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THE PROSECUTOR'S DISCRETIONARY POWER TO INITIATE THE DEATH SENTENCING HEARING—PEOPLE EX REL. CAREY V. COUSINS

Illinois capital punishment statutes have been frequent targets of judicial review in the past few years.1 Recently, Judge William Cousins Jr., a circuit court judge of the criminal division of Cook County, held that section 9-1(d) of the Illinois Criminal Code2 was unconstitutional as applied in the case at bar.3 This section of the Illinois death penalty statute gives the prosecutor sole discretion to request a death sentencing hearing upon the defendant's conviction for murder. The Illinois Supreme Court, however, overturned Judge Cousins' decision in People ex rel. Carey v. Cousins,4 where the court, hearing the appeal on a writ of mandamus, upheld the constitutionality of section 9-1(d) amidst state and federal constitutional challenges.

This Note examines the recent judicial challenges to the constitutionality of Illinois death penalty statutes and the legislative responses to these challenges. It then analyzes and compares the contrary positions taken by the Cousins majority and dissenting opinions in resolving the issues concerning the constitutionality of section 9-1(d), as well as the support relied upon to substantiate each position. In addition, this Note examines the weaknesses of the majority opinion resulting from its questionable application of precedent and from its failure to make use of pertinent Illinois case law. Finally, the Note proposes that section 9-1(d) be modified to avoid the risk of future challenges to its constitutionality and to reflect the true intent of the legislature.

1. Prior Illinois capital punishment statutory provisions were recognized as being unconstitutional in People ex rel. Rice v. Cunningham, 61 Ill. 2d 353, 336 N.E.2d 1 (1975) and Moore v. Illinois, 408 U.S. 786, 800 (1972).
2. ILL. REV. STAT. ch. 38, § 9-1(d) (1979). Section 9-1(d) provides:
   Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c). The proceeding shall be conducted:
   1. before the jury that determined the defendant's guilt; or
   2. before a jury impanelled for the purpose of the proceeding if:
      A. the defendant was convicted upon a plea of guilty; or
      B. the defendant was convicted after a trial before the court sitting without a jury; or
      C. the court for good cause shown discharges the jury that determined the defendant's guilt; or
   3. before the court alone if the defendant waives a jury for the separate proceeding.
   Id. (emphasis added).
4. 77 Ill. 2d 531, 397 N.E.2d 809 (1979).
Prior to 1972, the constitutionality of capital punishment was presumed. The first time the United States Supreme Court addressed the issue, however, in *Furman v. Georgia*, it held that the death penalty violated the cruel and unusual punishment clause of the eighth amendment. On the same day the Court decided *Furman*, it declared the Illinois death penalty statute unconstitutional as violative of the eighth and fourteenth amendments. Subsequently, the legislatures of Illinois and thirty-four other states reinstated the death penalty by enacting statutes intended to comply with the requirements of *Furman*.


7. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.
8. 408 U.S. at 239-40. *Furman* was an unusual case in that it evoked nine separate opinions from the Court's members. For this reason, the Court tendered a per curiam opinion. Nevertheless, the *Furman* decision is binding on its exact facts as to all state and federal courts.
10. "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 law." U.S. CONST. amend. XIV. The ban against cruel and unusual punishment was incorporated into the fourteenth amendment, making it applicable to the states, in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, 473-74 (1947). Further evidence of the applicability of the eighth amendment to the states is *Robinson v. California*, 370 U.S. 660 (1962), where the Court held that a state statute making the "status" of narcotic addiction a criminal offense inflicted a cruel and unusual punishment in violation of the fourteenth amendment. *Id.* at 667.
11. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 n.23 (1976), for a list of the thirty-five states which enacted new statutes in the wake of *Furman*. The effect of *Furman* was to strike down the capital punishment statutes of thirty-nine states and the District of Columbia, as well as the federal statutory provisions permitting capital punishment.
13. 61 Ill. 2d 353, 336 N.E.2d 1 (1975). The court held that the statute was unconstitutional on three grounds. First, the section of the death penalty statute providing for a three-judge panel to determine whether the death sentence should be imposed was constitutionally defective because it deprived each of the judges of the jurisdiction vested in him by the Illinois Constitution. Second, the "mercy provision" of the statute was defective because it failed to provide standards or guidelines for determining whether the defendant should be shielded from the death penalty. See note 66 infra. Finally, the procedure for appellate review was unconstitutional because it was in direct contradiction of the Illinois Constitution, ILL. CONST. art. VI, § 4(b), which provides for direct appeal of the death penalty to the Illinois Supreme Court.
Constitution. The legislative response to this decision took shape almost immediately. Within two months, new capital punishment legislation was introduced in the Illinois General Assembly, although it was not enacted into law until June 21, 1977. Judge Cousins found section 9-1(d) of this revised statute unconstitutional, thereby causing the Illinois Supreme Court to inquire into the constitutionality of an Illinois death penalty provision for the second time in four years.

61 Ill. 2d at 362, 336 N.E.2d at 6. Because these unconstitutional provisions were strongly interdependent upon one another, the court declared the entire statute invalid, rather than attempt to sever the unconstitutional provisions from the remainder of the statute. Id.


For the state to succeed in its quest for the death penalty, the criteria of § 9-1 must be met. Section 9-1(a) sets forth the various acts which constitute the offense of murder, though it does not delineate those murders for which the death penalty may be imposed. The determination of whether a particular murder is a capital offense is made by referring to § 9-1(b), which lists seven aggravating factors. For the defendant to be eligible for the death penalty, the judge or jury must find at least one of these aggravating factors at the separate sentencing hearing held after the trial. Id. § 9-1(g) to -1(h). If one or more aggravating factors exist, the sentencing body must determine whether any mitigating factors exist sufficient to preclude the imposition of the death penalty. The death penalty will be imposed if it is determined that there are no mitigating factors sufficient to preclude its imposition. Id.

The death penalty statute does not require that a separate sentencing hearing be held to make such a determination. Rather, under § 9-1(d), a death penalty hearing is held only "where requested by the state . . . ." Id. § 9-1(d). Therefore, if the State decides not to request a sentencing hearing, it has precluded the imposition of the death penalty. It is curious to note that a separate sentencing hearing is required upon a determination of guilt for all other crimes, except those in which the death penalty may be imposed. See note 19 infra.

