

Chapter 2

Bifurcated Trials: Eligibility and Selection Decisions in Capital Cases

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Introduction

I. Topic and Case Background

A. Why a Bifurcated Trial, and What is a Bifurcated Trial?

The concept of trial bifurcation seems relatively straightforward: it is a procedural device that divides a trial into two stages. Bifurcation is used when it is perceived to enhance some goal of procedural law, such as procedural fairness or judicial efficiency. The most commonly recognized form of bifurcated trials is in criminal cases, in which bifurcation usually refers to the separation of the determination of guilt or innocence from the sentencing phase of a trial, and the vast majority of states with capital punishment use this type of basic bifurcation in capital cases.¹ In this context, bifurcation is important because of the risk that sentencing-related information about the defendant himself could bias the factfinder against the defendant in the guilt-determination phase, for reasons that do not relate to his culpability for committing a particular offense. When a jury, rather than a judge, is determining guilt, it is especially important that the jury not be allowed to hear evidence related to sentencing issues, especially when that evidence consists of the defendant's prior criminal convictions. This is because:

The common law has long deemed it unfair to argue that, because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime. . . . The objection to such evidence is not that the proposed inference is illogical. The objection is rather that the inference is so attractive that it will overwhelm the factfinder and create an unwarranted presumption of guilt. As Professor Wigmore explained: "The natural and inevitable tendency of the tribunal -- whether judge or jury - - is to give excessive weight to the vicious record of crime exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge". . . . "Not that the law invests the defendant with a presumption of good character . . . but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a logical perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to

¹ "Bifurcated proceedings are now the rule in capital cases throughout the Nation." *Marshall v. Lonberger*, 459 U.S. 422, 456, n.8 (1983) (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJs) (Ohio's laws are unique in the U.S. in allowing only partially bifurcated capital trial proceedings, in which aggravating factors that determine sentencing are heard during the guilt determination phase of the trial). "In most cases, these determinations [guilt and sentencing] are made in two stages. At the first stage, strict rules of procedure govern the order in which evidence is offered, the quality of the evidence that may be admitted, and the burden of proof that is required to establish the defendant's guilt. At the second stage, however, the rules are relaxed; a wide range of evidence concerning the defendant's character may be received by the sentencing authority even though it is entirely extraneous to the particular offense that has just been proved." *Id.* at 447.

so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.”²

The separation between the determination of guilt or innocence and the sentencing proceeding has become so commonplace in criminal trials in the U.S., however, that “bifurcation” of a trial now often refers to an additional procedural separation, usually within the determination of guilt phase itself. For example, some states believe that it is advisable to bifurcate criminal trials where a defendant pleads not guilty by reason of insanity (even where he has already been determined competent to stand trial during pretrial proceedings). Those states require two stages within the trial on the issue of guilt, each overseen by a jury: evidence relating to guilt or innocence will generally be heard in a first stage of the trial, and if the defendant is found guilty, a subsequent proceeding will be held to determine whether the defendant is criminally insane and thus not legally responsible for his actions.³ In civil tort cases, judges usually bifurcate issues of liability and damages in the interests of conserving judicial and party resources. Although it would seem logical to first determine liability and then damages, in certain civil cases where parties may first want to know “how much is at stake” before dedicating huge amounts of resources to a case, judges may even “reverse bifurcate,” first hearing issues related to damages, and then trying issues of liability.⁴

In the U.S., bifurcation often refers to the number of separate stages of a trial that the *jury* oversees and in which it makes a determination. And yet, the archetypical American criminal trial involves a jury making a determination of guilt, and the judge making a determination of sentence.⁵ This most common separation is, in fact, a basic form of a “bifurcation,” but for whatever reason, is rarely referred to as such, perhaps because Americans most often refer to the guilt-determination phase as the “trial” and the penalty-determination phase as “sentencing” (and thus not technically part of the trial itself), or perhaps because Americans tend to think of this procedural division as the status quo, or the traditional division of labor between judge and juries.

In U.S. death penalty jurisprudence, however, the meaning of bifurcation is more complex than the simple separation of a guilt determination phase, where the jury is the standard decision-maker, from the sentencing phase, where the judge is usually the sentencing authority. This complexity derives from at least two factors.

² *Marshall v. Lonberger*, at 449, n.1, citing 1 J. Wigmore, *Evidence* § 194 (3d ed. 1940) and *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

³ See Chapter 5 - Defendants with Mental Disorders and the U.S. Death Penalty - for additional discussion of this type of case.

⁴ Drury Stevenson, *Reverse Bifurcation*, 75 U. Cin. L. Rev. 213 (2006). Available at SSRN: <http://ssrn.com/abstract=895003>.

⁵ Of course, the vast majority of criminal cases are resolved without a trial. Of the felony cases that do go to trial, in the thirteen states that provided data to the National Center for State Courts’ Court Statistics Project, the number of jury trials was found to outnumber bench trials around 2:1. For example, in 2002, in the thirteen states that provided data (which account for forty percent of the U.S. population), there were 20,557 felony jury trials to just 9,695 felony bench trials. G. T. Munsterman & S. Strickland, *The Vanishing Trial?*, 19 *The Court Manager* 2, 50, n.2, available at <http://www.ncsconline.org/Juries/JuryNews/JuryNewsCM19-2.pdf>.

