P.S. 179, 186 (1978). The "reform" motivation behind degrees of murder was largely nullified in many jurisdictions by "courts which almost universally have held that the criterion [of premeditation and deliberation] reduces to no more than a requirement of an intent to kill." MODEL PENAL CODE § 201.6, Comment (Tent. Draft No. 9, 1959).

13. In McGautha v. California, 402 U.S. 183 (1971), the Court was faced with the contention that the absence of standards to guide the jury's discretion in capital cases violated due process. The Court responded that "[t]o identify before the fact those circumstances of criminal homicides . . . which call for the death penalty, and to express those characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." 402 U.S. at 204 (Harlan, J.).

14. *See* 1939 Fla. Laws ch. 19554, § 237A.

guilty or waived jury trial.[15] The jury could recommend mercy for any reason it found persuasive. There was no provision for appellate review of the sentencing decision.[16]

At the time of the *Furman* decision, the use of the death penalty in Florida had been suspended, pending the outcome of constitutional litigation on the issue of the permissibility of capital punishment.[17]

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15. FLA. STAT. § 921.141 (1971). That section provided:

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

16. The supreme court heard appeals as a matter of right from judgments imposing the death penalty. FLA. CONST. art. V, § 3(b)(1) (amended 1972); FLA. STAT. §§ 924.05, .08(1) (1979). The scope of review in criminal appeals was governed by Florida Appellate Rule 6.16 (1962 Revision):

> **a. Generally.** Upon an appeal by either the state or the defendant the appellate court shall review all rulings and orders appearing in the appeal record insofar as it is necessary to do so in order to pass upon the grounds of appeal. The court shall also review all instructions to which an objection was made and which are alleged as a ground of appeal, and the sentence when there is an appeal therefrom. The court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appear in the appeal record, including instructions to the jury. The reception of evidence to which no objection was made shall not be construed to constitute a ruling by the court.
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> **b. Sufficiency of Evidence.** Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not.

Prior to *Furman*, the law in most states did not permit appeal from a sentence that was within the statutory authority of the court to impose.

> To the extent that appellate courts were attuned to the danger of abuse in capital cases, they could only fight it by fashioning fairer procedure, rules which primarily applied to the determination of guilt. As a result, judges agonized over nice questions of procedure, when what really concerned them was the appropriateness of the death sentence.

M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 91 (1973).

17. Ehrhardt and Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?* 64 J. CRIM. L.C. & P.S. 10, 11 (1973). This suspension was part of a national "moratorium," brought about by the litigation efforts of death penalty opponents. M. MELTSNER, *supra* note 16, at 113. The last execution in America before *Furman* was that of Luis Jose Monge in Colorado on June 2, 1967. Cowger, *Death Penalty: "State-Administered Suicide"?* 65 A.B.A.J. 1775 (1979). Florida had not inflicted the penalty of death since May 12, 1964,

B. *Furman v. Georgia*

The Supreme Court of the United States decided in *Furman v. Georgia*[18] that the sentences of death in the cases under review constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.[19] The Court announced its judgment in a brief *per curiam* opinion in which five of its members concurred, although nine filed separate opinions. Two of the justices concluded that capital punishment was unconstitutional per se.[20] The other three members of the majority[21] confined their consideration to death sentences imposed under statutory schemes in which the death penalty for capital crimes was discretionary with the sentencing court or jury.[22] Justice Douglas emphasized that unfettered discretion may lead to discrimination by race or by

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when Sie Dawson and Emmett C. Blake died in Raiford's electric chair. The St. Petersburg Times, May 22, 1979, at 1A, col. 6.

18. 408 U.S. 238 (1972).

19. The constitutionality of the death penalty had been presented to the Court in various ways in the years preceding *Furman*, but had not been directly confronted, as the Court avoided the issue "by limiting certiorari to the procedural aspects of capital punishment trials." Comment, *supra* note 12, at 182. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968) (imposition of death by jury from which all persons with reservations about capital punishment were excluded violates due process); United States v. Jackson, 390 U.S. 570 (1968) (statute allowing juries but not judges to impose death for kidnapping impermissibly burdens exercise of right to jury trial). For an account of the connection of many such cases with the organized legal battle against capital punishment, see M. MELTSNER, *supra* note 16 (discussing Maxwell v. Bishop, 398 U.S. 262 (1970) (exclusion of veniremen with scruples against capital punishment); Boykin v. Alabama, 395 U.S. 238 (1969) (due process denied where record did not show guilty plea made with understanding of consequences); and Coleman v. Alabama, 389 U.S. 22 (1967) (new trial awarded for systematic exclusion of blacks from grand and petit juries)).

Prior to *Furman*, the Court had developed only sparsely its interpretation of the eighth amendment ban on cruel and unusual punishment. *See* Robinson v. California, 370 U.S. 660 (1962) (imprisonment for status of being a narcotics addict violates the eighth and fourteenth amendments); Trop v. Dulles, 356 U.S. 86 (1958) (denationalization imposed for the crime of wartime desertion is an impermissible penalty); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1946) (second attempt at electrocution not violative of eighth amendment because not proposed in order to inflict unnecessary pain); Weems v. United States, 217 U.S. 349 (1910) (fifteen years hard labor in chains with perpetual loss of political rights excessive punishment for minor defalcation of government funds); *In re* Kemmler, 136 U.S. 436 (1890) (electrocution is a permissible method of execution); Wilkerson v. Utah, 99 U.S. 130 (1878) (shooting is a permissible method of execution).

20. Furman v. Georgia, 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

21. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

22. The Court had earlier rejected a constitutional challenge grounded on the due process clause of the fourteenth amendment to death sentences imposed through uncontrolled jury discretion. McGautha v. California, 402 U.S. 183 (1971).

social class.[23] Justice Stewart focused on the "freakish" way in which capital sentencing discretion had come to be used and on the lack of standards to guide the sentencer.[24] Justice White was troubled by the possibility that crimes designated as capital by statute might not really be capital. With the life-or-death decision in the hands of the judge or jury, no one knew what a capitally punishable crime was until the sentencer had passed judgment.[25] Justice White concluded that when infrequently and arbitrarily applied, as under the statutes before the Court, the death penalty could not serve the social purposes that justify it.[26]

The practical effect of the *Furman* decision was not confined to the cases then before the Court, but resulted in the striking down of all state death penalty laws having the infirmities held

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23. The words of the "cruel and unusual punishments" clause of the eighth amendment suggest that it is "cruel and unusual" to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.

408 U.S. at 245 (Douglas, J., concurring) (footnote omitted).

24. These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

408 U.S. at 309-10 (Stewart, J., concurring) (footnotes omitted).

25. Justice White made clear that a mandatory death penalty for a particular category of crime would present a different question:

> The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist. It is in this context that we must consider whether the execution of these petitioners would violate the Eighth Amendment.

408 U.S. at 311 (White, J., concurring).

26. *Id.* at 311-13. "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313.

Commentators have focused on the opinions of Justices Stewart and White, in *Furman* and in subsequent cases, as they have come to regard the two justices as the pivotal members of the Court with regard to death penalty litigation. *See, e.g.*, Palmer, *Two Perspectives on Structuring Discretion: Justices Stewart and White on the Death Penalty*, 70 J. CRIM. L.C. & P.S. 194 (1979); Comment, *supra* note 12.

crucial in *Furman*.[27] Following that decision, the Supreme Court of Florida held that capital crimes no longer existed in Florida.[28] Forty persons whose appeals from judgments imposing the death penalty were pending before the supreme court were resentenced to life imprisonment in *Anderson v. State*.[29] Sixty others, whose appeals had already resulted in affirmance, received the same treatment as a matter of equal protection.[30]

C. *The Capital Felony Sentencing Law*

Within six months of the *Furman* decision, the Florida legislature met in special session and became the first state legislature in the nation to reinstate capital punishment.[31] The new statute re-

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27. *See* Stewart v. Massachusetts, 408 U.S. 845 (1972), and companion cases. A number of death sentences imposed by Florida courts were vacated on the authority of *Stewart*. Williams v. Wainwright, 408 U.S. 941 (1972); Hawkins v. Wainwright, 408 U.S. 941 (1972); Pitts v. Wainwright, 408 U.S. 941 (1972); Boykin v. Florida, 408 U.S. 940 (1972); Johnson v. Florida, 408 U.S. 939 (1972); Brown v. Florida, 408 U.S. 938 (1972); Anderson v. Florida, 408 U.S. 938 (1972); Paramore v. Florida, 408 U.S. 935 (1972); Thomas v. Florida, 408 U.S. 935 (1972).

28. Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972). The court also held that upon conviction for an offense previously termed capital, the defendant would automatically be sentenced to life imprisonment; that the statute providing for a twelve-person jury in capital cases was of no effect, permitting six-person juries in trials of offenses previously termed capital; and that crimes previously termed capital could now be charged either by indictment or information. *Id.* at 502-04.

In State *ex rel.* Manucy v. Wadsworth, 293 So. 2d 345 (Fla. 1974), the court held that crimes previously deemed capital, committed during the period from the effective date of *Furman* (July 24, 1972) to the date of the reintroduction of capital crimes (October 1, 1972) had to be prosecuted within the two-year limitations period prescribed for all non-capital offenses. *Accord*, Reino v. State, 352 So. 2d 853 (Fla. 1977). *Manucy* also held that after the reinstatement of "capital crimes," offenses so designated must once again be charged by indictment of a grand jury. *See* Lowe v. Stack, 326 So. 2d 1 (Fla. 1975) (defendant tried for first-degree murder pursuant to only an information dated November 20, 1972, entitled to be charged by indictment); Hunter v. State, 358 So. 2d 557 (Fla. 4th DCA 1978). *But see* State v. Bell, 372 So. 2d 445 (Fla. 1979) (Alderman, J., dissenting from denial of certiorari).

29. 267 So. 2d 8 (Fla. 1972).

30. *In re* Baker, 267 So. 2d 331 (Fla. 1972). *See* Ehrhardt and Levinson, *supra* note 17, at 12. The court decided *Anderson* on September 8, 1972 and *Baker* on September 26, 1972. This direct resentencing by the court shielded the persons involved from the effect of a pre-*Furman* enactment, which was to take effect on October 1, 1972 and provided in part:

> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment with no eligibility for parole.

1972 Fla. Laws ch. 72-118 (current version at FLA. STAT. § 775.082(2) (1979)). Thus, for these two groups of condemned prisoners, the possibility of parole remained open.

31. U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS BULL.: CAPITAL PUNISHMENT 1975, at 56 (1976). Florida enacted 1972 Fla. Laws ch. 72-724, which took effect on Decem-

sponded to the infirmities condemned by the Supreme Court of the United States. No fewer than thirty-four other states have since followed Florida's lead by revising or enacting provisions for capital punishment, at least for the crime of murder.[32]

In Florida there are two capital felonies, murder in the first degree (premeditated or first-degree felony murder)[33] and sexual battery by a person eighteen years of age or older upon a person eleven years of age or younger.[34] Capital felonies are punishable by death or by imprisonment for life without elibigility for parole for twenty-five years.[35]

Under Florida's new capital felony sentencing law, a separate proceeding is held on the issue of which penalty to impose.[36] This

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ber 8, 1972.

32. U.S. DEP'T OF JUSTICE, *supra* note 31; Comment, *supra* note 12.

33. FLA. STAT. § 782.04(1)(a) (1979).

34. FLA. STAT. § 794.011(2) (1979). The use or threat of force is not an element of the offense defined by this subsection. *See* Harrison v. State, 360 So. 2d 421 (Fla. 1978); Banks v. State, 342 So. 2d 469 (Fla. 1976).

35. FLA. STAT. § 775.082(1) (1979). The supreme court upheld the provision for sentences of life imprisonment without eligibility for parole for 25 years against an eighth amendment attack, McArthur v. State, 351 So. 2d 972 (Fla. 1977); Banks v. State, 342 So. 2d 469 (Fla. 1976), as well as against challenges arguing that the law usurps executive pardon and parole powers. Owens v. State, 316 So. 2d 537 (Fla. 1975); Dorminey v. State, 314 So. 2d 134 (Fla. 1975).

36. FLA. STAT. § 921.141 (1979). The capital felony sentencing law provides:

> (1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
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> (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

bifurcated trial, with a guilt-or-innocence phase separate from a

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the 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) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(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, 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.

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

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

life-or-death sentencing phase, permits the accused to testify on matters in mitigation of punishment without giving up the possible benefits of not testifying at trial on his guilt.[37]

At the sentencing hearing, evidence may be presented to the court and jury on "any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated" in the statute.[38] Having weighed such aggravating or mitigating circumstances, the jury advises the court by majority vote whether to sentence the defendant to death or to life imprisonment.[39] If the defendant pleads guilty or is tried by the judge, or if for any reason the jury that rendered the verdict cannot reconvene, the "sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant."[40]

(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.

The legislature amended § 921.141 to comply with the requirements of the *Furman* decision. Fla. Laws ch. 72-724. That statutory revision superseded another one that would have taken effect October 1, 1972, which was adopted before the *Furman* decision. *See* 1972 Fla. Laws ch. 72-72.

37. Rejecting the argument that a single proceeding in which the jury determines guilt and makes a binding, unreviewable decision on whether to grant mercy impermissibly burdens the defendant's right against self-incrimination and opportunity to address the jury in mitigation of punishment, the United States Supreme Court has held that bifurcated trials in capital cases are not constitutionally required. Crampton v. Ohio, 402 U.S. 183 (1971).

38. FLA. STAT. § 921.141(1) (1979).

39. *Id.* § 921.141(2).

40. *Id.* § 921.141(1). As originally enacted, 1972 Fla. Laws ch. 72-724 provided for empaneling a jury where the defendant pleads guilty or waives jury trial. The supreme court held that the jury recommendation under such circumstances is a right of the accused, which can only be waived knowingly and intelligently. Lamadline v. State, 303 So. 2d 17 (Fla. 1974). A provision for empaneling a second jury "because of the inability of one or more of the jurors to function" was included in the pre-*Furman* revision of § 921.141, 1972 Fla. Laws ch. 72-72 (superseded by *id.* ch. 72-724).