16. The troublesome language, "where requested by the state," which led Judge Cousins to hold § 9-1(d) unconstitutional, was not originally included in the legislative bill later to become the current Illinois death penalty statute. In response to Cunningham, House Bill 3204 was introduced in the Illinois General Assembly on November 6, 1975. It provided that "[t]he court shall conduct a separate sentencing proceeding . . . ." H.B. 3204, 79th G.A., 1976 Sess., § 9-1(d) (1976). This bill floundered in the House for a year and was reintroduced before the General Assembly on November 30, 1976, as House Bill 10. H.B. 10, 80th G.A., 1977 Sess. § 9-1(d) (1977). The bill retained the provision requiring a separate sentencing proceeding. On March 8, 1977, however, this bill was amended to include the provision: "Where requested by the State, the court shall conduct a sentencing hearing . . . ." See 1 Illinois Legislative Reference Bureau, Legislative Synopsis and Digest 955 (1977). This unique verbiage originated in House Bill 74, another legislative attempt to amend provisions of the Illinois death penalty statute. H.B. 74, 80th G.A., 1977 Sess. § 1005-8-1 (c)(1) (1977). When this phrase granting the prosecutor the discretion to request a sentencing hearing was incorporated into House Bill 10 through the March 8th amendment, House Bill 74 was immediately tabled. This apparently innocent trade-off between legislators resulted in the shaping of § 9-1(d) in its present form, which Judge Cousins and three out of seven Illinois Supreme Court Justices found to be unconstitutional.
FACTUAL BACKGROUND AND JUDGE COUSINS’ ORDER

An information was filed in the circuit court of Cook County charging Ronald Brown with the aggravated kidnapping, armed robbery, and murder of Charles McGee. Brown was convicted on all charges at a bench trial before Judge Cousins. Thereafter, pursuant to section 9-1(d) of the Illinois Criminal Code, the State requested that a jury be impanelled to determine whether the death penalty should be imposed. Under section 9-1(d), once the trial has been completed and the defendant convicted, the state is given the sole and unfettered discretion to request a sentencing hearing. If the state requests a sentencing hearing, the defendant becomes eligible for the death penalty; however, if the state fails to request a sentencing hearing, the trial judge is permitted only to sentence the defendant to a prison term within the guidelines established by the Unified Code of Corrections. In response to a motion by Brown, Judge Cousins denied the state’s request for a separate sentencing hearing and entered an order holding section 9-1(d) unconstitutional.

Judge Cousins ruled that this provision causes the death penalty to be “wantonly and freakishly imposed” because it “vests the prosecution with unlimited discretion to trigger death sentence proceedings.” As a result, Judge Cousins held that the application of section 9-1(d) violates the prohibition against cruel and unusual punishment of the eighth amendment of the United States Constitution, the due process clause of the fourteenth amendment of the United States Constitution, and article I, section 2 of the Illinois Constitution.

PROCEDURAL HISTORY AND DECISION OF COUSINS

In response to Judge Cousins’ order, the state filed a motion for a stay of the proceedings in the trial and a motion for leave to file a petition for a writ

17. An information is an accusation of a crime in the nature of an indictment, from which it differs in that it is presented by a competent public officer instead of a grand jury. BLACK’S LAW DICTIONARY 701 (5th ed. 1979). In Illinois, “[a]ll prosecutions of felonies shall be by information or indictment.” ILL. REV. STAT. ch. 38, § 111-2 (1979).

18. ILL. REV. STAT. ch. 38, §§ 9-1(a) to -1(h) (1979) provides for a bifurcated procedure whereby sentencing is not considered until the determination of guilt has been made. See also MODEL PENAL CODE § 201.6, Comment 5 (Tent. Draft No. 9, 1959).

19. The Unified Code of Corrections provides that “[c]except when the death penalty is sought under hearing procedures otherwise specified, after a determination of guilt, a hearing shall be held to impose the sentence.” ILL. REV. STAT. ch. 38, § 1005-4-1(a) (1979). It is at this hearing that “[t]he judge who presided at the trial . . . shall impose the sentence . . . .” Id. § 1005-4-1 (b). The sentencing judge has the option to sentence a defendant convicted of murder to “a term . . . not less than 20 years and not more than 40 years, or . . . to a term of natural life imprisonment.” Id. § 1005-8-1(a)(1). The sentencing judge does not have the option to sentence the defendant to death.


21. Id.

22. Id.
of mandamus before the Illinois Supreme Court. The court granted both motions and, in a 4-3 decision, issued a writ of mandamus directing Judge Cousins to expunge the order holding section 9-1(d) unconstitutional. The court also ordered Judge Cousins to hold a hearing to determine whether Ronald Brown should be sentenced to death.

The Illinois Supreme Court based its decision upholding the constitutionality of section 9-1(d) on four grounds. First, the court found that the prosecutorial power to request a sentencing hearing did not usurp a judicial function in violation of the separation of powers provision of the Illinois Constitution. It also ruled that the absence of standards to guide the prosecutor's discretion in requesting a sentencing hearing did not cause the death penalty to be imposed in a "wanton and freakish" manner in contravention of the prohibition of cruel and unusual punishment found in the eighth amendment of the United States Constitution. In a cursory fashion, the court also resolved two other challenges to this statute. It decided that the exercise of prosecutorial power under section 9-1(d) did not deny the defendant due process of law and concluded that the additional grounds raised by the respondent in challenging section 9-1(d) were premature inasmuch as the defendant had not been sentenced to death.

Three justices joined in a strong dissenting opinion asserting that section 9-1(d) was unconstitutional and, therefore, a separate sentencing hearing could not be held to decide whether to impose the death penalty. Justice Ryan, writing for the dissenters, vigorously contended that section 9-1(d) violated both the separation of powers provision of the Illinois Constitution and the cruel and unusual punishment clause of the United States Constitution.

23. The authorization for the institution of proceedings in an original action relating to mandamus is found in Supreme Court Rule 381(a). ILL. REV. STAT. ch. 110A, para. 381(a) (1979). Paragraph (d) of this Rule provides that in an original action to review a judge's judicial act, the judge will be a nominal party to the action. Id. para. 381(d). The Illinois Supreme Court has held that under its supervisory and administrative powers and duties, as provided in the constitution, it may consider the issuance of a writ of mandamus when the matters involved are of compelling and general importance, even though the remedy of an interlocutory appeal may be available. People ex rel. Carey v. Strayhorn, 61 Ill. 2d 85, 89, 329 N.E.2d 194, 197 (1975). 77 Ill. 2d at 544, 397 N.E.2d at 816.

24. The majority disposed of this issue merely by applying the same rationale used to resolve the separation of powers challenge in this case. Id. at 539, 397 N.E.2d at 814. The court also cited several cases to support its holding that it does not violate due process to give the prosecutor "unbridled discretion" to determine whether or not to seek a sentencing hearing. Id. at 539-40, 397 N.E.2d at 814 (citing People v. Brooks, 65 Ill. 2d 343, 349, 357 N.E.2d 1169, 1172 (1976) (the prosecutor has the discretion to prosecute an individual under either of two different statutes where the conduct involved constitutes a crime under each); People v. McCollough, 57 Ill. 2d 440, 444-45, 313 N.E.2d 462, 464-65 (a statute does not deny due process by granting to the prosecutor the discretion to determine the offense which he will prosecute) appeal dismissed, 419 U.S. 1043 (1974); People v. Golz, 53 Ill. App. 3d 654, 658, 368 N.E.2d 1069, 1072 (2d Dist. 1977) (the prosecutor has the discretion to choose not to prosecute at all), cert. denied, 437 U.S. 905 (1978).