1. Capital Proceedings are Unique in Allowing *Juries* to Decide the Sentence; States Bifurcate Guilt and Sentencing in Capital Cases For This Reason

First, unlike juries in most criminal proceedings, juries in capital cases have traditionally been granted the power not only to declare a defendant innocent or guilty of a death-eligible offense, but also to determine whether that defendant deserves a death or a prison sentence. Even before the *Furman* decision (discussed in Chapter 1 - Arbitrariness and the Death Penalty under U.S. Supreme Court Law), many states bifurcated those proceedings in death penalty cases, allowing for “guilt” and “sentencing” portions of the capital trial. This had practical benefits for defendants, for some who wished to plead not guilty at the guilt-determination stage and retain their right to silence would nonetheless be able to speak on their own behalves and ask for mercy from the jury at the “sentencing stage,” had they been found guilty at the guilt-determination stage. While many deemed this to be good policy and all states adhere to this practice now, some states did not follow this format in the past, and required even capital juries to make the guilt and sentencing decision at the same time, based on guilt-related and sentence-related evidence that was admitted in a single proceeding. Surprisingly, this was never ruled unconstitutional by the U.S. Supreme Court. Indeed, in *McGautha v. California*, a case decided the year before *Furman* and in which a California and Ohio death penalty case were treated simultaneously, the Supreme Court declared that the state of Ohio was not constitutionally required to bifurcate its death penalty procedures, and that it could require juries to make guilt and sentencing determinations at the same time, based on evidence introduced in a single trial proceeding.⁶

⁶ *McGautha v California*, 402 U.S. 183 (1971). In dissent, three Justices strenuously objected to this decision. Not bifurcating the guilt and sentencing phases of a trial (having a “unitary” trial system) forces a defendant, who wishes to speak directly to the jury to plead for clemency in sentencing, to make such statements before the jury’s determination of his guilt or innocence. The dissent’s concern was that a defendant under these circumstances must waive his Fifth Amendment right to remain silent or else be prohibited from introducing evidence relevant to sentencing alone (and more prejudicial than probative as related to his guilt or innocence of the offense) that could potentially lead to his own conviction. Alternatively, the defendant in this situation could waive his right to a jury trial and elect a bench trial instead, in the hopes that a judge would be more likely capable of separating the consideration of information relevant to guilt from information relevant to sentencing in his mind, and therefore not convicting the defendant based on bias stemming from sentence-related evidence (such as the defendant’s prior convictions). Both of these issues are further exacerbated when a third separate issue – that of the defendant’s sanity – is also part of the same proceeding, mingling evidence about sanity, guilt, and sentencing together. The dissenting Justices in *McGautha* therefore stated:

“The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional....That ‘undeniable tension’ between two constitutional rights...should lead to a reversal here. For the unitary trial or single verdict trial in practical effect allows the right to be heard on the issue of punishment only by surrendering the protection of the Self-Incrimination Clause of the Fifth Amendment.

...But the rules governing and restricting its [the Ohio tribunal’s] administration of the unitary trial system, place the weights on the side of man’s sadistic drive. The exclusion of evidence relevant to the issue of ‘mercy’ is conspicuous proof of that lopsided procedure; and the hazards to an accused resulting from mingling the issues of guilt, insanity, and punishment in one unitary proceeding are multiplied. Whether this procedure would satisfy due process when dealing with lesser offenses may be debated. But, with all deference, I see no grounds for debate where the stake is life itself.”

2. Capital Cases Require a Special Kind of Bifurcation: Eligibility (narrowing the class of death-eligible defendants) and Selection (holistic, individualized consideration of all mitigating and aggravating factors to decide whether *this* defendant deserves death or life in prison)

Second, and perhaps more confusing than the first point, bifurcation in death penalty trials also refers to the separate decisions that must be made as to the death penalty-eligibility of the offense and particular defendant, on the one hand, and as to the actual selection (or not) of the death penalty, based on holistic, individualized consideration, on the other hand. After *Furman* declared the death penalty unconstitutionally arbitrary as practiced in 1972, thirty-five states passed new legislation that sought to reinstitute the death penalty but to curb unconstitutional arbitrariness in their capital procedural systems. As we have seen in Chapter 1, in 1976 the Supreme Court reviewed those systems and deemed some to meet the constitutional threshold and others (like *Woodson*, which required mandatory death sentences for anyone found guilty of death-eligible offenses) to fall short of that threshold. All of the systems deemed to meet constitutional requirements instituted bifurcated procedures for the guilt and sentencing stages, albeit with some variation, but the Supreme Court has never held that states must do so or explicitly overruled *McGautha*. Most confusing of all, however, is that the Court's subsequent holdings have required that constitutional death penalty systems must accomplish *two functions* that are similar to, but not the same as, the functions of a system that simply separated the guilt and sentencing stages of a death penalty trial. Those functions are the following:

- (1) **A Death-Penalty Eligibility Determination:** This is a “narrowing of the class of death-eligible offenses” through the use of various substantive and procedural restrictions that effectively limit the discretion of the sentencer to hand down a death sentence for all but the most serious crimes.
- (2) **A Death-Penalty Selection Determination:** If a defendant is deemed eligible for the death sentence (based on the type of offense and defendant), the sentencer is then afforded relatively broad discretion to make a more holistic, individualized determination of whether that particular defendant deserves the death penalty or some lesser punishment, usually life in prison, with or without the possibility of parole.

An astute reader can see why many might mistakenly equate bifurcation of the guilt and sentencing stages of a trial with the Supreme Court's requirements for eligibility and selection determinations, but the reality is that these are not one and the same. Some states have chosen to align the eligibility and selection functions with bifurcated guilt and sentencing stages, respectively, but the majority of jurisdictions have chosen to address the Supreme Court's eligibility and selection requirements by including both in the sentencing stage of the trial. Some states, however, have chosen to include the eligibility decision in the guilt stage of the trial and reserved the selection decision for sentencing. This variety of state practices has caused confusion and frustration both for observers and for the Supreme Court, which has sought to clarify its holdings over time.

The goal of this chapter, then, is to aid the reader in clarifying current law. The authors hope that, along the way, the normative and procedural debates in which the Court engages may prove useful for Chinese scholars as they seek to calibrate fair procedures for their own death penalty systems.