In Lee v. State, 294 So. 2d 305 (Fla. 1974), the supreme court held that the trial court could empanel a jury under the new law to conduct a sentencing hearing for a defendant convicted of a capital felony before the *Furman* decision. Subsequently, the legislature

After receiving the recommendation of the jury, the trial court judge weighs the aggravating and mitigating circumstances and decides how to sentence the defendant.[41] If the decision is for death, the statute requires the judge to "set forth in writing" his findings of aggravating circumstances and his conclusion that mitigating factors are insufficient to outweigh them.[42]

As under the old law, the supreme court hears appeals from judgments imposing the death penalty.[43] Unlike the old law, appellate review extends to the sentence as well as to the judgment of conviction.[44] The statute provides not for an appeal "as of right" but for "automatic review."[45]

The statute provides two lists of factors relating to the circumstances of the capital felony and the character of the defendant, which the jury and the court must consider in making the sentencing decision.[46] The subsection that enumerates the aggravating circumstances begins, "Aggravating circumstances shall be *limited to* the following: . . . ."[47] The subsection introducing the mitigating factors states, "Mitigating circumstances shall be the following:

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amended § 921.141(1) to provide for the summoning of a special juror or jurors if "through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused." 1974 Fla. Laws ch. 74-379, § 1. Rudolph Valentine Lee was sentenced to death under the old law on June 22, 1972. After the *Furman* decision, the trial court reduced his sentence to life imprisonment and the state appealed. After the adoption of chapter 72-724 and the decision in State v. Dixon, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), the district court remanded for a penalty trial under the new statute. The supreme court approved, holding that because the death penalty was a possible punishment at the time of the crime, Lee could be sentenced under the new capital felony sentencing law. But life imprisonment without possibility of parole for 25 years was a feature of the new law that the court held could not be applied retroactively. The possible penalties for a capital felony at the time of the crime were death and an ordinary sentence of life imprisonment. *Cf.* Dobbert v. Florida, 432 U.S. 282 (1977) (application of new law to pre-*Furman* offense not ex post facto; revisions procedural and ameliorative), *aff'g* Dobbert v. State, 328 So. 2d 433 (Fla. 1976).

On remand, Lee was again sentenced to death. On appeal, the court took into consideration that most other pre-*Furman* death sentences were collectively reduced to life in *In re* Baker, 267 So. 2d 331 (Fla. 1972) and in Anderson v. State, 267 So. 2d 8 (Fla. 1972). *See* note 30 *supra*. The only reason Lee was not included among the *Anderson* category was that his lawyer had been diligent in moving to vacate his death sentence immediately after the *Furman* decision. As a matter of equal protection, the court reduced Lee's sentence to life imprisonment. Lee v. State, 340 So. 2d 474 (Fla. 1976).

41. FLA. STAT. § 921.141(3) (1979).

42. *Id.*

43. FLA. CONST. art. V, § 3(b)(3); *see* note 16 *supra*.

44. FLA. STAT. § 921.141(4) (1979).

45. *Id.; see* Ehrhardt and Levinson, *supra* note 17, at 19 n.93.

46. FLA. STAT. § 921.141(5)-(6) (1979).

47. *Id.* § 921.141(5) (emphasis added).

. . . ."[48] These guidelines[49] derive from the Model Penal Code of the American Law Institute.[50] They are designed to guide and control the exercise of the sentencer's discretion and to limit the imposition of the death penalty to crimes for which the state's interests in using it are the most compelling.[51]

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48. *Id.* § 921.141(6). This difference of language might have appeared insignificant in view of the provision of subsection (1) that "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant . . . ." *But see* note 110 *infra*.

Prior to the *Furman* decision, the legislature provided in 1972 Fla. Laws ch. 72-72 (superseded by *id.* ch. 72-724) for bifurcated trials and gave a list of guidelines, but left the final decision with the jury unless the jury was waived by the defendant and by the state. That enactment included one aggravating circumstance not included in chapter 72-724: "At the time the capital felony was commited the defendant also committed another capital felony." *Id.* ch. 72-72, § 3(c). It also included a mitigating factor not found in the later formulation: "The capital felony was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct." *Id.* § 4(d). The mitigating circumstance pertaining to age in chapter 72-72 read: "The youth of the defendant at the time of the crime." *Id.* § 4(4)(h). Chapter 72-724 later expressed the age factor "The age of the defendant at the time of the crime." FLA. STAT. § 921.141(6)(g) (1979). The list of aggravating circumstances as now codified includes a factor added by the 1979 Legislature: "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral justification." Fla. Laws ch. 79-353, § 1 (codified at FLA. STAT. § 921.141(5)(i)).

49. In a case in which a state sentencing law provided that the trial court could reduce the jury's penalty verdict of death to life imprisonment if it found the verdict not supported by the weight of the evidence, the United States Supreme Court held that the absence of standards to guide the jury's exercise of discretion did not deny due process. McGautha v. California, 402 U.S. 183 (1971). The "standards" feature of this decision seems to have been disapproved in *Furman*, at least by the three members of the majority who limited their expression of views to the sentences imposed in the cases before the Court and did not discuss the constitutionality of the death sentence per se. The emphasis on the arbitrariness of the exercise of discretion was the common feature of those opinions. 408 U.S. at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

50. MODEL PENAL CODE § 210.6 (Proposed Official Draft, 1962). The American Law Institute's Advisory Committee recommended that the Institute eliminate capital punishment from the model code. The Institute declined to take a position on abolition or retention and included the section on capital sentencing to provide jurisdictions retaining the death penalty with a model for determining those cases in which to impose it and a procedure for making the determination. MODEL PENAL CODE § 210.6, Comment at 65 (Tent. Draft No. 9, 1959). *See* M. MELTSNER, *supra* note 16, at 21-22.

51. The model code's recommended limitations on the use of the death penalty are based on an approach using flexible standards. This approach may be compared with the restriction of the death penalty to five enumerated classes of murders in England's Homicide Act of 1957.

> The particular classes chosen may appear somewhat curious to American lawyers, but it is to be remembered that they do not represent an attempt to distinguish between murders according to heinousness or moral gravity, but to select for capital punishment those types of murder in which the deterrent effect is likely to be most powerful.

H. HART, *supra* note 11, at 60.

In *State v. Dixon*,[52] the Supreme Court of Florida upheld the reinstatement of capital punishment. The majority opined that *Furman* did not require the complete elimination of discretion in sentencing for capital crimes.

> Thus, if the judicial discretion possible and necessary under Fla. Stat. § 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia . . . has been met. What new test the Supreme Court of the United States might develop at a later date, it is not for this Court to suggest.[53]

In rejecting the suggestion that crimes most warranting the death penalty can be defined with specificity before the fact, Justice Adkins reasoned:

> Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. In so doing, the Legislature has also recognized the inability of man to predict the myriad tortuous paths which criminality can choose to follow. If such a prediction could be made, the Legislature could have merely programmed a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors included—with ranges of possible impact of each—and provided for the imposition of death under certain circumstances, and for the imposition of a life sentence under other circumstances. However, such a computer could never be fully programmed for every possible situation, and computer justice is, therefore, an impossibility. The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges.[54]

The court noted that a number of procedural steps or safeguards stand between conviction of "a most serious crime" and the

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52. 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). The court again upheld the statute in Alford v. State, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912 (1976). For a discussion of Florida's response to *Furman*, see Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. U.L. REV. 108 (1974); Note, *Florida Death Penalty: A Lack of Discretion?* 28 U. MIAMI L. REV. 723 (1974).

53. 283 So. 2d at 7.

54. *Id.* Justice Harlan expressed similar views in McGautha v. California, 402 U.S. 183 (1971). *See* note 13 *supra*.

imposition of the death penalty.[55] Holding a separate proceeding for sentencing assures the presentation of information at the sentencing phase that "might have been barred or withheld from a trial on the issue of guilt or innocence."[56] The rules of evidence are relaxed, and the defendant may testify in his own behalf on the question of sentence without the adverse consequences that might follow from doing so in a unitary proceeding. Even on the issue of sentence, the defendant cannot be required to testify against himself. Cross-examination must be limited to matters the defendant himself has presented in mitigation.[57] The separate proceeding gives the jury more information relevant to sentencing than it would otherwise receive.[58] To repose the actual sentencing decision with the judge guards against decisions based on "the inflamed emotions of jurors," and the judge's expertise "in the facts of criminality" helps to assure consistent application.[59] The requirement that a sentence of death be justified in writing makes meaningful appellate review possible.[60] Appellate review itself is the final safeguard and

> 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. Thus, the discretion charged in Furman v. Georgia . . . can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment

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55. 283 So. 2d at 7.

56. *Id.*

57. *Id.* at 7-8.

58. *Id.* at 8.

59. *Id.*

60. *Id.* The court invoked its power to promulgate rules of practice and procedure under article V, section 2(a), of the Florida Constitution, and declared that when a trial court sentences a capital felon to life imprisonment, such sentence also must be supported in writing. "[R]equiring these findings by the judge provides an additional safeguard for the defendant sentenced to death in that it provides a standard for life imprisonment against which to measure the standard for death established in the defendant's case, and again avoids the possibility of discriminatory sentences of death." 283 So. 2d at 8. Because judgments in which the sentence is life imprisonment are reviewed by different appellate courts, however, it is arguable that there is nothing to assure consistency in the sentencing decision except the conscientiousness of the sentencing judges. FLA. CONST. art. V, § 3(b)(2) (amended 1980) no longer authorizes the legislature to provide for supreme court review of judgments imposing life imprisonment. *See* Kramer, Halpern & Robbins, *Constitutional Law, 1979 Developments in Florida Law*, 34 U. MIAMI L. REV. 597, 610 (1980).

rather than an exercise in discretion at all.[61]

As noted above, Florida was the first state to reinstate capital punishment after *Furman,* and a large number of other states soon followed.[62] Thus, the predominant question among state lawmakers, constitutional lawyers, and commentators was how those post-*Furman* enactments would fare when considered by the Supreme Court of the United States. Florida's law was scrutinized on certiorari review of a decision by the Supreme Court of Florida that affirmed a capital felony judgment and sentence of death.[63]

D. Proffitt v. Florida *and Its Companion Cases*

On July 2, 1976, the Supreme Court of the United States upheld the Florida capital felony sentencing law in *Proffitt v. Florida.*[64] The Court held that the new statutory provisions had remedied the deficiencies condemned by *Furman* and that the death sentence imposed did not violate the eighth amendment. In rejecting the petitioner's contention that the imposition of the death penalty violates the eighth amendment under all circumstances,[65] the Court referred to *Gregg v. Georgia,*[66] one of four other cases that challenged death penalty statutes and were decided on the same day as *Proffitt.*[67] In *Gregg, Proffitt,* and *Jurek v. Texas*[68] there were two plurality opinions, each joined in by three justices.[69]

In *Gregg,* the plurality opinion of Justices Stewart, Powell, and Stevens explained that the basic concern of the eighth amend-

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61. 283 So. 2d at 10.

62. U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS BULL., *supra* note 31.

63. Proffitt v. Florida, 428 U.S. 242 (1976).

64. *Id.*

65. *Id.* at 247 (opinion of Stewart, Powell, and Stevens, JJ.).

66. 428 U.S. 153 (1976).

67. *See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). The Stewart plurality considered per se constitutionality in *Gregg,* 428 U.S. at 168, while Justice White, joined by Chief Justice Burger and Justice Rehnquist, rejected petitioner's per se challenge for the reasons stated in his dissent in Roberts v. Louisiana. 428 U.S. at 226 (White, J., dissenting).

68. 428 U.S. 262 (1976).

69. Gregg v. Georgia, 428 U.S. at 158 (opinion of Stewart, Powell & Stevens, JJ.); *id.* at 207 (White, J., joined by Burger, C.J., & Rehnquist, J., concurring in the judgment); Proffitt v. Florida, 428 U.S. at 244 (opinion of Stewart, Powell & Stevens, JJ.); *id.* at 260 (White, J., joined by Burger, C.J., & Rehnquist, J., concurring in the judgment); Jurek v. Texas, 428 U.S. at 265 (opinion of Stewart, Powell & Stevens, JJ.); *id.* at 277 (White, J., joined by Burger, C.J., & Rehnquist, J., concurring in the judgment).

ment is to protect human dignity, requiring that punishments not be excessive.[70] Therefore, punishment should not involve unnecessary infliction of pain, nor be grossly out of proportion to the crime for which it is imposed.[71] The plurality found support for their conclusions in the language of the fifth and fourteenth amendments[72] and in the Court's eighth amendment decisions,[73] which they thought indicated a tradition of social acceptance of capital punishment. They noted that the eighth amendment is not a static concept, but one based on evolving standards.[74] The legislative response to *Furman,* however, indicated continued social acceptance and endorsement of the death penalty.[75] The plurality concluded that if a penalty the legislature proposes to use is not cruelly inhumane or disproportionate to the crime, courts should not interfere.[76]

Moreover, the plurality argued, the inconclusiveness of the evidence on the deterrent value of capital punishment does not bar its use, but offers a further reason for deference to the legislative judgment.[77] Furthermore, retribution as a social purpose is not inconsistent with the dignity of man; in the view of many, human dignity demands retribution for the most culpable crimes.[78] The *Gregg* plurality concluded that for the crime of deliberate murder, "we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."[79]

After deciding that capital punishment is not unconstitutional per se, the plurality explained that to remedy the problems identified in *Furman,* the statutory sentencing procedure must assure guided and controlled consideration of information relevant to the

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70. 428 U.S. at 173 (1976) (plurality opinion).

71. *Id.*

72. U.S. CONST. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . .

Id. amend. XIV, § 1 provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

73. *See* note 19 *supra.*

74. 428 U.S. at 173 (plurality opinion).

75. *Id.* at 179-80.

76. *Id.* at 175.

77. *Id.* at 185-86.

78. *Id.* at 183-84.

79. *Id.* at 187.

sentencing decision.[80] The Georgia statute met the test by requiring the jury to focus on the circumstances of the crime and the character of the defendant.[81]

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80. The Court concluded:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id. at 195.