25. See notes 95-99 and accompanying text infra.
tion. In addition, the dissent found that section 9-1(d) denied the defendant a fundamental element of due process. The dissent argued that the exercise of prosecutorial discretion in requesting a death sentencing hearing permitted the prosecutor to interfere with the sentencing function and risked the imposition of the death sentence in an arbitrary and capricious manner.

THE COURT'S REASONING

Separation of Powers

Under the Illinois death penalty provisions, the death penalty cannot be imposed unless a sentencing hearing is held, and such a hearing cannot be held unless requested by the prosecutor. Consequently, if the prosecutor decides not to request a sentencing hearing, he or she has successfully precluded the imposition of the death penalty. It was argued in Cousins that in granting such discretionary powers, the statute permitted prosecutors to participate in the imposition of a criminal sentence, a purely judicial function. This exercise of an inherent judicial function by the prosecutor, an

27. Ill. 2d at 545, 397 N.E.2d at 816 (Ryan, J., dissenting).
28. Id. at 561, 397 N.E.2d at 824.
29. See note 15 supra. The terms "prosecutor" and "State's Attorney" will be used interchangeably throughout this Note. The State's Attorney is the chief prosecuting officer of the county, whose duties are "[t]o commence and prosecute all actions, suits, indictments, and prosecutions, civil and criminal . . . in which the people of the State or county may be concerned." ILL. REV. STAT. ch. 14, § 5(1) (1979).
30. The majority in Cousins remarked that although the separation of powers issue was not advanced by the respondents and was not included in the defendant's motion before Judge Cousins, it appeared "to form the basis of the trial court's holding." 77 Ill. 2d at 535, 397 N.E.2d at 812. This assertion cannot be supported by the facts. Nowhere in Judge Cousins' order holding § 9-1(d) unconstitutional did he discuss the separation of powers provision of the Illinois Constitution, article II, section 1. Judge Cousins based his decision on violations of the eighth and fourteenth amendments, as well as the due process provision contained in article I, section 2, of the Illinois Constitution. The separation of powers issue found its origin in a brief submitted by one of amici, not in the order issued by Judge Cousins. Brief for the Office of the Public Defender of Cook County, Amicus Curiae, at 20, People ex rel. Carey v. Cousins, 77 Ill. 2d 531, 397 N.E.2d 809 (1979).
31. People v. Williams, 6 Ill. 2d 179, 186-87, 361 N.E.2d 1110, 1114 (1977) (it is within the inherent power of the judiciary to impose sentences in criminal cases); People v. Montana, 380 Ill. 596, 608, 44 N.E.2d 569, 575 (1942) (the power to impose sentence as a punishment for crime is purely judicial); People ex rel. Martin v. Mallary, 195 Ill. 582, 594, 63 N.E. 508, 511 (1902) (only the courts have the power to authorize the punishment of persons for crime by confinement in the penitentiary). See also 5 CALLAGHAN'S ILLINOIS CRIMINAL PROCEDURE § 38.20 (1971).
official of the executive branch of government, was claimed to violate the separation of powers provision of the Illinois Constitution.

The Cousins majority addressed and rejected this argument, reasoning that the prosecutor was not participating in a judicial function, but was merely exercising one of his many discretionary powers as counsel for the state. In holding that the prosecutorial power to request a sentencing hearing did not violate the Illinois Constitution, the majority simply compared this discretionary power to the State’s Attorney’s other discretionary powers, such as challenging jurors or tendering instructions.

To further bolster its decision that requesting a sentencing hearing is not a judicial function, the majority analogized the power to request a sentencing hearing to the power to transfer a delinquency proceeding to a criminal court. The exercise of either power by the prosecutor has the potential to increase the severity of the sentence that might be imposed upon the defendant. The majority noted that prior Illinois Supreme Court decisions presupposed that the prosecutor’s transferring power is not a judicial function. Therefore, by equating the power to transfer a juvenile to a criminal court with the power to request a sentencing hearing, the majority found support for its decision that the exercise of prosecutorial discretion authorized by section 9-1(d) does not violate the separation of powers provision of the Illinois Constitution.

33. Although the Illinois Supreme Court has not expressly held that the State’s Attorney is a member of the executive branch of government, the appellate districts in Illinois have explicitly ruled that the office of State’s Attorney is part of the executive branch of the government and the powers exercised by that office are executives powers. See Ware v. Carey, 75 Ill. App. 3d 906, 912, 394 N.E.2d 690, 693 (1st Dist. 1979); People v. Baron, 130 Ill. App. 2d 588, 591, 264 N.E.2d 423, 426 (2d Dist. 1970); People v. Sievers, 56 Ill. App. 3d 880, 885, 372 N.E.2d 705, 708 (4th Dist. 1978); People v. Vaughn, 49 Ill. App. 3d 37, 363, N.E.2d 879, 881 (5th Dist. 1977).

34. ILL. CONST. art. II, § 1 (1970) provides: “The legislative, executive, and judicial branches are separate. No branch shall exercise powers properly belonging to another.”

35. 77 Ill. 2d at 536, 397 N.E.2d at 812.
38. Up until 1973, the Juvenile Court Act provided that the State’s Attorney had the unchallenged power to transfer a delinquency proceeding to a criminal court: “If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, the State’s Attorney shall determine the court in which that minor is to be prosecuted . . . .” ILL. REV. STAT. ch. 37, § 702-7(3) (1971). This power was taken away from the State’s Attorney, however, in 1973 when the Illinois legislature amended the Juvenile Court Act of August 17, 1973, P.A. 78-341, 1973 Ill. Laws 1099. Nevertheless, the majority in Cousins chose to rely upon case law upholding the constitutionality of the prosecutor’s new obstacle transferring power. See note 39 infra.

39. In People v. Bombacino, 51 Ill. 2d 17, 280 N.E.2d 697, cert. denied, 409 U.S. 911 (1972), the Illinois Supreme Court upheld the constitutionality of the Juvenile Court Act, which vested the State’s Attorney with the discretion to determine whether to proceed criminally against the juvenile offender. The court in People v. Handley, 51 Ill. 2d 229, 282 N.E.2d 131, cert. denied, 409 U.S. 914 (1972), deferred to the legislative judgment of granting discretion to the State’s Attorney to transfer delinquency proceedings under the Juvenile Court Act. In so
The dissent rejected the majority's analysis and asserted that section 9-1(d) violated the separation of powers provision. In so doing, the dissent repudiated the majority's reliance upon prior case law which had upheld the exercise of prosecutorial discretion at a pretrial stage of the proceedings and distinguished the exercise of prosecutorial discretion before the trial from the post-trial exercise of discretion in requesting a sentencing hearing. The dissent noted that prosecutors traditionally have been afforded a broad range of discretion at the pretrial stage to enable them to perform their public duty of evaluating the evidence and other pertinent factors to determine what offense can and should properly be charged and that consequently there is a general recognition and acceptance of pretrial discretion. This recognition and acceptance, however, has not been extended to the exercise of prosecutorial discretion after the trial. For this reason, the dissent ar-