A general statement of the law is this: states are not required to bifurcate their death penalty procedures into a guilt-or-innocence determination and a sentencing phase, but, as a matter of fact, all of them do

and will probably continue to do so. However, states *are required* to 1) establish procedures and systems that effectively narrow the classes of death-eligible defendants and offenses and, once that narrowing has been accomplished, 2) to establish procedures and systems that allow sentencers broad discretion to make individualized determinations of whether or not a particular defendant deserves the death penalty. Just how bifurcation interacts with U.S. Supreme Court requirements of eligibility and selection determinations is the subject of this chapter.

B. *Bifurcated Trials after the 1976 Death Penalty Cases and the Relationship of the Bifurcated Trial to the Supreme Court's Requirement of an Eligibility and Selection stage of a trial*

Of the *Gregg* suite of cases,⁷ the three systems that were considered constitutional by the Court all included a bifurcated trial of some sort. Although the systems of Georgia (*Gregg*), Florida (*Proffitt*), and Texas (*Jurek*) differed in the details, in general they all included separate deliberations for the guilt and penalty phases of the trial. Only after the jury had determined that the defendant was guilty of capital murder did the sentencer⁸ decide, in a second stage, whether the defendant should be sentenced to death or given a lesser sentence of some length of prison time.

As noted above, the Supreme Court simply held these states' systems constitutional, and it did not hold that the constitution requires states to bifurcate their trial procedures, generally. In essence, the bifurcated trial was a practical solution to the problem of arbitrariness the court dealt with in *Furman* and *Gregg*: it seemed to cabin the finder-of-fact's discretion in the guilt-determination stage by limiting the categories and quality of evidence that could be heard at the first trial proceeding. This stayed true to the long-held belief that it was the defendant's crime, not the defendant's character, on trial. Only after a guilty verdict was rendered would the bifurcated trial structure allow the sentencer to take a holistic view of the defendant, to consider not just the crime at hand, but all factors, both aggravating and mitigating, that spoke to the issue of whether or not the defendant deserved death. In the end, all states that instituted death penalty systems also legislated for proceedings that bifurcated the guilt and sentencing determinations in this way.

C. *Eligibility and Selection Determinations: Part of Trial or Part of Sentencing?*

By the 1990s, the Court's concern with the prevention of arbitrary decisions had developed into a two-pronged standard to be applied to any death penalty system: each capital trial must provide for an *eligibility determination* that narrows the class of defendants and offenses eligible for a death sentence and also a *selection determination* as to whether a particular eligible defendant actually deserves the ultimate penalty.

These two requirements were often referred to as the eligibility and selection *determinations*. In most systems, these determinations both took place within the sentencing stage of a bifurcated trial, but they were not fixed there, especially not the eligibility stage.

In the eligibility determination, the prosecution typically must prove at least one aggravating circumstance as defined by statute. The primary intention here is to narrow the class of death-eligible offenses, effectively limiting the discretion of the sentencer to hand down a death sentence for all but

⁷ See Chapter 1, page 2, and footnote 5 for an introduction to this suite of five 1976 Supreme Court death penalty cases.

⁸ In most jurisdictions, the jury still retained the exclusive right to sentence a defendant to death. However, to this day, five states allow judges the right to review and overturn jury sentencing decisions with which they disagree.

the most serious crimes. In the selection stage, once a defendant's crime is determined sufficiently heinous (as defined by statute), the second step is to give the sentencer nearly unlimited discretion to consider all mitigating and aggravating evidence and make its final determination of death or a lesser sentence. This echoes what we saw in the *Woodson* case, where mandatory death penalty statutes were deemed unconstitutional because they failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant."⁹

Justice Stephens, the Supreme Court Justice responsible for developing the terminology of the "eligibility" and "selection" decisions, defines them thus:

The eligibility decision fits the crime within a defined classification. Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death."... The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability.¹⁰

For some time, scholars and jurists believed that both the eligibility decision and the selection decision must take place within the sentencing stage of the trial. In other words, it was thought that the "aggravating factors" that the sentencer attributes to the defendant or to his/her crime must be found *in addition to* and separately from the underlying elements of the offense proved at the guilt-determination stage. In the case discussed below, *Lowenfield v. Phelps*, we will take a closer look at how the Court saw its eligibility and selection decisions operating in the context of a bifurcated trial. As we will see, the Court ultimately held that the "rationally reviewable narrowing" (the eligibility determination) can take place in either the guilt-determination or the sentencing stage of the trial.

D. *The Eligibility Determination Requires Finding an "Aggravating Factor" to Narrow Discretion*

In order to meet the Supreme Court's requirement of "narrowing the class of death-eligible murders," states revisited their capital sentencing legislation. Over time, states removed, or the Supreme Court deemed unconstitutional, capital punishment for all crimes against the person that did not involve a death.¹¹ But in the case of interpersonal crimes that were still eligible for the death penalty (murder or other crimes against the individual involving a death), there are still additional constitutional requirements that must be met before a defendant can be declared eligible for the death penalty: the trier of fact must convict the defendant and find at least one statutory "aggravating circumstance" (or its equivalent).

⁹ *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Readers will note that there is a potential problem here, for if an aggravating factor is determined in the sentencing stage along with mitigating factors, there is some concern that the prosecution might benefit unfairly from the relatively lower standard of proof used in the sentencing stage (usually less than "beyond a reasonable doubt") to prove an aggravating factor that might be difficult to prove in the guilt-determination stage, thus making a defendant eligible for the death penalty who might not have been under the heightened standard used for the determination of guilt. This very important issue will be addressed in Chapter 3.

¹⁰ *Tuilaepa v. California*, 512 U.S. 967, 973 (1994).

¹¹ For more on this, please consult our Chapter 4 and the *Kennedy* case, which found the death penalty an unconstitutional punishment for child rape and for all crimes against the person not causing the death of a victim.