81. According to the opinion:

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

Id. at 206-07.

In an early decision of the Supreme Court of Florida under the new law, some language appeared that seemed inconsistent with the *Furman* concerns about unfettered discretion to effect mercy:

> The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.
>
> The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976).

The *Gregg* plurality opinion, however, seemed to de-emphasize the concern with arbitrary power to grant mercy:

> The petitioner next argues that the requirements of *Furman* are not met here because the jury has the power to decline to impose the death penalty even

Likewise, in *Proffitt v. Florida*[82] the plurality said that because the trial judge had to weigh aggravating and mitigating circumstances, the statute required a focus on "the circumstances of the crime and the character of the individual defendant."[83] The plurality saw appellate review of the sentencing decision as a safeguard against arbitrary imposition of the death penalty, because of the appellate court's role of assuring consistency.[84] The existence of prosecutorial, jury, and executive discretionary stages in the process of selecting those who will ultimately suffer the penalty of death does not render the sentencing arbitrary. The plurality said, as in *Gregg*, that the petitioner's argument on this point was "based on a fundamental misinterpretation of *Furman*."[85]

In response to the petitioner's argument that Florida's new statute did not eliminate arbitrariness, because the provisions enumerating the aggravating and mitigating circumstances were vague and overbroad, the Court referred to some of the early decisions of the Supreme Court of Florida construing these provisions of the statute.[86] The petitioner also argued that the weighing process mandated by the statute would not help to standardize decisions, because the statute did not tell the jury what weight to assign to each factor. The Court said:

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder 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 va-

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> if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets *Furman*. Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

428 U.S. at 203 (citation omitted). For further discussion of this point, see England, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between Furman and Gregg*, 52 NOTRE DAME LAW. 596 (1977); Note, *Furman to Gregg: The Judicial and Legislative History*, 22 HOW. L.J. 53 (1979).

82. 428 U.S. 242 (1976).

83. *Id.* at 251 (plurality opinion).

84. *Id.* at 253.

85. *Id.* at 254.

86. *Id.* at 255-56.

> rious 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.[87]

Finally, the Court reiterated its belief that there was an important safeguard in the appellate review process, "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."[88] The Florida appellate review process had thus incorporated into law the "type of proportionality review mandated by the Georgia statute."[89]

Since the Court's validation of the constitutionality of the Florida capital felony sentencing law, prosecution for capital offenses and the imposition of death sentences have continued apace. There are now approximately one hundred and fifty persons under sentence of death in Florida. The process initiated by the reinstatement of capital punishment in 1972 came to a culmination with the electrocution of John Spenkelink on May 25, 1979.[90]

II. THE SENTENCING PROCESS

The common features of the death penalty laws upheld in *Proffitt, Jurek,* and *Gregg* include the following: a sentencing proceeding for the receipt of evidence and argument relative to sen-

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87. *Id.* at 257-58.

88. *Id.* at 258 (footnote omitted).

89. *Id.* at 259.

In the third case decided on July 2, 1976, Jurek v. Texas, 428 U.S. 262 (1976), the Court upheld the Texas capital punishment laws, holding that both standards of aggravation and opportunity for individualized consideration were sufficiently present. The other two decisions rendered that day, Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), struck down provisions for a mandatory sentence of death for a specified crime. In both of these cases the plurality of Justices Stewart, Powell, and Stevens were joined in their judgment by Justices Brennan and Marshall. The plurality said that the failure to allow for individualized consideration of the appropriate punishment, even for a most serious crime, violated the eighth amendment. *See generally* Comment, *First-Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas, and Louisiana,* 24 LOY. L. REV. 709 (1978).

90. St. Petersburg Times, May 26, 1979, at 1A, col. 5. Gary Gilmore was executed in Utah on January 17, 1977. Jessee Bishop died in Nevada on October 22, 1979. Cowger, *supra* note 17.

tence; written standards, either in the form of definitions of aggravated murders or guidelines for determining the aggravation of capital crimes; a requirement of written findings by the sentencer; a method or standards for focusing attention on mitigating circumstances; and appellate review of the sentence of death. Under the Florida law, however, the jury sentencing proceeding need not invariably take place. The defendant may waive the jury's advisory sentence, if the waiver is knowingly and intelligently made.[91] The defendant's waiver, however, does not determine the matter; it merely gives the trial judge discretion either to dispense with the jury hearing or to require it.[92]

The Florida statute provides that the "separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment"[93] is to be "conducted by the trial judge before the trial jury as soon as practicable."[94] At this proceeding, the parties may present evidence on "any matter that the court deems relevant to the nature of the crime and the character of the defendant."[95] The statute declares that the evidence presented "shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6)."[96] The court may receive any evidence that "the court deems to have probative value . . . , regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."[97] Finally, subsection (1) provides that the state and the defendant or counsel shall be permitted to present an argument for or against

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91. Holmes v. State, 374 So. 2d 944 (Fla. 1979); Washington v. State, 362 So. 2d 658 (Fla. 1978).

The jury recommendation is an essential right.

> Both the trial judge, before imposing a sentence, and this Court, when reviewing the propriety of the death sentence, consider as a factor the advisory opinion of the sentencing jury. In some instances it could be a critical factor in determining whether or not the death penalty should be imposed.

Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974).

92. State v. Carr, 336 So. 2d 358 (Fla. 1976). The Georgia statute providing that death may not be imposed for a capital crime unless the jury finds at least one aggravating circumstance also provides that "[t]he provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty." GA. CODE § 26-3102 (1978).

93. FLA. STAT. § 921.141(1) (1979); *see* note 36 *supra*.

94. *Id.* The proceeding may be held before a second jury empaneled especially for the purpose. *See* note 40 *supra*.

95. FLA. STAT. § 921.141(1) (1979).

96. *Id.*

97. *Id.*

the sentence of death.[98]

As for the advisory verdict on sentence, the statute directs:

> After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
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> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
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> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
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> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.[99]

The jury arrives at its recommendation by majority vote.[100] The trial judge is free to reject the jury's recommendation, but only "after weighing the aggravating and mitigating circumstances."[101] But the statute does not offer any guidance on the degree of aggravation necessary for a death sentence.

In *State v. Dixon*,[102] the court began to resolve some of the unanswered questions about the statute:

> The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A., actually define those crimes—when read in conjunction with Fla. Stat. §§ 782.04(1) and 794.01(1), F.S.A.—to which the

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98. Florida Rule of Criminal Procedure 3.780 was promulgated to create a uniform procedure for sentencing proceedings in capital cases, *Re* Florida Rules of Criminal Procedure, 343 So. 2d 1247, 1263 (Fla. 1977), and provides as follows:

> (a) In all proceedings based upon Section 921.141, Florida Statutes (1975), the state and defendant will be permitted to present evidence of an aggravating or mitigating nature, consistent with the requirements of the statute. Each side will be permitted to cross-examine the witnesses presented by the other side. The state will present evidence first.
>
> (b) The trial judge shall permit rebuttal testimony.
>
> (c) Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first.

See also Yetter, *The Florida Rules of Criminal Procedure: 1977 Amendments*, 5 FLA. ST. U.L. REV. 243, 305-06 (1977).

99. FLA. STAT. § 921.141(2) (1979).

100. Allowing the jury recommendation to be arrived at by majority vote in the sentencing phase of a capital case does not violate constitutional rights to trial by jury. Alvord v. State, 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976). The court in *Alvord* cited Watson v. State, 190 So. 2d 161 (Fla. 1967), a pre-*Furman* case on the permissibility of a binding recommendation of mercy by majority vote. In *Watson*, the court reasoned that a requirement of unanimity would make it more difficult for the defendant to get a recommendation of mercy. *Id.* at 166.

101. FLA. STAT. § 921.141(3) (1979).

102. 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

> death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.
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> . . . .
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> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. § 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.[103]

The aggravating and the mitigating circumstances serve different purposes. By codifying the aggravating circumstances, which define the crimes to which the death penalty applies in the absence of mitigating circumstances, the legislature has attempted to provide "clearly articulated standards of culpability,"[104] in response to one of the problems perceived by the *Furman* majority.[105] The mitigating circumstances, on the other hand, focus attention on the facts and surrounding circumstances of the crime and the character and background of the defendant. Punishment of certain conduct, however it is defined, is not the only public policy aim of the criminal justice system.[106] Whether the objective of capital punishment is utilitarian (*i.e.*, based on deterrence) or moralistic (*i.e.*, based on retribution), there are both utilitarian and morally based limitations on its use.[107] The legislature, therefore, focuses the sentencer's decision on consideration of factors suggesting that the capital felony in question should not be punished as severely as other such felonies. In the sentencing process, using standards of culpability on the one hand and mitigating factors on the other, the values of consistency and individualization remain in constant tension with one another.

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103. *Id.* at 9.

104. *See* Palmer, *supra* note 26. The author posits that Justice Stewart's chief concern is with individualizing consideration of the sentence of death, while Justice White's is with clearly defining the conduct that is to be so punished.

105. *See* notes 8 & 18 and accompanying text *supra*.

106. [I]n relation to any social institution, after stating what general aim or value its maintenance fosters we should enquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value. Just because the pursuit of any single social aim always has its restrictive qualifier, our main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles.

H. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 10 (1968).

107. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

A. *Evidence and Argument*

Under Florida's capital felony sentencing law, all evidence that the court considers relevant to the sentencing question is admissible.[108] The rules of evidence are relaxed and the court's approach to what is relevant should be broad rather than narrow.[109] Because aggravating and mitigating factors serve different purposes, however, the question of "relevance" to the sentencing decision differs in the two contexts.[110] Evidence disfavoring the defendant's claim that he should be spared the extreme penalty must relate to one of the statutory aggravating circumstances.[111] It is error to allow the state, in seeking a sentence of death, to present to the jury evidence or argument not relevant to a statutory aggravating circumstance.[112] Such evidence may tend to prejudice the defendant or inflame the jury with improper considerations.[113]

In making findings, the trial judge may consider information relevant to sentencing that neither party has sought to put before the jury.[114] All information considered, however, must be furnished to the defendant, and he must have an opportunity to explain, rebut, or deny it.[115] The Supreme Court of the United States an-

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108. FLA. STAT. § 921.141(3) (1979). *See, e.g.*, Swan v. State, 322 So. 2d 485 (Fla. 1975) (trial court properly considered testimony by a psychologist, a psychiatric report from a prior criminal hearing, and a pre-sentence investigation report).

109. Alvord v. State, 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976).

110. The plurality in *Proffitt* noted the different introductory language in subsections (5) and (6) of section 921.141 and expressed confidence that this indicated that the standards of aggravation would not be arbitrarily expanded. Proffitt v. Florida, 428 U.S. 242, 250 n.8, 256 n.14 (1976).

111. *See, e.g.*, Elledge v. State, 346 So. 2d 998 (Fla. 1977); Meeks v. State, 339 So. 2d 186 (Fla. 1976), *cert. denied*, 439 U.S. 991 (1978).

112. In *Elledge*, the court held inadmissible, at a sentencing trial for a murder conviction, testimony and prosecutorial argument concerning the defendant's confession to a subsequent murder for which he had not yet been convicted. The Supreme Court of Florida held that admission of the evidence was not harmless error because it related to a nonstatutory aggravating factor and might have influenced the jury's weighing process. 346 So. 2d at 1002-03. In *Meeks*, the court held that comments by the prosecutor regarding contemporaneous felony convictions were erroneously allowed, but that the error was harmless because the same jury that heard the comments had returned the verdicts commented upon. 339 So. 2d at 190.

113. The aggravating factors in the statute define the crimes for which death is appropriate. State v. Dixon, 383 So. 2d at 9. Allowing the jury or the judge to add to the list invades the province of the legislature. Miller v. State, 373 So. 2d 882 (Fla. 1979). The standards of culpability and responsibility are matters of legislative policy. *See* Furman v. Georgia, 408 U.S. 238, 314 (White, J., concurring); Comment, *supra* note 89.

114. *See, e.g.*, Sawyer v. State, 313 So. 2d 680 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976).

115. Gardner v. Florida, 430 U.S. 349 (1977).

nounced this principle in *Gardner v. Florida,*[116] on review of a judgment of the Supreme Court of Florida,[117] in the context of trial court use of pre-sentence investigations.[118]

In *Gardner v. Florida,* the Court held that a sentence of death imposed in partial reliance on information in the confidential portion of a pre-sentence investigation report, which the defendant had no opportunity to explain, rebut, or deny, violated due process.[119] The Court reasoned that in a death penalty case, the need for reliability in considering the facts of the crime and the characteristics of the defendant compelled the disclosure of all information. Despite recognizing that the principle of guided and controlled discretion requires as much relevant information as possible, the Court nevertheless felt that the quality of the deci-

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116. *Id.* at 362 (plurality opinion); *id.* at 363 (White, J., concurring).

117. Gardner v. State, 313 So. 2d 675 (Fla. 1975), *cert. granted,* 428 U.S. 908 (1976). The grant of certiorari was limited to the following question:

> Whether nondisclosure of a 'confidential' portion of a pre-sentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the pre-sentence report?

428 U.S. at 909.

118. Pre-sentence investigations, to be considered when a judge has discretion in sentencing, are authorized by Florida Rule of Criminal Procedure 3.710, which provides:

> In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge.

Section 921.231 of the Florida Statutes (1979) governs the conduct of the investigation. Thus, in some cases the court *must* order an investigation and consider its results. Under the procedural rule, the court *may* disclose the reported findings to the parties, and if disclosed to one side, the findings must be disclosed to both. FLA. R. CRIM. P. 3.713(a).

In a capital case, however, where the statute provides that evidence and argument be heard on the issue of sentence, the court has discretion whether to order a pre-sentence investigation. Even if the capital felony is the defendant's first felony offense, the pre-sentence investigation is optional because probation is not a possible sentence. *See, e.g.,* Jackson v. State, 366 So. 2d 752 (Fla. 1978); Hargrave v. State, 366 So. 2d 1 (Fla. 1978). Query whether, if the legislature amended section 921.141 to provide for the consideration of a court-ordered background investigation, the supreme court would hold the amendment an invasion of the court's authority over procedure. *See generally* Huntley v. State, 339 So. 2d 194 (Fla. 1976) (court-ordered pre-sentence investigation is a matter of practice and procedure; legislature cannot require it); Kramer, Halpern & Robbins, *supra* note 60, at 602-08.