40. 77 III. 2d at 546, 397 N.E.2d at 817 (Ryan, J., dissenting).
41. 77 III. 2d at 547-48, 397 N.E.2d at 817-18 (Ryan, J., dissenting).
43. Justice Ryan's dissenting opinion in Cousins readily conceded that "[i]t is perfectly proper for the prosecutor to exercise discretion prior to the stage of the proceeding designated as a judicial function." 77 Ill. 2d at 547, 397 N.E.2d at 817 (Ryan, J., dissenting).
44. See People v. Phillips, 66 Ill. 2d 412, 362 N.E.2d 1037 (1977). Phillips involved a provision of the Dangerous Drug Abuse Act, ILL. REV. STAT. ch. 91½, § 120.8 (1973), under which a probation officer was granted the discretion to decide whether a defendant was eligible for treatment as a narcotics addict in lieu of criminal prosecution. The statute was challenged as an infringement upon the judicial power to sentence. The Illinois Supreme Court sustained the statute, holding that "the authority granted the probation officer to deny treatment under the Act to persons charged with, but not convicted of, a criminal offense does not infringe upon the court's constitutional right to impose sentence." 66 Ill. 2d at 415-16, 362 N.E.2d at 1039 (emphasis added). Though this case was cited by both the majority and the dissent, it is clear that the court in Phillips was condoning the exercise of prosecutorial discretion only at the pretrial stage of the proceedings. Because the discretion challenged in Cousins was exercised after the trial had ended, the dissent believed that the majority's reliance upon Phillips was misplaced. People ex rel. Carey v. Cousins, 77 Ill. 2d at 548, 397 N.E.2d at 818 (Ryan, J., dissenting).
gued that the discretion to request a sentencing hearing after the trial was violative of separation of powers because it permitted the prosecutor to participate in the sentencing process, which traditionally is recognized as solely a judicial function.\textsuperscript{45} As support for this position, the dissent relied upon cases where the Illinois Supreme Court declared unconstitutional the participation of the executive branch in the sentencing function.\textsuperscript{46} In these cases the court held that the usurpation of judicial power by another branch of government violated the principle of separation of powers.

The dissent also argued that the majority’s decision sustaining the prosecutor’s power to request a sentencing hearing could severely hamper the performance of the judicial function.\textsuperscript{47} It was theorized that if the imposition of the death penalty could be contingent upon obtaining the prior approval of the prosecutor—that is, the death penalty cannot be imposed unless the prosecutor requests a sentencing hearing\textsuperscript{48}—then the imposition of any sentence could be conditioned upon obtaining the prior approval of the prosecutor.\textsuperscript{49} The dissent felt that this curtailment of the courts’ power could preclude the courts from functioning in the manner mandated by the Illinois Constitution.\textsuperscript{50}

The dissent’s conclusion that the discretionary power to request a sentencing hearing violated the separation of powers provision was not based solely upon a categorization of that power as an intrinsic judicial power;\textsuperscript{51} rather, the dissent also appeared to base its decision on the fact that the power to request a sentencing hearing was exercised during a purely judicial stage of the proceedings. The difference between these two approaches is that under the categorization approach the prosecutor is thought to violate the separation of powers principle merely by exercising an inherent judicial power, whereas under the alternative approach, the prosecutor violates separation of powers by exercising a power during the sentencing stage of the proceed-

\textsuperscript{45} 77 Ill. 2d at 552, 397 N.E.2d at 819 (Ryan, J., dissenting).
\textsuperscript{46} Id. at 547-48, 397 N.E.2d at 817-18 (Ryan, J., dissenting) (citing People v. Montana, 380 Ill. 596, 44 N.E.2d 569 (1942); People ex rel. Martin v. Mallary, 195 Ill. 582, 63 N.E. 508 (1902)). In Montana, the court held that the power given to the Division of Correction to change the maximum or minimum sentence unconstitutionally vested judicial power in an administrative body. 380 Ill. at 608-09, 44 N.E.2d at 575. The court in Mallary held that the General Assembly could not confer upon the executive branch of government the authority to send to the penitentiary persons who had been committed to a reformatory. The court ruled that such power was judicial, not executive or administrative. 195 Ill. at 593, 63 N.E. at 511.
\textsuperscript{47} 77 Ill. 2d at 550, 397 N.E.2d at 818 (Ryan, J., dissenting).
\textsuperscript{48} See note 15 supra.
\textsuperscript{49} 77 Ill. 2d at 549-50, 397 N.E.2d at 818 (Ryan, J., dissenting). The dissent illustrated this argument with the following hypothesis: ‘If the legislature can so condition the performance of this judicial function, it could also provide that, ‘where requested by the State, the court shall conduct a hearing to determine whether or not a defendant may be sentenced to probation.’ ’ Id.
\textsuperscript{50} Id. at 550, 397 N.E.2d at 818 (Ryan, J., dissenting). The Illinois Constitution provides that: “The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts.” Ill. Const. art. VI, § 1 (1970).
\textsuperscript{51} For a discussion of intrinsic judicial powers, see note 32 and accompanying text supra.
ings, thereby interfering with the judicial process.\textsuperscript{52} According to this alternative approach any exercise of power by the prosecutor which limits, interferes with, or conditions the exercise of the judicial function violates the doctrine of separation of powers as contained in the Illinois Constitution.\textsuperscript{53} Because the dissent believed that the power to request a sentencing hearing interfered with the sentencing process, as well as conditioned the imposition of the sentence upon the prosecutor initiating the death sentencing hearing, it would have held section 9-1(d) violative of the doctrine of separation of powers.\textsuperscript{54}

\textit{Cruel and Unusual Punishment}

Judge Cousins also held section 9-1(d) unconstitutional as contravening the prohibition of cruel and unusual punishment set forth in the eighth amend-