The question, then, was, when should this “narrowing” take place -- in the guilt-determination stage or in the penalty stage of the trial? In the Georgia and Florida death penalty legal schemes (and later, the federal scheme), the most obvious narrowing took place at the penalty stage, when juries would be asked to find at least one aggravating factor beyond a reasonable doubt before sentencing a defendant to death. This was the model proposed by the Model Penal Code, drafted by the American Law Institute. But in states like Texas, the majority of the “narrowing” took place via the legislature’s redefinition of the capital crimes themselves, and therefore was more present in the guilt-determination stage of the trial. In the sentencing stage, the Texas capital jury was not asked to find aggravating factors, but rather to fill out a three-part questionnaire, the most critical question of which was whether or not the defendant is a “continuing threat to society.” In Louisiana, where the *Lowenfield* case took place, the capital jury was required to find an aggravating factor in the sentencing stage, but serious controversy arose when the aggravating factor the jury found in that case was essentially the same as a necessary element of the crime of which the jury had found the defendant guilty in the guilt-determination stage of the trial. This duplication seemed to contradict the Supreme Court’s requirement that the eligibility decision “narrow the class” of death-eligible offenses.

Lowenfield is one of the first cases that shows the Court struggling with just how, exactly, the selection and eligibility determinations are supposed to interact with the bifurcated trial. Most critical is the role of the aggravating factor, which many assumed must, at minimum, be determined during the penalty stage. *Lowenfield* is then notable for the way the Court gave wide latitude to state legislatures in crafting capital punishment systems that would comply with the *Gregg* line requirements. The Court refused to require an additional “narrowing of the class” during the penalty phase. Indeed, the “narrowing” could be fixed by the legislature *ex ante*, as an element of the crime itself distinguishing it as more deserving of the ultimate sentence. To many abolitionists, this seemed to be a retrenchment of the procedural protections gained in the 1976 Death Penalty Cases.

But, as is so common in the common law, the implications of *Lowenfield* were not fully evident at the time the case was decided. While ostensibly certifying Louisiana’s less-than-ideal system death penalty adjudication system, *Lowenfield* exposed a problem with the determination of an aggravating factor, as practiced by many other systems -- one that has yet to be wholly solved. It is a problem we will discuss in the rest of this chapter and in Chapter 3 - Standards of Proof in Death Penalty Proceedings: The aggravating factor is used in two different ways during the course of a trial; it must first be proven and then, usually, “weighed” by the sentencer. Proving the factor seems to be a legal function the U.S. system typically puts in the guilt stage, where defendants enjoy due process protections afforded by criminal procedure and evidence laws mentioned in the introduction to the chapter. “Weighing” is a process most akin to sentencing, and is less of a due process concern once guilt has been established on all elements. Most systems did not take adequate account of these two separate legal determinations, and often put most processes dealing with the aggravating factor in the penalty stage. This elevated the risk that a defendant could effectively be convicted of a crime with elements insufficient to warrant the death penalty, but then be found eligible in the penalty stage, without adequate procedural protections on the basis of a factor that had been proven already in the trial on the merits. In cases after *Lowenfield*, the Court has increasingly tried to assure that findings of fact associated with the eligibility determination receive the due process protections they deserve.

II. Case and Analysis

Lowenfield v. Phelps, 484 U.S. 231 (1988).

A. Case Facts:

At petitioner's state-court trial on charges of killing five people, the jury returned guilty verdicts on three counts of first-degree murder, an essential statutory element of which, under the circumstances, was a finding of intent "to kill or inflict great bodily harm upon more than one person." After finding the defendant guilty on these three counts, the jury also made a separate finding of the statutory aggravating circumstance of "knowingly creat[ing] a risk of death or great bodily harm to more than one person," and sentenced petitioner to death on all three first-degree murder counts. After the Louisiana Supreme Court upheld Lowenfield's convictions and sentences, the Federal District Court denied him habeas corpus relief and the Court of Appeals affirmed. The Supreme Court granted certiorari but it also affirmed the constitutionality of the convictions and the imposition of the death penalty.

B. Court Holding:

The death sentence does not violate the Eighth Amendment simply because the single statutory "aggravating circumstance" found by the jury duplicates an element of the underlying offense of first-degree murder. "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"¹² This "narrowing function" may constitutionally be provided in either of two ways: The legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase, as most States have done, or the legislature may itself narrow the definition of capital offenses so that the jury finding at the guilt phase responds to this concern, as Louisiana has done here. Thus, the duplicative nature of the statutory aggravating circumstance did not render the petitioner's sentence infirm, since the constitutionally mandated narrowing function was performed at the guilt phase and the Constitution did not require an additional aggravating circumstance finding at the penalty [sentencing] phase.¹³

C. The Court's Reasoning: The Dissent and Other States:

1. *Dissent*. In his dissent, Justice Marshall, joined by Justice Brennan, claimed that "narrowing the class of death eligible offenders is not an 'end in itself,'" but is supposed to "channel the discretion of the sentencer." He objected to the inclusion of a necessary aggravating factor for death penalty purposes in the trial on the merits, when the jury is not thinking about sentencing and its implications at all. This structure creates a situation in which a jury that returns a verdict of guilt, not thinking about sentencing at the time, is then presented with the conditions for sentencing and finds that it had *already* determined that the specific case and defendant met the requisite minimum conditions for the possible imposition of a death sentence. He believed this made it far more likely that a jury would impose a death sentence,

¹² *Lowenfield v. Phelps*, at 244, citing *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

¹³ *See Id.* at 241-44.

since it never had to consider the difficult moral question of whether it, itself, would choose to make the critical finding of death penalty-eligibility. Justice Marshall wrote that:

... the jury's sentence of death could not stand because it was based on a single statutory aggravating circumstance that duplicated an element of petitioner's underlying offense. This duplication prevented Louisiana's sentencing scheme from adequately guiding the discretion of the sentencing jury in this case and relieved the jury of the requisite sense of responsibility for its sentencing decision. As we have recognized frequently in the past, such failings may have the effect of impermissibly biasing the sentencing process in favor of death in violation of the Eighth and the Fourteenth Amendments...