119. 430 U.S. at 351.

sion improves when both sides have a chance to evaluate and respond to the information.[120] After *Gardner v. Florida*, the Supreme Court of Florida adopted the practice of remanding or relinquishing jurisdiction over pending appeals so that the trial court could determine whether the sentence of death was based on information that the defendant had no opportunity to rebut, explain, or deny.[121]

When evidence of aggravating circumstances is presented, any evidence reasonably related to one of the enumerated mitigating factors also must be received at the sentencing hearing. In *Miller v. State*,[122] defense counsel asked for a continuance of the sentencing hearing so that he could present psychiatric testimony on the statutory mitigating circumstances of emotional disturbance, impaired capacity to conform to the law, and lack of appreciation of criminality. The trial court refused to continue the sentencing trial. On appeal, the Supreme Court of Florida held:

> The jury was deprived of testimony highly relevant to their evaluation of mitigating circumstances—the testimony of the psychiatrists, who had testified during trial, relative to whether Miller acted under the influence of extreme mental disturbance (Section 921.141(6)(b)) or whether his ability to conform his conduct to the requirements of the law was substantially im-

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120. *Id.* at 359. This holding represents an expression of trust in the adversary process as the best way to arrive at the truth.

121. *E.g.*, Jacobs v. State, 357 So. 2d 169 (Fla. 1978) (after inadequate response to *Gardner* order, remanded for specific finding of opportunity to rebut or new sentencing hearing). On certiorari review of Songer v. State, 322 So. 2d 481 (Fla. 1975), the death sentence was vacated and the case remanded for consideration in light of *Gardner*. Songer v. Florida, 430 U.S. 952 (1977) (mem.).

A number of capital cases, after affirmance on appeal, were reconsidered in light of the *Gardner* decision. Trial court recitation indicating compliance corrected some of these cases. Others resulted in a reconsideration of sentence after hearing from the defendant. Still others resulted in vacation of the sentence and remand for a new sentencing hearing before the judge. *See, e.g.*, Dobbert v. State, 375 So. 2d 1069 (Fla. 1979) (death sentence affirmed after resentencing on *Gardner* remand); Harvard v. State, 375 So. 2d 833 (Fla. 1977), *cert. denied*, 441 U.S. 956 (1979) (remanded for new sentencing hearing); Funchess v. State, 367 So. 2d 1007 (Fla. 1979), *vacating* 341 So. 2d 762 (Fla. 1976) (confidential portion of presentence investigation considered); Meeks v. State, 364 So. 2d 461 (Fla.), *cert. denied*, 439 U.S. 991 (1978) (death sentence affirmed after remand to trial court for *Gardner* inquiry); Barclay v. State, 362 So. 2d 657 (Fla.), *cert. denied*, 439 U.S. 892 (1978) (death sentence vacated, remanded for opportunity to rebut); Adams v. State, 355 So. 2d 1205 (Fla.), *cert. denied*, 439 U.S. 947 (1978) (motion for remand for *Gardner* inquiry denied); Alford v. State, 355 So. 2d 108 (Fla. 1977), *cert. denied*, 436 U.S. 935 (1978) (death sentence reaffirmed after trial court inquiry).

122. 332 So. 2d 65 (Fla. 1976).

paired . . . .[123]

The supreme court ordered a new sentencing proceeding, with a jury and psychiatric testimony.[124] *Miller* stands for the proposition that all evidence proffered by the defendant and relevant to a statutory mitigating circumstance must be received.[125]

Not only must all evidence of mitigating circumstances be received, but also due process requires that mitigating considerations not be limited to those given in the statute. In *Lockett v. Ohio*,[126] the Supreme Court of the United States vacated a sentence of death, holding that the sentencing statute violated the eighth and fourteenth amendments by its failure to allow the consideration of mitigating factors other than those given in the statute.[127] The Ohio statute narrowly limited the factors that the sentencer could consider as mitigating. As a result, the death penalty was much akin to a mandatory death provision. The statute, said the plurality, barred the sentencing authority from considering the circumstances of the offense and the character and record of the defendant, thus subjecting the defendant to the risk of arbitrary and capricious selection for death.[128]

Even before the *Lockett* decision, the Supreme Court of Florida had recognized that circumstances other than those listed in the statute could reasonably influence a jury to recommend or a judge to impose a life sentence instead of death.[129] In *Songer v. State*,[130] the court rejected an argument that the capital felony sentencing law is unconstitutional under *Lockett*, referring to cases in which it had approved trial court consideration of mitigating circumstances not listed in the statute.[131] The Supreme Court of the United States had noted the nonexclusive nature of the statutory list in *Proffitt v. Florida*,[132] and the Supreme Court of Florida

123. *Id.* at 67-68.

124. *Id.* at 68.

125. Because the jury recommendation is so important under the Florida scheme, it is reversible error to keep such matters from the jury. Of course, if the jury recommends life, any such error is harmless. But where the court imposes death over a jury recommendation of life, the appellant is more likely to complain of those matters the sentencing judge considered or failed to consider.

126. 438 U.S. 586 (1978).

127. *Id.* at 606 (plurality opinion).

128. Note, *Sentencer Must Have Some Discretion in Imposing Capital Punishment: Another Retreat from Furman v. Georgia*, 44 MO. L. REV. 359 (1979).

129. Songer v. State, 365 So. 2d 696 (Fla. 1978) (on rehearing).

130. *Id.*

131. *Id.* at 700.

132. 428 U.S. 249 (1976); *see* note 110 *supra*.

construed the statute in conformity with the view upheld there.[133]

B. *The Jury's Recommendation*

In *Taylor v. State*,[134] one of the earliest appeals heard under revised section 921.141, the trial judge had imposed a sentence of death immediately after the jury had recommended life imprisonment. No evidence had been presented by either side on the issues of aggravation and mitigation. On appeal, the supreme court looked at the language of subsection (3) of the newly revised law,[135] which directs the trial judge to "weigh" the aggravating and mitigating circumstances before imposing sentence. The court held that the trial court's "immediate rejection of the jury's recommendation . . . does not comport with the intent of the legislation."[136] The record indicated "that the trial judge in his haste to impose sentence may not have properly considered the mitigating circumstances enumerated by the statute and found in the record."[137]

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133. 365 So. 2d at 700. Songer had based his argument on language found in the court's opinion in Cooper v. State, 336 So. 2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977). The court in *Cooper* affirmed a sentence of death based upon a jury recommendation and held that the trial court had properly refused to admit evidence of the defendant's past employment, his attempts to avoid the company of his accomplice, and the reputation of the accomplice for violence. The court found the relation of these matters to the actual crime too speculative. "[T]he Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty . . . and we are not free to expand the list." 336 So. 2d at 1139. In *Songer* the court said that *Cooper* "was concerned not with whether enumerated factors were being raised as mitigation, but with whether the evidence offered was probative." 365 So. 2d at 700. *But see* Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 774 n.84 (1978); Stotzky, *Capital Punishment*, 31 U. MIAMI L. REV. 841, 860 n.83 (1977).

The Supreme Court of Florida has considered the culpability of a defendant relative to that of his accomplices as a possible mitigating circumstance in a number of cases. *See* Brown v. State, 367 So. 2d 616 (Fla. 1979); Jackson v. State, 366 So. 2d 752 (Fla. 1978); Salvatore v. State, 366 So. 2d 745 (Fla. 1978); Smith v. State, 365 So. 2d 704 (Fla. 1978); Barclay v. State, 343 So. 2d 1266 (Fla. 1977), *cert. denied*, 439 U.S. 892 (1978); Witt v. State, 342 So. 2d 497 (Fla.), *cert. denied*, 434 U.S. 935 (1977); Meeks v. State, 339 So. 2d 186 (Fla. 1976), *cert. denied*, 439 U.S. 991 (1978); Messer v. State, 330 So. 2d 137 (Fla. 1976); Slater v. State, 316 So. 2d 539 (Fla. 1975). The statutory list of mitigating factors suggests the relevance of the defendant's relative culpability in the following language: "The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor," FLA. STAT. § 921.141(6)(d) (1979), and "The defendant acted under extreme duress or under the substantial domination of another person," *id.* § 921.141(6)(e).

134. 294 So. 2d 648 (Fla. 1974).

135. FLA. STAT. § 921.141(3) (1979).

136. 294 So. 2d at 651.

137. *Id.* The supreme court reduced the sentence to life, concluding from the record that the circumstances supported the jury's view rather than the judge's.

Taylor made clear that the judge must engage in the deliberation mandated by the statute before rejecting—or accepting—a jury recommendation. But the statute does not indicate what weight the jury's recommendation should carry. Is the judge to be influenced by it at all, or is he to engage in an entirely independent evaluation? The supreme court provided guidance on this question in *Tedder v. State*.[138] "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."[139]

Although the words "so clear and convincing that virtually no reasonable person could differ" may be criticized for creating an impossible test, subsequent refinements of the *Tedder* rule have shown that the test requires great deference to a jury recommendation based on reason and proper mitigating considerations. In a case decided the following year, *Thompson v. State*,[140] the court elaborated on the rule:

> This court is well aware that the recommendation of sentence by the jury is only advisory and is not binding on the trial court. However, the advisory opinion of the jury must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.[141]

The legislature would not have placed the sentencing decision with the trial judge, if it had not thought the judge more likely than the jury to resist the effect of improper and unreasonable considerations.

The court has applied the *Tedder* rule in a number of subsequent cases in which the jury recommended life and there was

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138. 322 So. 2d 908 (Fla. 1975).

139. *Id.* at 910. The court ordered the sentence reduced to life in accord with the jury recommendation, finding one of the trial court's recited aggravating circumstances erroneous.

140. 328 So. 2d 1 (Fla. 1976).

141. *Id.* at 5. The court found the jury's recommendation of life reasonable and ordered the penalty reduced to life.

some evidence in the record providing a reasonable basis for the recommendation.[142] For example, when psychiatric testimony indicated mental disturbance or raised substantial questions about a defendant's mental capacity, the court found a reasonable basis for the jury recommendation of life and held that the judge should have followed it.[143]

In *Chambers v. State*,[144] the court applied the *Tedder* rule in the case of a murder resulting from a violent lovers' quarrel. The relationship had often exploded into violence. The jury recommended life on the basis of the extreme mental and emotional conditions present in the relationship.[145] In an opinion concurred in by three justices, the court explained the importance of the jury recommendation:

> Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice. Given that the imposition of a death penalty "is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment . . . ", both our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists.[146]

The court did not, however, explain why a jury recommendation should receive greater deference when it is for life than when it is for death, as implied in *Tedder* and explicitly stated in *Thompson*.[147] The need for consistent application of the death penalty de-

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142. The supreme court has also invoked the *Tedder* rule, without discussion of any mitigation in the record, where "reasonable persons can differ" on the propriety of the death sentence. Provence v. State, 337 So. 2d 783, 787 (Fla. 1976), *cert. denied*, 431 U.S. 969 (1977). The fact of a co-perpetrator's immunity has been held a reasonable basis for a jury recommendation of life. Brown v. State, 367 So. 2d 616 (Fla. 1979).

143. Burch v. State, 343 So. 2d 831 (Fla. 1977); Jones v. State, 331 So. 2d 615 (Fla. 1976); *see* FLA. STAT. § 921.141(6)(b), (e), (f) (1979).

144. 339 So. 2d 204 (Fla. 1976).

145. The defendant was arrested for severely beating his girlfriend. After she posted bond for him, they became embroiled in an argument and he beat her so severely that she died five days later of her injuries. *Id.* at 205. The beatings were incident to an ongoing sado-masochistic relationship. *Id.* at 209 (England, J., concurring).

146. *Id.* at 208-09 (England, J., concurring).

147. Thompson v. State, 328 So. 2d at 5; Tedder v. State, 322 So. 2d at 910.

mands judicial rejection of a jury recommendation of life that, even though reasonable, deviates from the standards developed and applied in other cases. But the need to minimize the risk of an improvident death sentence speaks loudly in favor of giving the benefit of the doubt to a jury recommendation of life.

The supreme court cited the *Tedder* decision in the later case of *LeDuc v. State*.[148] The defendant in *LeDuc* pleaded guilty to two capital felonies and the court empaneled a special jury to consider punishment. The jury heard a summary of evidence concerning the crimes and an argument by the defense that the defendant was mentally disturbed. In keeping with a bargain for the guilty pleas, the prosecutor did not ask for death, but listed for the jury the aggravating circumstances he thought the evidence showed. The jury recommended death. On appeal, the supreme court said:

> The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was [*sic*] considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. On the record placed before the jury in this case, a recommended sentence of death was certainly reasonable. Indeed, the only data on which a life recommendation could have been made would have had to be grounded on the nonevidentiary recommendation of the prosecutor and the emotional plea of defense counsel.[149]

The court thus stated the rule differently in *LeDuc* than it had in the *Thompson* and *Tedder* cases, providing the same burden for justifying a departure from a jury recommendation whether the recommendation is for life or for death.

Under the *Tedder* rule, a jury recommendation of life is of great benefit to a defendant sentenced to death, because the supreme court will reduce the sentence to life if its examination of the record indicates that the judge ignored or did not properly consider anything that in reason could have influenced the jury. The rule as stated in *LeDuc* has somewhat different consequences on appeal. When judge and jury agree on death, the supreme court will not "cast aside that careful deliberation which the matter of sentence has already received by the jury and the trial judge, unless there has been a material departure by either of them from their proper functions" or unless the death penalty is plainly dis-

148. 365 So. 2d 149, 151 n.5 (Fla. 1978).