\begin{footnotesize}
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\item The dissent succinctly stated this dual approach to determining if there has been violation of the doctrine of separation of powers when it opined that it would be a violation of separation of powers for the prosecutor "to exercise a judicial function or to interfere with or foreclose the proper exercise of a judicial power." \textit{77 Ill. 2d} at 551-52, 397 N.E.2d at 819 (Ryan, J., dissenting).
\item \textit{Id.} at 552, 397 N.E.2d at 819 (Ryan, J., dissenting). The dissent was persuaded by California Supreme Court decisions holding that the judicial power to sentence cannot be interfered with or conditioned upon the prosecutor's request for a sentencing hearing. In People v. Tenorio, 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970), the court held that a statutory provision denying the trial judge the discretion to dismiss certain charges under the Health and Safety Code, except on a motion of the district attorney, constituted an invasion of judicial power in violation of the separation of powers provision of the California Constitution. In striking down this exercise of prosecutorial discretion, the court stated that "[w]hen the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature." \textit{Id.} at 94, 473 P.2d at 996, 89 Cal. Rptr. at 252.
\item The California court further limited prosecutorial powers by ruling in Esteybar v. Municipal Court, 5 Cal. 3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971), that a statute requiring the prosecutor's consent before a magistrate could determine that an offense be tried as a misdemeanor violated the doctrine of separation of powers. The court reasoned that inasmuch as the magistrate's determination follows the district attorney's decision to prosecute, it would not interfere with the charging stage of the proceedings. Therefore, because the decision to prosecute would have been made, the magistrate would be properly exercising his power during the judicial process by making such a determination. \textit{Id.} at 127, 485 P.2d at 1145, 95 Cal. Rptr. at 529.
\item In People v. Superior Court, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974), the court used an approach similar to that used in \textit{Tenorio} to find a violation of separation of powers. It held that once "the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility." \textit{Id.} at 66, 520 P.2d at 410, Cal. Rptr. at 26. People v. Superior Court involved the validity of a statute similar to that considered by the Illinois Supreme Court in \textit{Phillips}. See note 44 supra. In this case, unlike in \textit{Phillips}, the prosecutor was given the power to veto all judicial decisions to divert a person charged with a narcotics offense into a treatment program. Because the California Supreme Court considered the power to divert a defendant into a treatment program as an integral step in the process leading to the disposition of the case, it held that the exercise of the veto power by the prosecutor violated the doctrine of separation of powers. \textit{Id.} at 65, 520 P.2d at 409, 113 Cal. Rptr. at 25.
\end{enumerate}
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ment of the United States Constitution. The basis for this decision was that the same element of potential arbitrariness and capriciousness in the sentencing process which led three Supreme Court Justices to hold state death penalty statutes unconstitutional in Furman v. Georgia, taints the prosecutor’s power to request a sentencing hearing. Furman held that the imposition and execution of death sentences under the statutes of Georgia and Texas constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. The underlying rationale of Furman was that because the sentencing authority was granted unguided discretion to impose or not impose the death penalty, the defendants were sentenced to death in a discriminatory, freakish, and capricious manner. Utilizing this rationale before the Illinois Supreme Court, the respondents argued that the effect of section 9-1(d) was to expressly vest prosecutors with the same unfettered and standardless power of selectivity which Furman held could not be given to the sentencing authority. In rebuttal, the state argued that the exercise of prosecutorial discretion in showing mercy to the defendant by removing him from possible consideration for the death penalty does not violate the constitution. The Illinois Supreme Court adopted the state’s position and upheld the validity of section 9-1(d), determining that the requirements imposed upon a sentencing body, as mandated by Furman, were not applicable to decisions made by a prosecutor.

The majority relied solely upon Gregg v. Georgia to support this position. The defendant in Gregg had argued that decisions made by the prosecutor were without objective standards and would result in the wanton and freakish imposition of the death penalty condemned by the Supreme Court in Furman. This argument was addressed and rejected by the Supreme Court.

57. Id. at 239. For a discussion of the fourteenth amendment and the applicability of the eighth amendment to the states, see note 9 supra.
58. In separate opinions in Furman, three Justices who had been unwilling to hold the death penalty per se unconstitutional, voted to reverse the death penalty which had been imposed. The three concluded that discretionary sentencing, unguided by legislatively defined standards, violated the eighth amendment because it was “pregnant with discrimination,” Furman v. Georgia, 408 U.S. at 257 (Douglas, J., concurring), because it permitted the death “penalty to be so wantonly and so freakishly imposed,” Id. at 310 (Stewart, J., concurring), and because it imposed the death penalty with “great infrequency” and afforded “no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not,” id. at 313 (White, J., concurring).
61. 77 Ill. 2d at 540, 397 N.E.2d at 814.
63. Id. at 199 (opinion of Stewart, Powell & Stevens, JJ.), 224 (White, J., concurring). To support this contention, the defendant pointed to three situations as examples of the arbitrariness and capriciousness inherent in the processing of any murder case under Georgia law: 1) the
Court in *Gregg* through opinions authored by Justices Stewart and White. Justice Stewart noted that decisions which removed a defendant from consideration as a candidate for the death penalty were not unconstitutional, even though such decisions were not controlled by any standards or guidelines. The majority in *Cousins* relied upon Justice Stewart's opinion to support its position that because the prosecutor's determination not to seek a sentencing hearing results in the defendant being granted mercy, such a determination need not be guided by *Furman* mandated standards.

Prosecutor has the unfettered discretion to charge a defendant with capital murder or to negotiate a plea to some lesser offense; 2) at trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death; and 3) the Governor of the State or the Georgia Board of Pardons and Paroles may commute a defendant's death sentence. *Id.* at 199.

64. *Id.* at 199-207 (opinion of Stewart, Powell & Stevens, JJ.), 225-26 (White, J., concurring). The Supreme Court considered the eighth amendment issue in four other cases along with *Gregg*. *Proffitt v. Florida*, 428 U.S. 242 (1976) (Florida statute requiring the trial judge to weigh aggravating elements against mitigating factors before the death penalty may be imposed was upheld as constitutional); *Jurek v. Texas*, 428 U.S. 262 (1976) (Texas statute limiting capital punishment to murders committed under five different circumstances was upheld as constitutional); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (North Carolina statute mandating the death penalty for those found guilty of first degree murder was held to be unconstitutional); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (Louisiana statute mandating death for those found guilty of first degree murder was held to be unconstitutional). In each case four Justices took the position that the death penalty statute complied with the Constitution. (Burger, C.J., White, Blackmun & Rehnquist, JJ.) Two Justices took the position that capital punishment is per se unconstitutional and therefore none of the statutes complied with the constitution. (Brennan & Marshall, JJ.). Hence, the disposition of each case varied according to the vote of three Justices who delivered a joint opinion in each of the five cases. (Stewart, Powell & Stevens, JJ.).

65. *Gregg v. Georgia*, 428 U.S. at 199 (opinion of Stewart, Powell & Stevens, JJ.). The necessary implication of Stewart's opinion is that the decision to grant mercy need not be guided by standards, whereas the decision to impose the death penalty must be guided by standards. A commentator has eloquently pointed out the inherent danger in adopting Justice Stewart's rationale: "The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate." K. DAVIS, DISCRETIONARY JUSTICE 170 (1976).

66. By adopting Justice Stewart's position that the decision to grant an individual mercy need not be guided by standards, the majority appears to be rejecting the Illinois Supreme Court's prior conclusion on the issue of whether the decision to grant an individual defendant mercy need be guided by standards. In *People ex rel. Rice v. Cunningham*, 61 Ill. 2d 353, 336 N.E.2d 1 (1975), the Illinois Supreme Court held invalid the provision of the 1973 Illinois death penalty statute giving the sentencing authority the power to grant the defendant mercy if the authority "determines that there are compelling reasons for mercy." *Ill. Rev. Stat. ch. 38, § 1005-8-1A* (1973). See 61 Ill. 2d at 362, 336 N.E.2d at 7. The *Cunningham* court determined that the "provision [to grant mercy] is defective because it does not contain standards or guidelines to be considered in determining whether there are 'compelling reasons for mercy.' . . . " *Id.* at 361, 336 N.E.2d at 6.