Even had the jury reached its verdict free from any improper influence by the court, that verdict still could not stand. The principles established by our prior cases preclude the imposition of the death penalty when it is based on a single statutory aggravating circumstance that merely duplicates an element of the underlying offense. We have insisted repeatedly that the discretion of the sentencer be guided by a narrowing of the class of people eligible for the death penalty and that the sentencer be fully cognizant of its responsibility for the imposition of a sentence of life or death. Both of these principles have been violated by the operation of the Louisiana sentencing scheme in this case.

Since our decision in *Furman v. Georgia*, we have required that there be a "meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many cases in which it is not." We have held consistently that statutory aggravating circumstances considered during the sentencing process provide one of the means by which the jury's discretion is guided in making such constitutionally mandated distinctions...

The Court today suggests that our emphasis on aggravating circumstances has been mere happenstance and holds that the critical narrowing function may be performed prior to and distinct from the sentencing process... This holding misunderstands the significance of the narrowing requirement. The Court treats the narrowing function as a merely technical requirement that the number of those eligible for the death penalty be made smaller than the number of those convicted of murder. But narrowing the class of death eligible offenders is not "an end in itself" any more than aggravating circumstances are. Rather, as our cases have emphasized consistently, the narrowing requirement is meant to channel the discretion of the sentencer. It forces the capital sentencing jury to approach its task in a structured, step-by-step way, first determining whether a defendant is eligible for the death penalty and then determining whether all of the circumstances justify its imposition. The only conceivable reason for making narrowing a constitutional requirement is its function in structuring sentencing

deliberations. By permitting the removal of the narrowing function from the sentencing process altogether, the Court reduces it to a mechanical formality entirely unrelated to the choice between life and death.

The Court's relegation of the narrowing function to the guilt phase of a capital trial implicates the concerns we expressed in another context in *Caldwell v. Mississippi*. In *Caldwell*, we vacated petitioner's sentence of death when the prosecutor had argued to the jury that the appellate court would review the imposition of the death sentence for correctness, concluding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Here, the sentencing jurors were led to believe that petitioner's eligibility for the death sentence was already established by their findings during the guilt phase -- findings arrived at without any contemplation of their implication for petitioner's sentence. Indeed, the court specifically instructed the jury at the start of its guilt phase deliberations: "You are not to discuss, in any way, the possibility of any penalties whatsoever." Then, during the penalty hearing, the prosecutor twice reminded the jury that it had already found during the guilt phase one of the aggravating circumstances that the State urged was applicable to petitioner's sentence. The prosecutor's argument might well have convinced the jury that it had no choice about and hence no responsibility for the defendant's eligibility for the death penalty. This situation cannot be squared with our promise to ensure that "a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'"

In sum, the application of the Louisiana sentencing scheme in cases like this one, where there is a complete overlap between aggravating circumstances found at the sentencing phase and elements of the offense previously found at the guilt phase, violates constitutional principles in ways that will inevitably tilt the sentencing scales toward the imposition of the death penalty. The State will have an easier time convincing a jury beyond a reasonable doubt to find a necessary element of a capital offense at the guilt phase of a trial if the jury is unaware that such a finding will make the defendant eligible for the death penalty at the sentencing phase. Then the State will have an even easier time arguing for the imposition of the death penalty, because it can remind the jury at the sentencing phase, as it did in this case, that the necessary aggravating circumstances already have been established beyond a reasonable doubt. The State thus enters the sentencing hearing with the jury already across the threshold of death eligibility, without any awareness on the jury's part that it had crossed that line. By permitting such proceedings in a capital case, the Court ignores our early pronouncement that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Illinois*.

2. *Other States*. As of 1997, only Tennessee had explicitly held that a required element of first-degree murder repeated in the sentencing phase was unconstitutional. Other state supreme courts have heard cases involving the same type of challenge, but have not followed Tennessee's example.¹⁴ In *State v. Middlebrooks*¹⁵ the Tennessee Supreme Court ruled unconstitutional a law that allowed the death penalty for felony-murder without proof of any *mens rea* to the homicide. "Murder committed during the commission of a felony" was also an aggravating factor, one that, like the Louisiana system in *Lowenfield*, simply repeated elements of the underlying offense. The Tennessee Supreme Court held that this provision failed to adequately narrow the class of defendants. However, the U.S. Supreme Court declined to hear this case on appeal, which means that while this is the law for Tennessee, and other death penalty states might also choose to increase their protections of defendants in this way, they are not required to do so under federal constitutional law.
3. *Really limiting, really less arbitrary? California Statistics*. Some abolitionists claim that it is nearly as difficult to predict who will live and who will die as it was before *Furman*, and they attempt to make a statistical argument to prove their point. See if you think this argument holds water. The *Furman* decision is an incredibly complicated decision, and just what exactly constituted unconstitutional arbitrariness is still debated by scholars. The justices who wrote *Furman* understood that fifteen to twenty percent of those eligible for the death penalty in Georgia received it.¹⁶ Some abolitionists imply that this should be taken as a baseline for what constitutes unconstitutional arbitrariness in death penalty decisions. According to one study analyzing cases from 1988 to 1992 in California, eighty-four percent of those convicted of first-degree murder in that state were statutorily eligible for the death penalty¹⁷ (thus a class of one hundred people would be narrowed by sixteen) and 9.6 percent of those convicted of first-degree murder were sentenced to death, which meant that California had a death sentence ratio of only 11.4 percent, or in other words, that fewer than one out of eight death-eligible convicted first-degree murderers was selected for death (at the discretion of prosecutors and juries), which was a lower ratio than Georgia's death sentence ratio at the time of *Furman*. These statistics have led many to question whether the steps taken to limit arbitrariness have really done so, and whether California's system is just as unconstitutional as Georgia's was at the time of *Furman*. For, once the limiting takes place, only a small percentage of the death-eligible receive the death penalty, making it almost as difficult to predict who will receive the death penalty as it was before. What do you think of this argument? What do the statistics reveal? What problems might there be with this analysis? Recall from Chapter 1 that states are forbidden from requiring that all death-eligible defendants receive the death penalty. How critical is the claim of "death is different" to the success of this argument?
- It should be noted that many states (like California) include "narrowing-type" processes in both trial and sentencing proceedings. For example, California includes both a requirement that the defendant be found guilty of first-degree murder *and* also that the

¹⁴ Nina Rivkind & Steven F. Shatz, *Cases and Materials on the Death Penalty* 144 (3rd ed. 2009).