149. *Id.* at 151 (footnotes omitted).

proportionate to the crime.[150] The court is therefore less likely to favor an argument on appeal that the judge failed to consider mitigating circumstances, since presumably the jury heard the claim of mitigation and rejected it.[151]

C. *Written Findings of Fact*

The capital felony sentencing law requires that the judge make written findings of fact in support of a sentence of death.[152] This requirement is particularly important because of its relation to appellate review.[153] It is error for the trial court to consider circumstances and information that do not relate to a statutory aggravating circumstance.[154] The written findings show the appellate court what considerations were determinative in the judge's decisionmaking process. When the findings indicate that the judge considered nonstatutory aggravating factors, or erroneously found a listed aggravating factor through misconstruction of the statute, there is error requiring resentencing, unless the error can be called harmless.[155]

One of the errors of trial courts revealed in their recitations of findings is the "doubling up" of aggravating circumstances by basing more than one statutory factor on essentially the same aspect of the crime.[156] "Doubling up" gives an inflated weight to a single factor and distorts the weighing process. In *Provence v. State*,[157]

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150. Hargrave v. State, 366 So. 2d 1, 5 (Fla. 1978).

151. Jackson v. State, 366 So. 2d 752 (Fla. 1978).

152. FLA. STAT. § 921.141(3) (1979).

153. State v. Dixon, 283 So. 2d 1 (Fla. 1973).

154. *See* cases cited note 111 *supra*. In *Elledge*, the court found error both in the presentation to the jury of testimony and argument relative to a nonstatutory aggravating circumstance and in the judge's reliance on the same in imposing death. The judge also misconstrued the statute to find statutory aggravating circumstances for which there was no support in the evidence. These errors were not harmless because the findings also indicated the presence of mitigating circumstances. On appeal, the supreme court granted the defendant a new sentencing trial. Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977); *accord*, Menendez v. State, 368 So. 2d 1278 (Fla. 1979) (consideration of improper aggravating factors not harmless error because mitigating factor was present; resentencing ordered).

155. *See, e.g.*, Dobbert v. State, 375 So. 2d 1069 (Fla. 1979); Mikenas v. State, 367 So. 2d 606 (Fla. 1978); Hargrave v. State, 366 So. 2d 1 (Fla. 1978). If the sentencer considers improper matters in aggravation, but there are no mitigating circumstances, the error is harmless. 375 So. 2d at 1071; 366 So. 2d at 5. If there were mitigating circumstances, the error is not harmless because an impermissible aggravating factor may have tipped the balance in favor of death. Miller v. State, 373 So. 2d 882, 885-86 (Fla. 1979); Mikenas v. State, 367 So. 2d at 610; Elledge v. State, 346 So. 2d at 1003.

156. *See* Provence v. State, 337 So. 2d 783 (Fla. 1976).

157. *Id.*

the trial court found that the capital felony was committed in the course of a robbery[158] and that it was committed for pecuniary gain.[159] In holding that this reasoning gave improper double consideration to a single factor, the supreme court said:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here as in all robbery-murders, both subsections refer to the *same aspect* of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him . . . .[160]

Just as other erroneous recitations of findings in aggravation can be harmless,[161] a "doubling up" error is harmless when properly established statutory aggravating circumstances are present and *no* mitigating circumstances weigh against them.[162] But when at least one mitigating circumstance is present and the sentencing judge relies on two statutory aggravating factors established by the same feature of the crime, or otherwise erroneously relies on some factor, the sentence must be reconsidered because the appellate court in such circumstances is "unable to determine what significance this factor was given in the weighing process."[163]

III. Appellate Review

Under pre-*Furman* law,[164] one convicted of a capital felony or any other crime had a right to an appeal.[165] Jurisdiction over appeals of death sentences lay with the supreme court.[166] Under the new capital felony sentencing law, appellate review is an integral part of the sentencing process, maintaining consistency in the im-

158. *See* Fla. Stat. § 921.141(5)(d) (1979).

159. *See id.* § 921.141(5)(f).

160. 337 So. 2d at 786 (emphasis in original). The jury had recommended life. On appeal, the supreme court corrected the "doubling up," eliminated another recited aggravating factor as erroneous, invoked the *Tedder* rule, compared the seriousness of the capital felony to that found in other cases, and ordered the sentence reduced to life without discussing whether mitigating factors had been shown to provide a rational basis for the jury recommendation.

161. *See* note 155 *supra*.

162. Clark v. State, 379 So. 2d 97 (Fla. 1979); Hargrave v. State, 366 So. 2d 1 (Fla. 1978); Jackson v. State, 359 So. 2d 1190 (Fla. 1978).

163. Fleming v. State, 374 So. 2d 954, 959 (Fla. 1978).

164. *See* Fla. Stat. § 921.141 (1971) (amended 1972).

165. *Id.* §§ 924.05, .08(1).

166. *See* note 16 *supra*.

position of the death penalty. It is one of the five steps discussed in *Dixon* that stand between the convicted capital felon and the extreme penalty.[167] *Proffitt* placed special emphasis on the importance of the appellate review process as a means of assuring "proportionality review."[168]

Appellate review of a judgment imposing the sentence of death is not a matter of personal right, but is mandated by the statute directing "automatic review."[169] The defendant cannot waive appellate review,[170] because the statute protects the interest of society in seeing that the courts impose death sentences only when appropriate.[171] Under Florida law, an improper death sentence is no less improper because the defendant does not object to it. The role of appellate review is to ensure consistency and conformity to the standards established as public policy. Therefore, a motion of an appellant to dismiss his appeal will be denied because the court has a duty to "examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature and the courts."[172]

In reviewing a judgment and sentence of death, the appellate court must examine the entire record to determine whether there was reversible error.[173] If, through no fault of the defendant, necessary portions of trial court transcripts are lost or destroyed or were never produced, there must be a new trial.

> Since the full transcript of the proceedings requested by the defendant is unavailable for review by this Court, and since the omitted requested portions of the transcript are necessary to a complete review of this cause, this Court has no alternative but to remand for a new trial of the cause.[174]

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167. State v. Dixon, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

168. Proffitt v. Florida, 428 U.S. 242, 259 (1976).

169. *Compare* FLA. STAT. §§ 924.05, .08(1) (1971) *with id.* § 921.141(4) (1979).

170. Goode v. State, 365 So. 2d 381 (Fla. 1978); *cf.* Aldridge v. State, 351 So. 2d 942 (Fla. 1977) (defendant's request for death sentence in lower court has no bearing on court's decision on appeal).

171. *See generally* Comment, *The Death Penalty and Guilty Pleas: Ohio Rule 11(c)(3)—A Constitutional Answer to a Capital Defendant's Dilemma*, 5 OHIO N.U.L. REV. 687 (1978) (suggesting that a waiver amounting to a consent to be executed cannot be knowing and intelligent).

172. Goode v. State, 365 So. 2d at 384; *accord*, Stone v. State, 378 So. 2d 765 (Fla. 1979).

173. *See, e.g.*, Gibson v. State, 351 So. 2d 948, 949 n.2 (Fla. 1977), *cert. denied*, 435 U.S. 1004 (1978). The scope of review in capital cases is broad. "In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review." FLA. R. APP. P. 9.140(f).

174. Delap v. State, 350 So. 2d 462, 463 (Fla. 1977) (footnote omitted).

In considering the propriety of the sentence of death,[175] the reviewing court examines the trial court's written findings of fact. It can reject improper or unsupported findings, or find matters in the record that should have been considered but were not. Although the court once said that it may reduce the sentence to life as an "exercise of mercy" based on "reasoned judgment" even in a case with facts that render death appropriate,[176] the court more recently said:

> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.[177]

IV. AGGRAVATING CIRCUMSTANCES

A. *Capital Felony Committed by a Person Under Sentence of Imprisonment*

What is the public policy behind the aggravating factor listed in section 921.141(5)(a) of the Florida Statutes, concerning capital felonies committed while the defendant remains under a sentence of imprisonment?[178] Does the statute aim to increase the punishment of persons with previous criminality, or to have a deterrent effect on a certain category of persons? In other words, did the legislature intend to punish some parties more severely than others not only for the capital felony but for past criminality as well? Or did it frame the law to deter a particular kind of person from violent crime? For instance, the prospect of further imprisonment may not deter long-term prisoners from crime in prison or from attempting to escape through life-threatening means. The statutory factor also comes into play in the case of capital felonies committed by persons on parole from prison. Although one could not say that such persons have "nothing to lose," subsection (5)(a) may provide such persons a clear incentive to avoid life-threatening crime.

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175. Of course, the reviewing court also considers matters concerning the fairness of the trial that resulted in the guilty verdict.

176. Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976).

177. Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1978) (nonstatutory aggravating factor considered; resentencing ordered).

178. FLA. STAT. § 921.141(5)(a) (1979).

In *Songer v. State*,[179] the supreme court found that the record established the aggravating circumstance of the defendant's being under sentence of imprisonment at the time of the capital felony. The appellant had escaped from prison in Oklahoma. His imprisonment had been for car theft and his remaining criminal history was not a violent one.[180] In *Darden v. State*,[181] the court mentioned that the appellant was on furlough from prison at the time of the capital felony, but did not rely on this fact in affirming the sentence of death, because there were a number of other aggravating factors.[182]

In *Stone v. State*,[183] the court rejected the argument that this factor should apply only to persons in prison, persons on parole, or escapees from prison. In that case the court squarely considered the legislative intent in drafting this factor. The appellant had previously been in prison, but at the time of the capital felony had been released on habeas corpus by a federal district court. Although affirmed by the Fifth Circuit, the district court order was eventually reversed by the Supreme Court of the United States.[184] The appellant contended that the trial judge erred in finding an aggravating circumstance, in that the appellant had been "under sentence of imprisonment" when he committed the capital felony while free on habeas corpus. The Supreme Court of Florida rejected the argument:

> The sole purpose of the federal proceedings in habeas corpus was to determine the legality of the restraint on liberty. As long as the proceedings in federal court were pending, defendant was under sentence of imprisonment, and would remain so until the federal proceedings were concluded favorably to defendant. The final determination was that defendant be returned to custody.[185]

Thus, it appears that a previously imposed but unexpired prison term supplies this aggravating circumstance, not only when the offender has escaped or is on furlough or parole, but also when he

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179. 365 So. 2d 696 (Fla. 1978) (on rehearing).

180. *Id.*

181. 329 So. 2d 287 (Fla. 1976), *cert. denied*, 430 U.S. 704 (1977).

182. In Ford v. State, 374 So. 2d 496 (Fla. 1979) and in Dobbert v. State, 375 So. 2d 1069 (Fla. 1979), the trial judges recited the factor but the supreme court rejected it as unsupported. The supreme court did not discuss a similar finding in affirming the death penalty in Thomas v. State, 374 So. 2d 508 (Fla. 1979).

183. 378 So. 2d 765 (Fla. 1979).

184. Wainwright v. Stone, 478 F.2d 390 (5th Cir. 1973), *rev'd*, 414 U.S. 21 (1973).

185. 378 So. 2d at 772 (citation omitted).

has been ordered released by habeas corpus and is lawfully at liberty without restriction.

B. *Previous Conviction for Another Capital Felony or for a Felony Involving the Use or Threat of Violence to the Person*

1. IN GENERAL

A question of legislative intent arises also in the case of section 921.141(5)(b), which defines certain previous convictions as an aggravating factor.[186] Did the legislature intend this factor to identify offenders who would have a propensity[187] to commit violence if at liberty, or did it intend the death penalty to have a deterrent effect on persons already convicted of violent felonies?

In *Swan v. State*,[188] the appellant was convicted of a murder that took place while charges were pending against the appellant for resisting arrest with violence. In imposing sentence for the murder charge, the trial judge held that the prior violent offense could not be considered an aggravating circumstance justifying imposition of the death sentence for the murder, because the adjudication of guilt on that charge took place after the murder.

Later, in *Provence v. State*,[189] the court had to determine

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186. FLA. STAT. § 921.141(5)(b) (1979).

187. In Proffitt v. State, 315 So. 2d 461 (Fla. 1975), *aff'd*, 428 U.S. 242 (1976), the supreme court gave implicit approval to the trial court's finding that the defendant had a "propensity" to commit murder. In a much later decision the court held that a similar consideration recited by the trial judge was outside the statutory list and improper. Miller v. State, 373 So. 2d 882 (Fla. 1979). *See generally* Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343 (1977).

In Alvord v. State, 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976), the trial court allowed the state to present evidence of a previous rape prosecution in Michigan, even though the proceedings there had resulted in a verdict of not guilty by reason of insanity. By that testimony, the state attempted to show that the defendant was in fact sane at the time of the incident in Michigan. The supreme court declined to hold that this was error, pointing out that Michigan has a broader insanity defense than Florida, and that the statute mandates a broad application of the rules of evidence, *i.e.*, rules of relevance. In Huckaby v. State, 343 So. 2d 29 (Fla. 1977), the trial court listed as an aggravating circumstance that the offender had a propensity to commit rape. There was evidence that the appellant had sexually abused his daughters over a long period of time. The supreme court said: "This attempt to predict future conduct is without relation to any statutory aggravating circumstance, and must be stricken." *Id.* at 33 n.11.

188. 322 So. 2d 485 (Fla. 1975). Appellant was convicted of a beating death committed during a robbery in a private home. The jury recommended life, but the trial judge imposed the death penalty, which on appeal was reduced to life.

189. 337 So. 2d 783 (Fla. 1976), *cert. denied*, 431 U.S. 969 (1977) (stabbing death in course of robbery; jury recommended life, but trial judge imposed death penalty; reduced to life).

whether this aggravating factor could be established by evidence of past violent criminality short of conviction. The court said: "Clearly the language of that subsection excludes the possibility of considering mere arrests or accusations as factors in aggravation."[190] This interpretation still left unclear whether the legislature had intended that the requirement of a previous *conviction* would ensure reliable identification of persons with a propensity to violence, or would appeal to the capacity of certain persons to control their violent proclivities.