Justice Ryan's special concurrence in *Cunningham* forewarned of the staunch position he would take in *Cousins* supporting the necessity of discretion guiding standards even where mercy is being granted. He wrote that the determination of whether to grant an individual mercy "is too vague and indefinite and permits a degree of arbitrariness in the imposition of the
The majority in Cousins also relied upon Justice White’s rationale in Gregg to support its conclusion that requirements imposed upon a sentencing body were not applicable to prosecutorial decisions. Justice White believed that in exercising discretion, prosecutors were guided by standards inherent in the decision-making process and therefore were not required to follow standards analogous to those relied upon by the sentencing body. Accepting this reasoning, the majority in Cousins asserted that because the prosecutor’s decision to request a sentencing hearing was based upon an assessment of the testimony and evidence presented at trial, it was not unconstitutional to fail to include other standards and guidelines within section 9-1(d).

The dissent totally rejected the majority’s application of the findings made in Gregg to the case at bar. It was felt that the prosecutorial discretion discussed in Gregg was merely discretion to charge a capital offense; it was not discretion to decide whether to request a sentencing hearing. By distinguishing these cases, the dissent remained steadfast in its belief that the prosecutor had become inexorably involved in the sentencing function by requesting a sentencing hearing. The dissent argued, therefore, that the exercise of such unfettered prosecutorial discretion could lead to the arbitrary and freakish application of the death penalty, thereby requiring that such discretion be controlled by the standards and guidelines imposed upon the sentencing body by the Supreme Court in Furman.

death penalty not permissible under Furman.” Id. at 363, 336 N.E.2d at 7 (Ryan, J., specially concurring).

67. 77 Ill. 2d at 541-42, 397 N.E.2d at 814-15.
68. Gregg v. Georgia, 428 U.S. at 224-25 (White, J., concurring). According to Justice White, the standards which motivate the prosecutor in making the decision include the seriousness of the offense and the sufficiency and strength of the proof. Id. at 225.
69. 77 Ill. 2d at 543, 397 N.E.2d at 815.
70. Id. at 556, 397 N.E.2d at 821 (Ryan, J., dissenting).
71. The discretion to request a sentencing hearing was not discussed in Gregg because under the Georgia statute at issue in Gregg a sentencing hearing was mandatory. Ga. Code Ann. § 27-2534.1(b) (1977).
72. 77 Ill. 2d at 557, 397 N.E.2d at 822 (Ryan, J., dissenting). The sentencing function was characterized as “the process of inflicting the penalty of death.” Id. The dissent had previously recognized that vesting in the prosecutor discretion to determine whether to conduct a sentencing hearing to determine if the death penalty should be imposed conferred upon the prosecutor the power to exercise a judicial function in violation of the doctrine of separation of powers. Id. at 545-46, 397 N.E.2d at 816-17 (Ryan, J., dissenting). See notes 40-46 and accompanying text supra.
73. 77 Ill. 2d at 556, 397 N.E.2d at 821 (Ryan, J., dissenting). The dissent also argued that § 9-1(d) violated the mandate set out in Furman because it could not be expected that the 102 Illinois State’s Attorneys would be able to request separate sentencing hearings without the death penalty being imposed in an arbitrary and capricious fashion. It was thought that the lack of standards to guide this prosecutorial discretion would inevitably lead to an uneven application of the law because each State’s Attorney would request a sentencing hearing based on different personal beliefs and office policies. Id. at 557-58, 397 N.E.2d at 822 (Ryan, J., dissenting). As support for this proposition, the dissent cited People v. Greer, 79 Ill. 2d 103, 402, N.E.2d 203 (1980). In Greer, a State’s Attorney requested a sentencing hearing and the defendant was sentenced to death. On appeal before the Illinois Supreme Court, however, it was established
Although the dissent viewed the distinction between the charging discretion upheld in *Gregg* and that given prosecutors by section 9-1(d) as significant enough to preclude the use of *Gregg* as precedential support, the majority characterized this distinction between the cases as "unsound." It is doubtful, however, that the majority and the dissent were even referring to the same distinction between *Gregg* and *Cousins*. The majority distinguished the discretion to charge a capital offense at issue in *Gregg* from the discretion to request a sentencing hearing at issue in *Cousins* on the basis that the charging discretion was limited by the statutory definition of the offense, whereas no such limitations were imposed upon the discretionary power to request a sentencing hearing. The majority characterized this distinction as being "unsound" because the prosecutorial power at issue in each case continued to be discretionary, and the prosecutor's ultimate decision in each situation would depend upon an estimate of the potential strength of testimony and other evidence. By characterizing the distinction in this manner, which consequently minimized the significance of the distinction between the cases, the majority presumed that *Gregg* could be used to support the proposition that prosecutorial discretion to request a sentencing hearing need not be guided by the standards and guidelines required by *Furman*.

The dissent, on the other hand, viewed the distinction between the discretion to charge a capital offense and the discretion to request a death penalty hearing in terms of whether either type of discretion need even satisfy the requirements of *Furman*. It was clear to the dissent that because the prosecutor in *Gregg* was not involved in the sentencing function, he was not required to follow the standards and guidelines required by *Furman*. The discretion exercised by the prosecutor under section 9-1(d), however, is essential to the disposition of the sentencing function. For this reason, the
dissent argued that such discretion must be guided by *Furman* mandated standards and guidelines to prevent the arbitrary and capricious imposition of the death penalty.

The difference in the way the majority and the dissent viewed the distinction stems from their basic perceptions of the role that the decision to request a sentencing hearing plays in the total sentencing function. The majority did not perceive the prosecutor’s decision to request a sentencing hearing as a part of the sentencing function; therefore, its contention that the *Furman* mandated guidelines—which are imposed only upon a sentencing body—were not required for such prosecutorial decisions, is a logical conclusion. Conversely, because the dissent perceived the prosecutor’s discretion to request a death penalty hearing as part of a sentencing process, its contention that such discretion should be guided by *Furman* mandated standards and guidelines is also a logical conclusion.

**Weaknesses of the Court’s Decision in Cousins**

The majority opinion sustaining the constitutionality of section 9-1(d) is flawed by the misuse of precedent and the persistent failure to recognize the fundamental distinction between pretrial and post-trial prosecutorial discretion. The most predominant weaknesses of *Cousins* lie in the tenuous application of case law by the majority to bolster its decisions on the issues of separation of powers and cruel and unusual punishment. To bolster its finding that the prosecutor does not usurp a judicial function by requesting a sentencing hearing, the majority attempted to equate the prosecutor’s discretionary power to request a sentencing hearing with the prosecutor’s discretionary power to proceed criminally against a juvenile offender. The majority relied upon three Illinois Supreme Court cases sustaining the State’s Attorney’s power to determine whether a juvenile should be tried as an adult, which had the effect of permitting the prosecutor to influence the sentencing process. The validity of these cases as precedent is questionable, however, in light of the Illinois Supreme Court’s subsequent decision in *People v. Rahn,* where the court held that the ultimate determination of whether to proceed criminally against a juvenile lies not with the State’s Attorney, but with the judge. A later Illinois case has interpreted *Rahn* to be a reassessment of the Illinois Supreme Court’s earlier decisions. Con-

79. See notes 38-39 and accompanying text supra.
80. See note 39 and accompanying text supra.
82. 59 Ill. 2d at 304-305, 319 N.E.2d at 789.
83. *People v. Pedrosa,* 36 Ill. App. 3d 207, 343 N.E.2d 649 (1st Dist. 1976). In *Pedrosa,* the court questioned the applicability of *Sprinkle* and *Handley* to juvenile transfer cases. The court pointed out that through the *Rahn* decision the “Supreme Court reassessed its position and held that the clear and unambiguous mandate of section 2-7 [of the Juvenile Court Act] is that the juvenile court, not the State’s Attorney, will make the final determination of whether to transfer a minor for criminal prosecution.” *Id.* at 209, 343 N.E.2d at 651.
sequently, \textit{Rahn}, rather than its precursors, has been held to be binding on the lower courts.\textsuperscript{84} These new interpretations of prior case law weaken the majority's conclusion in \textit{Cousins} that the prosecutor can justifiably influence a convicted murderer's punishment by seeking a death sentencing hearing.