¹⁵ *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992).

¹⁶ *Id.*; Rivkind & Shatz, at 145.

¹⁷ This was the case at the time of writing of the 1997 article that produced the statistics cited in this paragraph, Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1332 (1997).

jury find one of nineteen “special circumstances” in the California Penal Code in order for the defendant to be determined death-eligible. Then, at the penalty phase, the jury must consult a separate set of specified factors in deciding whether to actually sentence the defendant to death.¹⁸ Of course, some question how much narrowing truly occurs at either of these stages. California’s system will be discussed in greater detail in Chapter 3.

III. The Selection Decision Post-*Lowenfield*

After *Lowenfield*, states appeared to have the power to determine at which stage they would “narrow the class” of death-eligible defendants. This power was confirmed in a later case, *Tuilaepa v. California*, quoted above. The Supreme Court in *Tuilaepa* simply requires that the trier of fact must convict a defendant of murder and one “aggravating circumstance” or its equivalent at *either the guilt or penalty phase*. Finally, as long as the aggravating circumstance is not unconstitutionally vague, it may be contained in the definition of the crime itself or in a separate sentencing factor (or both).¹⁹

But, even if the sentencer determines the defendant to be death-eligible, there is another, separate requirement for the selection decision: whether the defendant eligible for the death penalty should in fact receive that sentence. This requirement developed from the concept, nascent in the *Woodson* case, of “individualized determination,” and eventually developed into its own line of cases (often called the *Woodson/Lockett* line). These cases elaborated greatly the sentencer’s duty to make individualized determinations as to whether someone found death-eligible deserves the death penalty or not. They did this by expanding the types of evidence that could be heard at the penalty stage and the degree of freedom the jury has to make a death penalty determination based on that evidence.

A. *The Sentencer has Broad Discretion in the Selection Decision*

Over the years, the Supreme Court has given sentencers (whether judges or juries), broad discretion to make an individualized capital sentencing determination through a number of its decisions:

- “The selection decision. . . requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant’s culpability.” No “nexus to the crime” is necessary in the selection decision, as opposed to the eligibility decision, which does require such a nexus. *Tuilaepa v. California*, at 973.
- “The sentencer may be given ‘unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.’” *Tuilaepa*, at 979, citing *Zant v. Stephens*, at 875. It is alright for juries “to consider all facts and circumstances presented in extenuation, mitigation, and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense.” *Zant v. Stephens*, at 889.
- The standard for admitting mitigating evidence is quite low: “[T]he jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant

¹⁸ *Tuilaepa v. California*, at 969.

¹⁹ There is a great deal of case law defining what actually constitutes constitutionally vague language, but this is a topic with which we do not concern ourselves in this chapter.

has met a ‘low threshold for relevance,’ which is satisfied by ‘evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.’”²⁰ *Smith v. Texas*, 543 U.S. 37, 44 (2004).

- There is no requirement that the jury make a unanimous finding on a particular mitigating factor, and in fact, such a requirement would be unconstitutional. *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990).

B. *Dissension within the Court on the Selection Stage: Is a system that limits discretion at one stage and then expands discretion at the next stage able to restrict arbitrariness effectively?*

1. *Walton v. Arizona*

In *Walton v. Arizona*, 497 U.S. 639 (1990) (later overruled in *Ring v. Arizona* to the extent that it allowed a judge alone to find an aggravating factor necessary to a determination of death-eligibility), fifteen years into the Supreme Court’s continuing effort to develop both the “narrowing the class” (eligibility decision) and the “individualized sentencing” (selection decision) prongs of its post-*Gregg* death penalty jurisprudence, Justice Scalia and Justice Stevens engaged in a rather epic debate about whether these two prongs were constitutional, helpful in preventing arbitrariness, or even logical. As you will notice, part of the debate focused on how to fit the eligibility and selection decisions into the bifurcated trial structure. The debate was also an excellent example of how the common law works in practice, as the various arguments made by each of the Justices eventually led to a relative clarification of the law on which they could both agree. Please read the following excerpts and decide for yourself who had the better argument.

Justice Scalia (concurring in *Walton*):

Today a petitioner before this Court says that a State sentencing court (1) had unconstitutionally broad discretion to sentence him to death instead of imprisonment, and (2) had unconstitutionally narrow discretion to sentence him to imprisonment instead of death. An observer unacquainted with our death penalty jurisprudence (and in the habit of thinking logically) would probably say these positions cannot both be right. The ultimate choice in capital sentencing, he would point out, is a unitary one — the choice between death and imprisonment. One cannot have discretion whether to select the one yet lack discretion whether to select the other. Our imaginary observer would then be surprised to discover that, under this Court’s Eighth Amendment jurisprudence of the past 15 years, petitioner would have a strong chance of winning on both of these antagonistic claims, simultaneously — as evidenced by the facts that four Members of this Court think he should win on both. But that just shows that our jurisprudence and logic have long since parted ways...

Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the States’ administration of capital sentencing —

²⁰ Again, there is a large amount of case law on exactly what the jury is and is not allowed to consider, and what instructions must be given to a jury by a judge. That does not concern us in this chapter.

effectively requiring capital sentencing proceedings separate from the adjudication of guilt, dictating the type and extent of discretion the sentencer must and must not have, requiring that certain categories of evidence must and must not be admitted, undertaking minute inquiries into the wording of jury instructions to ensure that jurors understand their duties under our labyrinthine code of rules, and prescribing the procedural forms that sentencing decisions must follow. The case that began the development of this Eighth Amendment jurisprudence was *Furman v. Georgia*, which has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion.

....

Shortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to "impose" the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to "*decline* to impose" it. This second doctrine — counterdoctrine would be a better word — has completely exploded whatever coherence the notion of "guided discretion" once had.

Some States responded to *Furman* by making death the mandatory punishment for certain categories of murder. We invalidated these statutes in *Woodson v. North Carolina* and *Roberts v. Louisiana*, a plurality of the Court concluding that the sentencing process must accord at least some consideration to the "character and record of the individual offender." Other States responded to *Furman* by leaving the sentencer some discretion to spare capital defendants, but limiting the kinds of mitigating circumstances the sentencer could consider. We invalidated these statutes in *Lockett v. Ohio*, a plurality saying the Eighth Amendment requires that the sentencer "not be precluded from considering, as a mitigating factor, *any aspect* of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." The reasoning of the pluralities in these cases was later adopted by a majority of the Court...

In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required.

As elaborated in the years since, the *Woodson-Lockett* principle has prevented States from imposing all but the most minimal constraints on the sentencer's discretion to decide that an offender eligible for the death penalty should nonetheless not receive it. We have, in the first place, repeatedly rebuffed States' efforts to channel that discretion by specifying objective factors on which its exercise should rest. It would misdescribe the sweep of this principle to say that "all mitigating evidence" must be considered by the

sentencer. That would assume some objective criterion of what is mitigating, which is precisely what we have forbidden.

...

To acknowledge that “there perhaps is an inherent tension” between this line of cases and the line stemming from *Furman*...is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing “twin objectives,” is rather like referring to the twin objectives of good and evil. They cannot be reconciled. Pursuant to *Furman*, and in order “to achieve a more rational and equitable administration of the death penalty,” we require that States “channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance.’” In the next breath, however, we say that “the State *cannot* channel the sentencer’s discretion ... to consider any relevant [mitigating] information offered by the defendant,” and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not “deserve to be sentenced to death.” The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.

The Court has attempted to explain the contradiction by saying that the two requirements serve different functions: the first serves to “narrow” according to rational criteria the class of offenders eligible for the death penalty, while the second guarantees that each offender who is death eligible is not actually sentenced to death without “an individualized assessment of the appropriateness of the death penalty.” But it is not “individualized assessment” that is the issue here. No one asserts that the Constitution permits condemnation *en masse*. The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not — whether it may insist upon a rational scheme in which all sentencers making the individualized determinations apply the same standard.

Justice Stevens (dissenting in *Walton*)

Justice Scalia announces in a separate opinion that henceforth he will not regard [the *Woodson* line of cases] as binding precedent... Although there are other flaws in Justice Scalia’s opinion, it is at least appropriate to explain why his major premise is simply wrong.

The cases that Justice Scalia categorically rejects today rest on the theory that the risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons who are eligible for the death penalty.

When *Furman* was decided, Georgia included virtually all defendants convicted of forcible rape, armed robbery, kidnapping and first-degree murder in that class. As the opinions in *Furman* observed, in that large class of cases race and other irrelevant factors unquestionably played an unacceptable role

in determining which defendants would die and which would live. However, the size of the class may be narrowed to reduce sufficiently that risk of arbitrariness, even if a jury is then given complete discretion to show mercy when evaluating the individual characteristics of the few individuals who have been found death eligible.

The elaborate empirical study of the administration of Georgia's capital sentencing statute... further illustrates the validity of this theory. In my opinion in that case I observed:

“...[One of the things the Supreme court has learned from a 1983 statistical study of 2,000 Georgia murder cases²¹ is that] there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.”

The Georgia Supreme Court itself understood the concept that Justice Scalia apparently has missed. In *Zant v. Stephens*, we quoted the following excerpt from its opinion analogizing the law governing homicides in Georgia to a pyramid:

“All cases of homicide of every category are contained within the pyramid. The consequences flowing to the perpetrator increase in severity as the cases proceed from the base of the apex, with the death penalty applying only to those few cases which are contained in the space just beneath the apex. To reach that category a case must pass through three planes of division between the base and the apex.

“The first plane of division above the base separates from all homicide cases those which fall into the category of murder. This plane is established by the legislature in statutes defining terms such as murder, voluntary manslaughter, involuntary manslaughter, and justifiable homicide. In deciding whether a given case falls above or below this plane, the function of the trier of facts is limited to finding facts. The plane remains fixed unless moved by legislative act.

“The second plane separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances. The function of the factfinder is again limited to making a determination of whether

²¹ Author's Note: This statistical study was used as the basis of an unsuccessful argument alleging racial discrimination in capital sentencing, and was analyzed in detail, and with differing conclusions by the majority and dissent (which dissent included Justice Stevens), by the Justices of the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

certain facts have been established. Except where there is treason or aircraft hijacking, a given case may not move above this second plane unless at least one statutory aggravating circumstance exists. . .

“The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. There is an absolute discretion in the factfinder to place any given case below the plane and not impose death. The plane itself is established by the factfinder. In establishing the plane, the factfinder considers all evidence in extenuation, mitigation and aggravation of punishment. . . There is a final limitation on the imposition of the death penalty resting in the automatic appeal procedure: This court determines whether the penalty of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the statutory aggravating circumstances are supported by the evidence; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. . . Performance of this function may cause this court to remove a case from the death penalty category but can never have the opposite result.

“The purpose of the statutory aggravating circumstances is to limit to a large degree, but not completely, the factfinder’s discretion. Unless at least one of the ten statutory aggravating circumstances exists, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the factfinder has a discretion to decline to do so without giving any reason. In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.