The decision in *Elledge v. State*[191] provided some guidance on this question. The court considered whether it was proper to put before the jury testimony and argument concerning two murders committed after the capital felony for which the offender was being sentenced. At the time of sentencing the appellant had been convicted of one of these. Rejecting the appellant's contention that the conviction could not be considered because obtained subsequently, the court said:

> Such an assertion simply does not comport with a plain reading of the statute. It is clear that the Legislature referred to "previous convictions" and not "previous crimes." It is apparent that the appellant had at the time of the trial in this case been convicted of the Nelson murder. In *Provence v. State*, 337 So.2d 783 (Fla.1976), we held that it was improper to consider under Section 921.141(5)(b), Florida Statutes, two armed robbery charges pending against Provence which predated the commission of the murder for which he was being tried. It was there emphasized that prior *conviction* was the essential element of that aggravating circumstance.[192]

Not only was the previous conviction admissible, but the court said it was also proper to present testimony to the jury concerning the circumstances of the crime on which the previous conviction was based.

> This is so because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is matter that can contribute to decisions as to sentence which will lead to uniform treatment and help

190. *Id.* at 786 (referring to FLA. STAT. § 921.141(5) (1979)).
191. 346 So. 2d 998 (Fla. 1976).
192. *Id.* at 1001 (emphasis in original).

> eliminate "total arbitrariness and capriciousness in [the] imposition" of the death penalty.[193]

Testimony on the other murder, for which the appellant had not yet been brought to trial, was held improper.[194]

Propensity to commit crimes, then, is one of the characteristics of the offender on which the capital felony sentencing law focuses. But the existence of this characteristic must be established in the fashion indicated by the legislature—by previous adjudication. There is no requirement, however, that the offender have been convicted of another capital or violent felony before he commits the capital felony for which sentence is imposed.

2. RECENT DEVELOPMENTS

In *Mikenas v. State*,[195] the trial judge listed as an aggravating circumstance the fact that the defendant "has a substantial history of prior criminal activity."[196] On appeal, the supreme court responded tersely: "The inclusion of this non-statutory aggravating circumstance indicates that the weighing process dictated by the statute was not followed."[197] In *Ford v. State*,[198] the trial court found the aggravating circumstance of a previous conviction for a violent felony, referring to a conviction for breaking and entering with intent to commit a felony and the defendant's admission to the sale of illegal drugs. The supreme court held it was error to base the conclusion on these factors, adhering to the proposition that the statute must be strictly followed to ensure reliability. The statute requires previous convictions, not arrests or accusations, and only crimes of life-threatening behavior qualify under subsection (5)(b). The court reiterated its "propensity" rationale in *Harvard v. State*,[199] holding that the capital felony together with a previous conviction for aggravated assault demonstrated a "propensity toward calculated homicide."[200]

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193. *Id.* (quoting Proffitt v. Florida, 428 U.S. 242, 258 (1976)).

194. *Id.* at 1002.

195. 367 So. 2d 606 (Fla. 1978).

196. *Id.* at 609.

197. *Id.* at 610. The sentence was vacated and the case remanded for resentencing.

198. 374 So. 2d 496 (Fla. 1979).

199. 375 So. 2d 833 (Fla. 1977), *cert. denied*, 441 U.S. 956 (1979).

200. *Id.* at 835. In Foster v. State, 369 So. 2d 928 (Fla. 1979), the trial court neither found nor indicated reliance upon previous convictions. Nevertheless, in comparing the facts with other cases, the supreme court referred to the appellant's "lengthy history of violence" and affirmed the sentence of death. *Id.* at 931.

In *Miller v. State*,[201] the trial judge recited several aggravating and mitigating circumstances in his findings of fact. He then stated that the mitigating factors would ordinarily outweigh the aggravating circumstances, which included a previous felony involving the threat of violence to another person. Nevertheless, the judge imposed the death sentence because the offender, who suffered from paranoid schizophrenia and hallucinations, might otherwise someday win parole and become a threat to others.[202] On appeal, the supreme court held improper the use of this consideration as an aggravating factor to tip the balance toward death. "The aggravating circumstances specified in the statute are exclusive," the court said, "and no others may be used for that purpose."[203] Emphasizing the need for strict compliance with the statute, the court explained further:

> The trial judge's use of the defendant's mental illness, and his resulting propensity to commit violent acts, as an aggravating factor favoring the imposition of the death penalty appears contrary to the legislative intent as set forth in the statute. The legislature has not authorized consideration of the probability of recurring violent acts by the defendant if he is released on parole in the distant future. To the contrary, a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse.
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> . . . .
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> . . . Whether a defendant who is convicted of a capital crime and receives a life sentence should be allowed a chance of parole after 25 years is a policy determination for the legislature or the parole authorities rather than for the courts.[204]

C. *Knowing Creation of a Great Risk of Death to Many Persons*

1. IN GENERAL

In construing the meaning of section 921.141(5)(c), which makes an aggravating factor of the fact that "[t]he defendant

201. 373 So. 2d 882 (Fla. 1979).
202. *Id.* at 885.
203. *Id.*
204. *Id.* at 886.

knowingly created a great risk of death to many persons,"[205] the court said in *Dixon v. State* that "[t]he use of the adjectives 'great' and 'many' is attacked as vague, but we feel that a man of ordinary intelligence and knowledge easily conceives the concepts involved."[206] On its face this factor seems directed at behavior carrying a risk of catastrophic social consequences. Yet, notwithstanding judicial approval of the statute in *Dixon,* many unanswered questions remained concerning the penological purpose of subsection (5)(c) and its proper application in light of its purposes.[207]

Some answers soon appeared. In *Huckaby v. State,*[208] the trial court found that the defendant created a great risk of harm to many. The capital felony at issue was sexual battery on a child;[209] the record included evidence of appellant's abuse of his family over a long period of time, including sexual abuse of his daughters. In approving the trial court's finding that the factor was established, the supreme court noted that the appellant "apparently made sincere threats on the lives of his nine children and wife over the course of many years, and he in fact caused them bodily harm from beatings and other forms of wanton cruelty."[210] This application suggests that because subsection (5)(c) describes conduct of the defendant without mentioning the "commission of the capital felony," conduct other than that directly associated with the capital felony can constitute aggravation that renders the death penalty appropriate.

Similarly, in *Barclay v. State,*[211] the court implicitly approved the trial court's finding of aggravation based on conduct surrounding, but not directly involved in, the capital felony. The trial court found that before committing a heinous, racially motivated kidnapping and stabbing murder, the appellants had tried unsuccessfully to select five different potential murder victims and had sent inflammatory tape recordings describing the murder to radio and television stations.[212]

In *Elledge v. State,*[213] however, the trial court placed a differ-

205. FLA. STAT. § 921.141(5)(c) (1979).

206. 283 So. 2d 1, 9 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974).

207. *See, e.g.,* Alvord v. State, 322 So. 2d 533 (Fla. 1975), *cert. denied,* 428 U.S. 923 (1976).

208. 343 So. 2d 29 (Fla. 1977), *cert. denied,* 434 U.S. 920 (1978).

209. *See* FLA. STAT. § 794.011(2) (1979).

210. 343 So. 2d at 33. The sentence, however, was reduced to life.

211. 343 So. 2d 1266 (Fla. 1977), *cert. denied,* 439 U.S. 935 (1977).

212. *Id.* at 1268, 1271 n.4.

213. 346 So. 2d 998 (Fla. 1977).

ent construction on the statute. There, in concluding that the defendant had created a great risk of death to many persons, the trial judge focused on behavior surrounding a criminal episode separate from the capital felony for which he was sentencing the defendant. The supreme court held this consideration inappropriate: "It is only conduct surrounding the capital felony for which the defendant is being sentenced which properly may be considered in determining whether the defendant 'knowingly created a great risk of death to many persons.' "[214]

2. RECENT DEVELOPMENTS

Against the background of decisions culminating in the *Elledge* construction, the supreme court more recently has further refined its interpretation of subsection (5)(c). Although *Elledge* seemed to settle whether conduct directly connected with the capital felony must create the risk of danger to others, it left unanswered other questions inherent in the statutory language.

The supreme court disposed of some of these problems in *Kampff v. State*.[215] In that case, a trial court found a knowing creation of great risk where one person shot another at close range in the presence of two other persons. The trial judge based that finding on the presence of the two bystanders, the fact that the business premises where the killing took place employed many people and was located at a busy intersection, and the fact that only two of the five bullets fired struck the victim. The supreme court rejected that rationale:

> We consider first the finding that the firing of five shots at close range under the circumstances established that the appellant knowingly created a great risk of death to many persons. There was evidence that two persons besides the appellant and the victim were present in the store at the time of the shooting. There were other people in the building and in the general area. One of the bullets appellant fired ricocheted and lodged in a wall.
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> When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some degree of risk of bodily harm to a few persons. "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many"

214. *Id.* at 1004.
215. 371 So. 2d 1007 (Fla. 1979).

> persons. By using the word "many," the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance. We hold that the trial court erred in finding that the appellant created a great risk of death to many persons.[216]

But in *Ford v. State*[217] the court subsequently affirmed the death sentence for a robbery-murder in which the "great risk" factor was based on circumstances rendered dubious by *Elledge* and *Kampff*, although the court did not discuss its approval of the finding. In the still later case of *Dobbert v. State*,[218] the court cited *Kampff* and *Elledge* in rejecting a finding of knowing creation of great risk, which the trial court had presumably based on the appellant's violent abuse of not only the victim, his nine-year-old daughter, but his other children as well. The supreme court may have rejected the finding of the aggravating circumstance because it was based on conduct not directly surrounding the capital felony,[219] or perhaps because Dobbert's other children did not fit the "many persons" requirement of the statute.[220]

D. *Capital Felony Committed in Connection with Another Enumerated Violent Felony, or for Pecuniary Gain*

It is convenient to discuss subsection (5)(d) and subsection (5)(f) together because these factors frequently appear together in the cases. Similar to other aggravating factors specified in the statute, these two may reflect an attempt to deter criminals from engaging in life-threatening conduct as they pursue their criminal activities.[221] At the same time, these factors may express the belief

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216. *Id.* at 1009-10.

217. 374 So. 2d 496 (Fla. 1979). In *Ford*, a policeman was shot and killed during the defendant's attempt to escape the scene of a robbery of a large restaurant during business hours. The judge's finding stated: "The trial evidence shows that the defendant not only threatened a number of other persons beside [*sic*] the decedent with a deadly weapon; he further operated a stolen motor vehicle at high rates of speed and at an obvious risk to the lives and safety of many others in the highways." *Id.* at 501.

218. 375 So. 2d 1069 (Fla. 1979).

219. *See* Elledge v. State, 346 So. 2d at 1004.

220. *See* Kampff v. State, 371 So. 2d at 1009-10.

221. But if a man must needs commit an offence of some kind or other, the next object is to induce him to commit an offence *less* mischievous, *rather* than one *more* mischievous, of two offences that will either of them suit his purpose.

> When a man has resolved upon a particular offence, the next object is to dispose him do to *no more* mischief than is *necessary* to his purpose: in other words, to do as little mischief as is consistent with the benefit he has in view.

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that murders committed in the course of these various criminal activities are more culpable and therefore more deserving of punishment than murders committed in the absence of these aggravating circumstances.[222]

The factor of pecuniary gain, in subsection (5)(f), sometimes overlaps with the commission of other enumerated violent felonies, in subsection (5)(d). A number of decisions have noted this analytical overlap.[223] Although the court has not expressly examined the legislative intent in listing the pecuniary gain factor as an aggravating circumstance, *Salvatore v. State*[224] illustrates the kind of situation to which this factor was probably intended to apply—murder for hire. It is doubtful that the *Salvatore* murder could have been construed as committed in the course of a robbery, but the trial court found the motive of pecuniary gain inherent in the following facts:

> The defendant was to gain directly from the proceeds of the sale of the boat, which he admitted he had previously stolen on behalf of the victim, and which he then stole again from the victim for the purposes of sharing in the proceeds of the sale, as well as for purposes of concealing the homicide that he had committed. The defendant also hoped to gain a pecuniary advantage indirectly in that he had been promised by the co-defendant future

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4, 5 (W. Harrison ed. 1948) (emphasis in original).

222. *See* MODEL PENAL CODE § 201.6, Comment (Tent. Draft No. 9, 1959).

223. *E.g.*, Provence v. State, 337 So. 2d 783 (Fla. 1976), *cert. denied*, 431 U.S. 969 (1977). The court in this case distinguished the two concepts of a murder committed in the course of a robbery and a murder committed for pecuniary gain. The trial court found both factors and appeared to give them separate consideration in the process of weighing of circumstances. On appeal, the supreme court said:

> The State argues the existence of two aggravating circumstances, that the murder occurred in the commission of the robbery [subsection (d)] and that the crime was committed for pecuniary gain [subsection (f)]. While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the *same aspect* of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

Id. at 786.

224. 366 So. 2d 745 (Fla. 1978).

financial rewards for the commission of this crime.[225]

On appeal, the supreme court upheld the trial court's weighing process, thus approving this indirect-reward or fruits-of-the-crime approach to pecuniary motive.[226]

E. *Capital Felony Committed for the Purpose of Avoiding or Preventing a Lawful Arrest or Effecting an Escape from Custody*

To the extent that subsections (5)(d) and (5)(f) emphasize the moral culpability of killing in the course of committing a crime, they overlap somewhat with subsection (5)(e), which makes killing to avoid arrest or to escape custody an aggravating circumstance.[227] As with the other statutory aggravating circumstances, an observer can only guess at what penological purposes this factor advances. Is it intended to encourage the professional criminal to stop his activities short of homicide? Or was it meant to focus on the reprehensible character of an execution-style murder?[228]

In *Washington v. State*,[229] the appellant had been convicted of a series of murders. For two of the murders, the supreme court held that evidence of conduct seeking to cover up the capital felonies themselves established an intention to avoid detection and arrest. The court's approach is subject to criticism for focusing on behavior following the capital felony, because the statutory factor seems directed at murders committed to eliminate evidence or to prevent investigation of other, separate criminal activity.[230]

In *Riley v. State*,[231] the court addressed the issue of whether the factor extends beyond situations such as the killing of a police officer to avoid arrest, to include the elimination of witnesses:

> Since the facts show this to be an execution-type killing to avoid lawful arrest, we necessarily reach the broader issue of whether the language of the applicable provision encompasses

225. *Id.* at 748.