The majority opinion also relied upon case law that is clearly distinguishable from \textit{Cousins}. In \textit{People v. Phillips},\textsuperscript{85} the court held that the exercise of prosecutorial discretion involving persons charged with, "but not convicted of," a criminal offense did not infringe upon the judicial power to impose sentence.\textsuperscript{86} Because it is already widely conceded that the prosecutor's pre-trial exercise of discretion does not infringe upon the judicial function,\textsuperscript{87} \textit{Phillips} is of dubious precedential value as support for the post-trial exercise of prosecutorial discretion at issue in \textit{Cousins}.\textsuperscript{88} Therefore, it is difficult to understand the significance accorded this case by the majority, insofar as the implication of \textit{Phillips} appears to be that the exercise of discretion after the conviction of a defendant does constitute a violation of separation of powers.

The majority also misapplied case law in an attempt to rationalize its holding that section 9-1(d) did not violate the cruel and unusual punishment clause of the eighth amendment. By relying solely upon \textit{Gregg v. Georgia}\textsuperscript{89} to support its position that the prosecutorial discretion authorized under section 9-1(d) need not be guided by standards, the majority again left itself open to the criticism of failing to distinguish between pretrial and post-trial prosecutorial discretion. The discretion sustained by the United States Supreme Court in \textit{Gregg} dealt with the prosecutor's power to choose whether or not to charge a capital offense.\textsuperscript{90} This discretion is inapposite to the

\begin{footnote}
\textsuperscript{84} In \textit{People v. Boclaire}, 33 Ill. App. 3d 534, 539, 337 N.E.2d 728, 733 (1st Dist. 1975), the appellate court acknowledged that the conclusion reached in \textit{Rahn} differed from that reached in \textit{Sprinkle} and \textit{Handley}, and held that since \textit{Rahn} is the Supreme Court's most recent interpretation of section 702-7 of the Juvenile Court Act, that decision will be binding on the court. See \textit{People v. Nichols}, 60 Ill. App. 3d 919, 377 N.E.2d 815, 817 (3d Dist. 1978); Thompson, \textit{The Development of the Law Applicable to Juvenile Delinquency in Illinois: Origin, Challenges and Current Status}, 66 ILL. B.J. 584, 589 (1978).

\textsuperscript{85} 66 Ill. 2d 412, 362 N.E.2d 1037 (1977).

\textsuperscript{86} \textit{Id.} at 415-16, 362 N.E.2d at 1039. See note 44 and accompanying text \textit{supra}.


\textsuperscript{88} The majority's comparison of the prosecutor's powers to challenge jurors and tender instructions with the prosecutor's power to request a sentencing hearing also illustrates the majority's failure to perceive the basic distinction between these powers. The majority characterized the power to challenge jurors and tender instructions as requests for judicial rulings which "may affect the ultimate outcome of the prosecution . . ." 77 Ill. 2d at 536, 397 N.E.2d at 812 (emphasis added). Because it is obvious that the power to request a sentencing hearing affects the defendant's sentence, not the outcome of the prosecution, the majority's attempt to equate these prosecutorial powers is fundamentally incorrect.

\textsuperscript{89} 428 U.S. 153 (1976).

\textsuperscript{90} See note 63 and accompanying text \textit{supra}.

The dissent also criticized the majority for its reliance upon \textit{Gregg}. \textit{See} text accompanying notes 70-73 \textit{supra}. In rejecting the applicability of \textit{Gregg} to the situation in \textit{Cousins}, Justice
prosecutorial discretion at issue in Cousins. The decision to request a sentencing hearing has a much more immediate effect on the imposition of the death penalty than does the decision to charge a capital offense. Coupled with the drastic nature and magnitude of the death penalty, it appears that in order to comply with the spirit of Furman v. Georgia, the exercise of prosecutorial discretion authorized by section 9-1(d) must be controlled by standards and guidelines.

Finally, it is surprising that the Illinois Supreme Court would abandon the unequivocal stance it took in People ex rel. Rice v. Cunningham, to adopt the position taken by three United States Supreme Court Justices in Gregg. In Cunningham the court explicitly held that a statutory provision allowing the sentencing authority to grant a defendant mercy was constitutionally defective because it did not delineate any standards for determining whether mercy should be granted. Yet, the majority in Cousins chose to adopt a joint opinion authored by three Justices in Gregg, which stated that because the decision to grant a defendant mercy did not violate the Constitution, standards or guidelines would not be necessary to control the prosecutor's discretion. Had the majority given full precedential value to the court's earlier decision in Cunningham, it could not have relied upon Gregg to the extent that it did.

These weaknesses in the majority opinion, however, cannot be cured without rendering the opinion fatally deficient. Therefore, the majority's dependence upon distinguishable or non-applicable case law compels the conclusion that its decision sustaining the constitutionality of section 9-1(d) is incorrect.

THE LAW AFTER COUSINS:
A PROPOSAL

Although the Illinois Supreme Court upheld the constitutionality of section 9-1(d) over claims that the section violated the separation of powers provision of the Illinois Constitution and the cruel and unusual punishment prohibition of the United States Constitution, the majority refused to resolve

Ryan wrote that Gregg "has no application here, because under the statute in that case the prosecutor did not participate in the sentencing function." 77 Ill. 2d at 556, 397 N.E.2d at 821 (Ryan, J., dissenting).

91. 408 U.S. 238 (1972).
92. 61 Ill. 2d 353, 336 N.E.2d 1 (1975).
93. Id. at 361, 336 N.E.2d at 6. Justice Ryan's special concurrence in Cunningham went so far as to state that the statutory provision was violative of Furman because it was too vague and indefinite and permitted a degree of arbitrariness in the imposition of the death penalty. For a complete discussion of the opinions in Cunningham, see note 66 supra.
other challenges to the constitutionality of this statute. Among these challenges was the claim that section 9-1(d) violated the Illinois Constitution by failing to require that the prosecutor notify the defendant in advance of trial of its intention to seek the death penalty. It was argued that if the accused was not notified prior to trial that the state would ultimately seek the death penalty, the accused would be unable to make intelligent decisions with regard to his or her defense. The majority based its refusal to resolve this issue on the assertion that an original action of mandamus was not appropriate to make determinations of questions of fact. Therefore, because the resolution of this issue would have required a determination of whether such notice had been given to respondent Brown, the majority refused to deny the issuance of the writ of mandamus on this ground. Consequently, the majority left open the question whether section 9-1(d) might be held unconstitutional on other grounds. To minimize the possibility of another challenge to the constitutionality of section 9-1(d), the Illinois General Assembly should delete the superfluous language in section 9-1(d) which gives the prosecutor such unbridled discretion.