“A case may not pass the second plane into that area in which the death penalty is authorized unless at least one statutory aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one. Once beyond this plane, the case enters the area of the factfinder’s discretion, in which all the facts and circumstances of the case determine, in terms of our metaphor, whether or not the case passes the third plane and into the area in which the death penalty is imposed.”

Justice Scalia ignores the difference between the base of the pyramid and its apex. A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex. After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to show mercy based on individual mitigating circumstances in the cases that remain.

Justice Scalia's Response in a Footnote in *Walton*:

Justice Stevens contends that the purpose of *Furman* is merely to narrow the group of crimes (to which the sentencer's unconstrained discretion is then applied) to some undefined point near the "tip of the pyramid" of murder — the base of that pyramid consisting of all murders, and the apex consisting of a particular type crime of murder defined in minute detail. There is, however, no hint in our *Furman* jurisprudence of an attempt to determine what constitutes the critical line below the "tip of the pyramid," and to assess whether *either* the elements of the crime are alone sufficient to bring the statute above that line (in which case no aggravating factors whatever need be specified) *or* whether the aggravating factors are sufficient for that purpose. I read the cases (and the States, in enacting their post-*Furman* statutes, have certainly read them) as requiring aggravating factors to be specified *whenever* the sentencer is given discretion. It is a means of confining the sentencers' discretion — giving them something specific to look for rather than leaving them to wander at large among all aggravating circumstances. That produces a consistency of result which is unachievable — no matter how narrowly the crime is defined — if they are left to take into account any aggravating factor at all. We have, to be sure, held that the discretion-limiting aggravating factor can duplicate a factor already required by the definition of the crime . . . , but in those circumstances the sentencer's discretion is *still* focused and confined. We have never allowed sentencers to be given complete discretion without a requisite finding of aggravating factors. If and when the Court redefines *Furman* to permit the latter, and to require an assessment (I cannot imagine on what basis) that a sufficiently narrow level of the "pyramid" of murder has been reached, I shall be prepared to reconsider my evaluation of *Woodson* and *Lockett*.

IV. Questions and Discussion

1. While Justices Scalia and Stevens are engaging in a constitutional debate, beneath that debate is another debate about the "best practices" for guiding discretion in death penalty cases. Disregarding the constitutional issue, who do you believe has a better normative argument? The better pragmatic argument? Is it possible to limit reasons why one "can impose death," in the first instance, and then remove "reasons why one cannot impose death" after that and still have a system that is not unduly arbitrary?
 - A. In *Tuilaepa v. California*, Justice Stevens seems to have eventually won the argument, and the pyramid that he describes above was cemented as law, but he also seemed to answer Justice Scalia's criticism, acknowledging that states are free to place the aggravating factor in either stage of the trial, and that wide discretion is given to the sentencer. The Court will then review state systems "to ensure that the process is neutral and principled so as to guard against bias and caprice in the sentencing decision," a principle that gives a great deal of deference to state and federal legislatures.

2. Another part of Justice Scalia's concurring opinion in *Walton* states the following facts. Do these facts change your opinion regarding Question 1?

... There has thus arisen, in capital cases, a permanent flood-tide of stay applications and petitions for certiorari to review adverse judgments at each round of direct and collateral review, alleging novel defects in sentencing procedure arising out of some permutation of either *Furman* or *Lockett*. State courts, attempting to give effect to the contradictory principles in our jurisprudence and reluctant to condemn an offender without virtual certainty that no error has been committed, often suspend the normal rules of procedural bar to give ear to each new claim that the sentencer's discretion was overconstrained or underconstrained. An adverse ruling typically gives rise to yet another round of federal habeas review — and by the time that is concluded we may well have announced yet another new rule that will justify yet another appeal to the state courts. The effects of the uncertainty and unpredictability are evident in this Court alone, even though we see only the tip of a mountainous iceberg. Since granting certiorari in *McKoy v. North Carolina* ..., on February 21, 1989 (the first of this Term's capital cases to have certiorari granted), we have received over 350 petitions for certiorari in capital cases; eight were granted, and 84 were held for the nine cases granted for this Term; 37 were held for this case alone. Small wonder, then, that the statistics show a capital punishment system that has been approved, in many States, by the democratic vote of the people, that has theoretically been approved as constitutional by this Court, but that seems unable to function except as a parody of swift or even timely justice. As of May 1990 there were 2,327 convicted murderers on death row; only 123 have been executed since our 1972 *Furman* decision.

3. Would it make a difference if it were a judge or jury making the sentencing decision? In *Walton v. Arizona*, the Court was reviewing a system that gave the judge the power to make a finding of aggravating and/or mitigating factors and also the power to make the penalty decision. While a more recent Supreme Court decision (*Apprendi v. New Jersey*, 530 U.S. 466 (2000)) requires that any finding of fact (like an aggravating factor) that would expose a defendant to greater punishment, except the fact of a prior conviction, be found by a jury, even in capital cases (*Ring v. Arizona*, 536 U.S. 584 (2002)), there are still three states (Florida, Alabama, and Delaware) that²² give the judge ultimate power to determine whether a defendant deserves the death penalty or some lesser sentence (after the jury has found at least one aggravating factor). What are the pros and cons of allowing a judge or jury to make a capital punishment decision?
4. And what of the rights of victims? Since *Walton*, the Supreme Court has widened the scope of the evidence that can be introduced in selection decisions, but this has not all necessarily been relevant to the issue of mitigation. The families of victims are being afforded more input into the sentencing stage of death penalty proceedings (for more on this, please see Chapter 6). It is foreseeable that this evidence could push a jury towards a death penalty verdict. Does this make

²² Equal Justice Initiative, *Judge Override*, available at <http://eji.org/eji/deathpenalty/override>.

the selection determination more or less fair? More or less arbitrary? Do you think that Justice Stevens would want to keep the language of “individualized determination” here without caveat?

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