226. *Id.* at 752.

227. *Compare* FLA. STAT. § 921.141(5)(d), (f) (1979) *with id.* § 921.141(5)(e).

228. In Alvord v. State, 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976), which involved a triple murder, the court stated that the murder of two of the victims had "obviously" been committed "in order to avoid a surviving witness to the murder of the other victim." *Id.* at 540. In Songer v. State, 322 So. 2d 481 (Fla. 1975), the court found this factor where Songer, a fugitive prisoner possibily avoiding arrest, shot and killed a state trooper making a routine inspection of Songer's automobile.

229. 362 So. 2d 658 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979).

230. *See id.* at 667 (England, J., concurring).

231. 366 So. 2d 19 (Fla. 1978).

> the murder of a witness to a crime as well as law enforcement personnel. We hold that it does. See *Sullivan v. State,* 303 So.2d 632 (Fla.1974). We caution, however, that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. Here, of course, it was.[232]

Thus, in contrast to the somewhat loose interpretation given subsection (5)(e) in *Washington,* the court read it more restrictively in *Riley.*

In a later case, the court implicitly recognized the infirmities of *Washington.* In *Menendez v. State,*[233] the state argued that the defendant's use of a murder weapon equipped with a silencer supported the trial court's finding of an attempt to avoid arrest. The supreme court rejected this argument:

> There is also considerable doubt that this murder was committed for the purpose of avoiding arrest within the contemplation of our statute. The state urges (with some logic) that any murder committed by means of a pistol fitted with a silencer indicates a motivation to avoid arrest and detection. The presumption accorded the instrument of murder by this reasoning, however, carries us too far. Were this argument accepted, then the perpetration of murder with a knife would similarly add an aggravating circumstance to the life-or-death equation, since it is less detectable than a firearm. This mechanical application of the statute would divert the life-and-death choice away from the nature of the defendant and the deed, as the statute seems to require. In *Riley v. State,* 366 So.2d 19 (Fla.1978), we held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Here, unlike *Riley,* we do not know what events preceded the actual killing; we only know that a weapon was brought to the scene which, if used, would minimize detection. We cannot assume Menendez's motive; the burden was on the state to prove it.[234]

Although one might reasonably infer that a robber who carries a firearm equipped with a silencer both anticipates that he may use the weapon and seeks to avoid detection if he does use it, the use

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232. *Id.* at 22 (footnotes omitted).
233. 368 So. 2d 1278 (Fla. 1979).
234. *Id.* at 1282 (footnote omitted).

of a silencer does not prove beyond a reasonable doubt that a subsequent killing was motivated by the desire to have the robbery go undetected.[235]

In *Dobbert v. State*,[236] the court upheld a death sentence for a father who had murdered his nine-year-old daughter. The evidence showed that he had violently abused the child, denied her medical attention, then finally killed her to prevent discovery of her condition and to avoid arrest. Because the child's very existence was proof of the father's criminal abuse, the court found that the aggravating circumstance of the avoidance of detection was present. In contrast to the *Washington* decision, this application of the statute reaffirmed that mere attempts to cover up evidence of the capital felony itself are insufficient to establish that the defendant sought to avoid or prevent a lawful arrest.

F. *Disruption or Hindrance of Government or Law Enforcement*

Subsection (5)(g) describes as an aggravating factor the disruption or hindrance of government or law enforcement,[237] a circumstance likely to overlap with the factor of avoiding or preventing arrest or escaping from custody.[238] The latter factor typically applies to the killing of a police officer and must be established with particularly compelling force when applied to an ordinary witness.[239] The courts, it might be suggested, should construe subsection (5)(g) to cover other kinds of situations on the assumption that the legislature had a distinct purpose in making this a separate consideration. Because the decisions have applied subsection (5)(e) to the cases of gun battles with police, arguably subsection (5)(g) should apply to activities of a more broadly disruptive nature, *e.g.*, assassination, political extortion, and the bombing of government buildings and conveyances.

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235. *See* Ford v. State, 374 So. 2d 496 (Fla. 1979), where the shooting of a police officer "when he posed no danger to Ford's escape and was in fact trying to cooperate with the armed appellant," apparently provided the basis both for avoiding and preventing his arrest and for a finding of "heinousness".

236. 375 So. 2d 1069 (Fla. 1979). Dobbert's convictions and sentence of death were previously affirmed. Dobbert v. State, 328 So. 2d 433 (Fla. 1976), *aff'd*, 432 U.S. 282 (1977). The court subsequently remanded for consideration of a possible *Gardner* violation and, after the trial court's response, relinquished jurisdiction for resentencing. The propriety of the new sentence of death then came before the court for review.

237. FLA. STAT. § 921.141(5)(g) (1979).

238. *Id.* § 921.141(5)(e).

239. Riley v. State, 366 So. 2d 19 (Fla. 1978).

In *Barclay v. State*[240] the supreme court implicitly approved without extended discussion the trial court's view that an intention to create catastrophic social disruption fell within subsection (g). The court perceived the heinous, racially motivated murder in this instance as an attempt to precipitate a racial war.[241] The court did not address the question of whether, in addition to intent, the defendant must also have a reasonable expectation that massive social disruption will result. The aggravating factor was linked to the possibility of catastrophic social consequences, but the decision left many questions unanswered.

The trial court found the aggravating circumstance of disruption of government in *Raulerson v. State*,[242] in the fact that the defendant killed a police officer while attempting to escape after a robbery. On appeal, the supreme court did not address this finding specifically, but affirmed the sentence based on a general comparison of this crime with the circumstances of other such crimes.[243] In another case involving a robbery and "shoot-out" with police, *Ford v. State*,[244] the trial court recited a finding of the disruption factor. On appeal, the supreme court did not directly discuss the propriety of the finding, but held that aggravating circumstances justified the death penalty, since there were no mitigating factors.[245]

In *Ford*, the court also found the aggravating circumstance of arrest avoidance, although both statutory factors seemed based on the same aspect of the appellant's crime.[246] It can be improper to "double up" the aggravating circumstances of witness elimination and hindrance of law enforcement.[247] In a police "shoot-out," avoidance of arrest is the more precise description of the killer's motive. Thus, the courts are likely to invoke the hindrance or disruption factor primarily in situations with a potential for broad social consequences.[248]

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240. 343 So. 2d 1266 (Fla. 1977), *cert. denied*, 439 U.S. 892 (1978).

241. *Id.* at 1271 n.5.

242. 358 So. 2d 826 (Fla. 1978).

243. *Id.* at 834-35.

244. 374 So. 2d 496 (Fla. 1979).

245. *Id.* at 503.

246. *Id.*

247. Clark v. State, 379 So. 2d 97 (Fla. 1979); *see* notes 156-63 and accompanying text *supra*.

248. *See* Barclay v. State, 343 So. 2d 1266 (Fla. 1977), *cert. denied*, 439 U.S. 892 (1978).

G. *Especially Heinous, Atrocious, or Cruel Capital Felony*

In *Proffitt v. Florida*,[249] the Supreme Court of the United States rejected the petitioner's contention that the words "heinous, atrocious, or cruel"[250] were vague and thus failed to provide adequate guidance to the sentencing decision, referring for support to the application and construction of this phrase by the Supreme Court of Florida. In *State v. Dixon*,[251] the Supreme Court of Florida rejected arguments that the imprecision of these and other words in the statute failed to eliminate the unfettered discretion condemned in *Furman*.[252] The court specifically interpreted the words "heinous, atrocious, or cruel":

> [W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crimes apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.[253]

The interpretive discussion in *Dixon* did not mention the purposes this factor serves, nor did it spell out exactly why this factor is relevant in distinguishing capital felonies warranting the death penalty.[254] Analysis of these issues must focus on the penological justifications cited by the Supreme Court plurality in holding that capital punishment per se does not violate the eighth amendment.[255]

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249. 428 U.S. 242, 255-56 (1976) (opinion of Stewart, Powell & Stevens, JJ.).

250. FLA. STAT. § 921.141(5)(h) (1979).

251. 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

252. *Id.* at 9.

253. *Id.* The supreme court implicitly approved but did not rely upon a heinousness finding in affirming the sentence of death in Hallman v. State, 305 So. 2d 180 (Fla. 1974), *cert. denied*, 428 U.S. 911 (1976).

254. As stated in *Dixon*, the aggravating circumstances actually define the crimes warranting the death penalty, and when the sentencer finds one of them, death is presumed appropriate absent any mitigating circumstances. 283 So. 2d at 9.

255. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); *see* Liebman & Shepard, *supra* note 133 (suggesting that statutory standards, to satisfy the eighth amendment, must effectuate the penological justifications offered in upholding capital punishment).

As suggested above, neither the statute nor its construction in *Dixon* tells us whether the aim is to deter potential torture-murderers by encouraging them to keep their mischief short of the homicidal,[256] or whether the factor simply permits retaliation for conduct which outrages the community and severely disturbs its security and integrity. Doubts have been expressed concerning the efficacy of capital punishment in deterring offenders whose conduct shows them "doubtfully within the reach of influences" that would inhibit the ordinary person.[257] On the other hand, if deterrence is impossible because the potential offender lacks the capacity for self-control, then "retribution" as justification for the factor would seem questionable as well.[258]

In exploring the purposes of the heinousness factor, we should ask what kinds of killing or other conduct set a capital felony apart from the norm. In other words, how, in light of its purposes, are the courts to apply the heinousness factor? As with the aggravating factor of capital felonies committed in the course of other serious felonies,[259] we must ask how closely the additional acts must be associated with the capital felony to set the crime apart from the norm.

In *Alford v. State*,[260] the appellant committed a capital felony by shooting—hardly a bizarre or unusual mode of homicide. But the shooting was directly preceded by vaginal and rectal sexual battery on the thirteen-year-old victim. The supreme court upheld the trial court's finding of heinousness on this basis.[261] Thus, acts of sexual assault, because of the suffering inflicted on the victim, apparently qualify as heinous under the concept of being "unnecessarily torturous."

The court adopted a different approach in *Alvord v. State*.[262]

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256. J. BENTHAM, *supra* note 221.

257. Commentary to the Model Penal Code section on capital sentencing states:

> This conclusion is not surprising when it is remembered that murders are, upon the whole, either crimes of passion, in which a calculus of consequences has small psychological reality, or crimes of such depravity that the actor reveals himself as doubtfully within the reach of influences that might be especially inhibitory in the case of an ordinary man.

MODEL PENAL CODE § 201.6, Comment 1 (Tent. Draft No. 9, 1959).

258. *See* Liebman & Shepard, *supra* note 133.

259. *See* note 214 and accompanying text *supra*.

260. 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912 (1976).

261. *Id.* at 445. The trial court also found that appellant committed the capital felony while engaged in or in flight after committing rape, resulting in some overlap or "doubling up" of factors. The court also found one mitigating circumstance. *Id.* at 443.

262. 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976).

Although the appellant had strangled three women and raped one of them, the court focused not on the torturous nature of the mode of killing or on additional acts, but on the cold, calculated nature of the killings.

> Each of the murders was especially heinous, atrocious and cruel in that the homicides were committed through strangulation by use of a rope. This could only be accomplished through a cold, calculated design to kill, as distinguished by [*sic*] a single shot from a firearm during an outburst of anger. The great risk of serious bodily harm by death to other persons is apparent, in that defendant obviously murdered two of the victims in order to avoid a surviving witness to the murder of the other victim.[263]

In *Purdy v. State*,[264] the jury convicted the appellant of sexual battery on a child and recommended death, finding heinousness as the only aggravating circumstance. Although the crime presumably inflicted suffering on the eight-year-old female victim, the court held that nothing set the crime apart from the "normal" violation of the same statute.[265] To hold this crime heinous would be to say that child rape is always an aggravated capital felony for which the death penalty is appropriate. This result, the court concluded, would violate the proscription against mandatory death penalty statutes.[266] Another case in which nothing set the crime apart from the norm was *Cooper v. State*.[267] The appellant shot and killed a deputy sheriff in the course of a grocery store robbery getaway. The trial court recited heinousness as a factor, but the supreme court held that as a matter of law the killing was not heinous because the death was instantaneous and painless.[268]

The supreme court further developed the importance of the mode of killing and of the surrounding circumstances in *Funchess v. State*[269] and in *Knight v. State*.[270] In *Funchess*, the court agreed with the trial court that a killing by stabbing is heinous. In *Knight*, a case involving kidnapping for ransom and deaths by shooting, the court found heinousness based on the infliction of fear: the victims knew their kidnapper was transporting them to a secluded

263. *Id.* at 540.

264. 343 So. 2d 4 (Fla. 1977), *cert. denied*, 434 U.S. 847 (1978).

265. *Id.* at 6.

266. *See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

267. 336 So. 2d 1133 (Fla. 1976).

268. *Id.* at 1141.

269. 341 So. 2d 762 (Fla. 1975), *cert. denied*, 434 U.S. 878 (1977).

270. 338 So. 2d 201 (Fla. 1976).

area where they would meet their deaths.[271] Thus, the court in most of the cases has emphasized the torturous nature of the mode of killing or the additional acts or has focused on the cold calculation of the killing, as in *Alvord*.[272]

Another series of cases, however, has restricted and qualified the use of the heinousness factor. In *Tedder v. State*,[273] the appellant shot his mother-in-law to death with a shotgun and left her to die while he abducted his wife and child from the scene. The trial court invoked the aggravating factor of heinousness. In rejecting aggravation of the crime on this basis, the court said:

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271. In *Knight* there was arguably some overlap because the appellant committed the murders in the course of kidnapping and to avoid detection and arrest. One who embarks on a course of kidnapping for ransom and who abducts the victim to a secluded place for killing has arguably not done anything *unnecessarily* torturous, in the sense of taking delight in the victim's suffering.

The court found heinousness in a bludgeoning death in Gardner v. State, 313 So. 2d 675 (Fla. 1975), *rev'd sub nom.* Gardner v. Florida, 430 U.S. 349 (1977). In Spenkelink v. State, 313 So. 2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976), the capital felony was an ordinary shooting death, but the court may have based its approval of a heinousness finding on the perpetrator's motive to eliminate his travelling companion. The court approved without discussion a heinousness finding based on death by stabbing in Proffitt v. State, 315 So. 2d 461 (Fla. 1975), *aff'd*, 428 U.S. 242 (1976). In Swan v. State, 322 So. 2d 485 (Fla. 1975), where the appellant committed murder by beating, binding and gagging the victim, the jury nevertheless recommended life. The supreme court reversed the death sentence imposed by the judge, but did not discuss the factors, saying merely: "Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty. We think the court should have followed the jury's recommendation for punishment." *Id.* at 489. In Douglas v. State, 328 So. 2d 18 (Fla. 1976), *cert. denied*, 429 U.S. 871 (1976), the appellant bludgeoned and shot the victim to death, but the court apparently found heinousness because the appellant abducted and forced the victim and his wife to engage in sex. In Henry v. State, 328 So. 2d 430 (Fla. 1976), *cert. denied*, 429 U.S. 951 (1977), the appellant beat the victim, cut his throat, and suffocated him to death with a gag. The trial court also emphasized that appellant shot an officer attempting to arrest him several days later. The supreme court affirmed the sentence without discussing the issue of heinousness.

In Hoy v. State, 353 So. 2d 826 (Fla. 1977), *cert. denied*, 439 U.S. 920 (1978), both perpetrators raped one of the victims and then shot her and her male companion to death. The trial court emphasized the rape in the presence of the boy and his murder in the presence of the girl, who must have known that her fate too would be death. On appeal, the court quoted the heinousness definition from *Dixon* and concluded that the additional acts set the capital felonies apart from the norm. *See also* Thompson v. State, 328 So. 2d 1 (Fla. 1976), where the defendant entered the victim's business unarmed and stabbed the victim to death in the course of a robbery attempt. The supreme court reduced the trial court's death sentence to life, the penalty recommended by the jury. Two justices would have held the stabbing murder heinous because "a shot may be fired in a sudden outburst of emotion or because of a 'hair trigger' but the use of a knife necessitates a period of cold calculation." *Id.* at 5 (Adkins, C.J., & Roberts, J., concurring specially).

272. 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976).

273. 322 So. 2d 908 (Fla. 1975).

> It is apparent that all killings are atrocious, and that appellant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance. Still, we believe that the Legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for first degree murder.[274]

In *Halliwell v. State*,[275] the jury recommended and the trial judge imposed the death sentence for a bludgeoning death brought on by a "violent rage" in the context of a love triangle. The supreme court ordered the sentence reduced to life, finding "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this court."[276] Thus, bludgeoning, in itself, is not a heinous way of killing.[277] The court suspected that the defendant's dismemberment of the victim's body several hours after the murder had influenced the jury's recommendation. This fact, the court held, did not support a finding of heinousness.[278]

Even where the mode of killing is unmistakably "torturous" and set apart from the norm of premeditated murders, the aggravating factor may be offset by mitigating factors that directly relate to the heinousness itself. When the jury recommends life and some basis for the recommendation is recited in the trial court's findings or appears in the record, the supreme court will reduce a death sentence to life imprisonment, at least where only a finding of heinousness supports a death sentence. For example, in *Jones v. State*,[279] the appellant killed the victim in a frenzied attack of stabbing in the course of a rape. The jury recommended life, but the judge ordered the death penalty. The record contained evidence showing "paranoid psychosis," and the court concluded that

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274. *Id.* at 910 (footnote omitted).

275. 323 So. 2d 557 (Fla. 1975).

276. *Id.* at 561.

277. *But see* Adams v. State, 341 So. 2d 765 (Fla. 1976), *cert. denied*, 434 U.S. 878 (1977) (beating with a fire poker past the point of submission until the victim's body was grossly mangled is heinous).

278. The court found mitigating factors in the record and reduced the penalty:

> In mitigation the record shows no prior arrests and that Appellant was a highly decorated Green Beret in Special Forces in the Vietnam war. Police officers testified he was under emotional strain over the mistreatment of Sandra by the victim and that Appellant was greatly influenced by her. There is testimony that she had attempted suicide, that she rushed to him previously for help in marital conflicts, and that he cancelled diving instruction trips when she was in trouble.

323 So. 2d at 561.

279. 332 So. 2d 615 (Fla. 1976).

the appellant's capacity to control his actions at the time of the crime was "not fully known." The court held that the trial judge should have followed the recommendation of the jury. Similarly, in *Chambers v. State*,[280] the jury recommended life imprisonment as the penalty for a death inflicted by beating. The trial court recited the evidence of appellant's long history of drug abuse and emotional disturbance, but concluded that insufficient mitigation had been established to outweigh the heinous nature of the crime. The supreme court, however, held that the jury recommendation should have been followed.[281]

In *Huckaby v. State*,[282] the jury recommended death for the capital felony of sexual battery upon a child. The trial court found heinousness, based on the appellant's behavior toward the victim, his daughter, and his other children over time. The supreme court said that "the record . . . bespeaks cruelty enough to his children to sustain the judge's finding."[283] But the record also showed that the appellant's capacity to appreciate the criminality of his conduct and to conform his conduct to the law were substantially impaired, that the trial court should have considered these factors, and that death was inappropriate. The court concluded:

> Our decision here is based on the causal relationship between the mitigating and aggravating circumstances. The heinous and atrocious manner in which this crime was perpetrated, and the harm to which the members of Huckaby's family were exposed, were the direct consequence of his mental illness, so far as the

280. 339 So. 2d 204 (Fla. 1976).

281. *Id.* at 207-08. A concurring opinion offered further explanation for the decision:

> On the record before us, it does not appear that the jury struck an impassioned and unreasoned balance when it recommended life imprisonment. Our death penalty statute lists as mitigating circumstances the fact that a defendant "was under the influence of extreme mental or emotional disturbance", as to which there was conflicting evidence, and the fact that the victim consented to the act causing death. The jury had evidence in abundance that appellant and Connie Weeks had voluntarily shared a long-standing sado-masochistic relationship which included severe and disabling beatings. They also knew that Connie Weeks had herself obtained appellant's release from jail on the very day he had beaten and dragged her through the streets in an unholy rage. In light of the Legislature's enumeration of the factors to be weighed before effecting state executions, the facts suggesting a sentence of death in this case are not so clear and convincing that reasonable people could not believe life imprisonment justified.

Id. at 209 (England, J., joined by Adkins & Sundberg, JJ., concurring) (footnotes omitted).

282. 343 So. 2d 29 (Fla. 1977).

283. *Id.* at 33.

record reveals.[284]

Thus, the heinousness itself strongly suggested a mitigating circumstance.[285]

Recent constructions and applications of the statute regarding heinousness have in general followed those in the earlier cases. Thus, the defendant's acts must fall into one of three types of heinousness as delineated by the court before this aggravating circumstance may be found: (1) "torturous" nature of the mode of killing, (2) "additional acts" separate from the actual killing which inflict suffering, including mental anguish, on the victim, or (3) the grave culpability or "shockingly evil" nature of acts such as an "execution" killing. As with the earlier cases, heinousness has been established in cases of death by stabbing,[286] beating or bludgeoning,[287] strangling,[288] and other bizarre modes involving torture.[289] The court has also held that an ordinary shooting death is not a heinous murder,[290] even when it is of the "execution" type,[291] unless the shooting is repeated, the death is not instantaneous, or the victim is finished off while begging for life.[292]

In a number of cases, the court has held that a capital felony constituted the "additional acts" necessary to set the crime apart

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284. *Id.* at 34.

285. In another case where the very heinousness of the crime apparently prompted consideration of mitigating factors, the defendant stabbed the victim 35 times in the course of a rape. The supreme court reduced the sentence to life, the penalty recommended by the judge. Burch v. State, 343 So. 2d 831 (Fla. 1977).

286. Rutledge v. State, 374 So. 2d 975 (Fla. 1979) (two counts of murder by stabbing; jury recommended death; death affirmed); Foster v. State, 369 So. 2d 928 (Fla. 1979) (throat and spine cut; jury recommended death; death affirmed); Washington v. State, 362 So. 2d 658 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979) (three murders by stabbing; jury recommendation waived; death affirmed).

287. Stone v. State, 378 So. 2d 765 (Fla. 1979) (bludgeoning; jury recommended death; death affirmed); Dobbert v. State, 375 So. 2d 1069 (Fla. 1979) (child beaten to death; death affirmed); Salvatore v. State, 366 So. 2d 745 (Fla. 1978) (bludgeoning death for hire; jury recommended death; death affirmed); Goode v. State, 365 So. 2d 381 (Fla. 1978) (sexual battery and murder by beating 10-year-old child; jury recommended death; death sentence affirmed).

288. Jackson v. State, 366 So. 2d 752 (Fla. 1978) (strangling and shooting death is heinous; jury recommended death; death affirmed).

289. Smith v. State, 365 So. 2d 704 (Fla. 1978) (victim beaten, stabbed with ice pick, incinerated alive in auto trunk; jury recommended death; death affirmed).

290. Lewis v. State, 377 So. 2d 640 (1979) (jury recommended death; sentence vacated, remanded for resentencing); Kampff v. State, 371 So. 2d 1007 (Fla. 1979) (jury recommended death; sentence reduced to life).

291. Menendez v. State, 368 So. 2d 1278 (Fla. 1979) (nothing to set the crime apart; jury recommended death; sentence vacated, remanded for resentencing).

292. Lucas v. State, 376 So. 2d 1149 (Fla. 1979) (lovers' quarrel that escalated to violence; jury recommended death; sentence vacated and remanded for resentencing).

from other similar ones. The *Dobbert* case[293] involved a history of severe child abuse, though the actual killing itself was heinous enough. A "campaign of terror" aggravated the ordinary shotgun slaying of the appellant's former wife in *Harvard v. State.*[294] Sexual battery of a wife while her husband lay dying rendered heinous the shooting death of the husband in *Thomas v. State.*[295] The infliction of mental anguish on the kidnap victim who was later killed provided additional aggravation in *Washington.*[296] Yet the court found nothing to set the crimes apart from the norm in *Shue v. State,*[297] even though the appellant had sexually battered the two young victims in the presence of one another. The court rejected as an aggravating factor the mental anguish caused by shooting a father in the presence of his son in *Riley v. State.*[298]

The court did not discuss the mode of killing in upholding a finding of heinousness for the rape and murder of a nine-year-old girl in *LeDuc v. State.*[299] The court in *Hargrave v. State*[300] approved a finding of heinousness because "the appellant in a calculated fashion 'executed' the victim to avoid later identification."[301] The court vacated a death sentence in *Menendez,*[302] where the same kind of circumstance was indicated but not clearly established.

In *Ford v. State,*[303] a new twist developed on the issue of heinousness. In the course of a robbery getaway, the appellant shot and killed a police officer whom he had already disabled with two shots. The court found the killing "especially heinous, atrocious, or cruel" under the statute because the appellant had shot the officer again "when he posed no danger to Ford's escape and was in fact

293. Dobbert v. State, 375 So. 2d 1069 (Fla. 1979).

294. 375 So. 2d 833 (Fla. 1977), *cert. denied,* 441 U.S. 956 (1979). Although decided in 1977, the opinion in *Harvard* was not published until November 1979, when the court remanded the case for resentencing because the previous sentencing procedure violated Gardner v. Florida, 430 U.S. 348 (1977).

295. 374 So. 2d 508 (Fla. 1979) (jury recommended death; death affirmed).

296. 362 So. 2d 658, 665 (Fla. 1978), *cert. denied,* 441 U.S. 937 (1979).

297. 366 So. 2d 387 (Fla. 1978) (trial court imposed death sentence although jury recommended life imprisonment; sentence reduced to life on appeal). The defendant apparently committed the capital felonies (sexual battery on two girls eleven years of age or younger) with a minimum of force and injury to the victims.

298. 366 So. 2d 19 (Fla. 1979).

299. 365 So. 2d 149 (Fla. 1978).

300. 366 So. 2d 1 (Fla. 1979).

301. *Id.* at 5.

302. Menendez v. State, 368 So. 2d 1278 (Fla. 1979).

303. 374 So. 2d 496 (Fla. 1979).

trying to cooperate with the armed appellant."[304]

The court had held in *Cooper*[305] that a shooting which causes instantaneous death is not heinous, as a matter of law. In *Raulerson v. State*,[306] death also was instantaneous, but the court approved the finding of heinousness because of the totality of circumstances. In the course of a restaurant robbery, the appellant sexually battered one of the employees while his accomplice held a number of others at gunpoint. When police officers arrived, appellant shot two of them, killing one. Responding to his contention that heinousness was not established, the court said:

> Defendant . . . says that the homicide was not heinous or cruel because it was accomplished by a pistol shot causing immediate death. This crime was committed during the course of a robbery and immediately after a rape. There were many shots fired and the deceased was well aware that his life was in danger from the moment he entered the restaurant. This was not a sudden attack, but was part of a general robbery scheme.[307]

Thus, the court drew upon the surrounding circumstances and the officer's awareness that his life was in danger to uphold the trial court's finding of heinousness.

V. Conclusion

This article has described the capital sentencing process in Florida. The approach has been empirical, looking at the principles developed in the cases decided since the reintroduction of capital punishment. An examination of these cases reveals the great difficulty of the tasks assigned to juries, trial judges, and the supreme court. Definite standards of culpability, as Justice Harlan wrote in *McGautha v. California*,[308] are difficult if not impossible to fashion. Therefore, the people through their legislature have chosen to place their trust in a process. The step-by-step procedure by which offenders are selected for the extreme sanction has numerous safeguards and numerous occasions for the exercise of discretion. The process is guided and principled enough so that it does not violate fundamental law. But whether it selects those offenders whose execution will most fulfill the purposes of capital punishment is a

304. *Id.* at 503.
305. Cooper v. State, 336 So. 2d 1133 (Fla. 1976).
306. 358 So. 2d 826 (Fla. 1978).
307. *Id.* at 834.
308. 402 U.S. 183 (1971).

question the people will have to decide as the application of the law proceeds.