Furthermore, section 9-1(d) should be amended to prevent any possible abuses of prosecutorial discretion which could risk the arbitrary or capricious imposition of the death penalty. Under a broad reading of the majority’s

95. The respondent challenged § 9-1(d) on the following additional grounds: 1) the information did not allege any of the aggravating factors enumerated in § 9-1(b); 2) the sentencing body is not told what weight to give the various factors; 3) the sentencing body is not required to make findings as to which factors were relied on; 4) the judge is not required to accept the recommendation of the sentencing jury. 77 Ill. 2d at 543-44, 397 N.E.2d at 815-16. The majority refused to rule on these challenges, holding that they were premature because the sentencing hearing had not yet been held. Id.

96. It was argued that the failure to provide the defendant with such notification violated a fundamental element of due process. 77 Ill. 2d at 561, 397 N.E.2d at 824 (Ryan, J., dissenting).

97. Id. at 544, 397 N.E.2d at 816. Among the decisions affected by whether or not such notification is provided are whether the accused should stand trial before a jury or the court, whether he or she should testify, and whether he or she should plead guilty. It is a fundamental principle of procedural due process that the defendant be given notice of the crime of which he is being charged. Cole v. Arkansas, 333 U.S. 196, 201 (1948); In re Oliver, 333 U.S. 257, 273-78 (1948). Though the notice requirement has not been extended to the necessity of notifying the defendant that a sentencing hearing would be requested, the United States Supreme Court has recognized the importance of providing the defendant with notice so that a reasonable opportunity to prepare will be afforded. In re Gault, 387 U.S. 1, 33 (1966). Consequently, a challenge to the constitutionality of § 9-1(d) based upon the denial of procedural due process might be successful.

98. The court decided that in an original action for writ of mandamus, only questions of law would be considered. 77 Ill. 2d at 544, 397 N.E.2d at 816. For this reason, the court felt that mandamus was inappropriate for determinations of factual questions. See Touhy v. State Bd. of Elections, 62 Ill. 2d 303, 312, 342 N.E.2d 364, 369 (1976).

99. 77 Ill. 2d at 544, 397 N.E.2d at 816. The dissent had no such qualms about finding the lack of notification to be a denial to the defendant of a fundamental element of due process. Id. at 561, 397 N.E.2d at 824 (Ryan, J., dissenting).
opinion, one could surmise that any discretion or decision implemented by a non-sentencing body need not be controlled by limitations or guidelines even if there is a risk that the death penalty could be ultimately imposed in an arbitrary and freakish manner. By mandating a separate sentencing hearing after all convictions for murder, the legislature would avoid future constitutional challenges to this provision, as well as limit the unnecessary and possibly abusive exercise of prosecutorial discretion.

A further reason for abolishing the prosecutor’s discretionary power to request a sentencing hearing is to reflect the true legislative intent concerning the functioning of the bifurcated procedure. By sustaining the constitutionality of section 9-1(d), the majority gave credence to a statutory provision which had been enacted without full legislative consideration of the power being vested in the prosecutor. Prior to the enactment of section 9-1(d) in its present form, the prosecutor was not given the power to request a sentencing hearing.100 Previous Illinois statutes made the sentencing hearing mandatory upon a conviction of murder.101 In fact, the original bill proposed in the Illinois General Assembly establishing the present bifurcated procedure for the death penalty did not give the prosecutor the power to request a sentencing hearing.102 Not until an amendment to the bill was proposed and passed without debate by the House was the prosecutor granted this discretionary power. It does not appear from the legislative history of section 9-1(d) that it was the true legislative intent to vest such a significant power in the prosecutor.103 Rather, it appears that the prosecutor acquired such

100. See ILL. REV. STAT. ch. 38, § 1005-8-1A (1973 & 1975).
101. Id. This provision, making it mandatory that the sentencing hearing be held, provided:

[F]ollowing the conviction of murder under Section 9-1 of the “Criminal Code of 1961,” the trial judge shall in all cases, before sentencing the defendant notify the chief judge of the circuit to assign 3 circuit judges to the case, one of whom should be the judge who presided over the defendant’s trial if that judge is able to serve. The 3 judge court shall then hear evidence on the foregoing circumstances and if a majority of the judges of such court determines that any of the above facts occurred, then the court shall sentence the defendant to death unless a majority of the judges of such court determines that there are compelling reasons for mercy and that the defendant should not be sentenced to death. At the hearing, the State shall have the burden of proving beyond a reasonable doubt the facts requiring imposition of the death penalty.

If the 3 judge court does not find as provided in this Section, after a hearing, that the defendant committed a murder which is beyond all reasonable doubt within one or more of the classifications set forth in this Section, the defendant shall be sentenced under Section 5-5-3 of the United Code of Corrections.

Id.

102. House Bill 10, which was proposed after the Illinois Supreme Court declared the prior death penalty statute unconstitutional in Cunningham, originally provided that “[t]he court shall conduct a separate sentencing hearing . . . .” H.B. 10, 80th G.A., 1977 Sess. § 9-1(d) (1977). See note 16 supra, for a complete discussion of the steps leading to the enactment of § 9-1(d).

103. The legislative debate discussing passage of the amendment giving the prosecutor complete discretion to request a sentencing hearing did not even discuss the proposed changes from
power due to a compromise made by legislators sponsoring competing legislative bills involving capital punishment. Therefore, by deleting the discretionary provision in section 9-1(d) the Illinois legislature would be merely affirming the functioning of the bifurcated procedure as it was originally proposed. In addition, because a sentencing hearing now would be mandatory for capital offenses, such an amendment would make section 9-1(d) consistent with all other sentencing procedures in Illinois.

In the alternative, rather than abrogating the prosecutor's power to request a sentencing hearing, the legislature could establish guidelines and limitations for the exercise of such prosecutorial power. Regardless of whether the discretion to request a sentencing hearing is interpreted as part of the sentencing process, or as a normal function of prosecutorial power, it should be subject to procedural guidelines and standards to minimize the risk of an arbitrary or capricious imposition of the death penalty. Many commentators have suggested that the discretion condemned by the Supreme Court in *Furman v. Georgia* may improperly extend beyond the jury phase of the proceedings into other phases of the capital punishment process. The exercise of unfettered discretion at other phases of the death penalty procedure, such as when the prosecutor requests a sentencing hearing upon the completion of the trial, may comply with the letter of the law in *Furman*, but certainly not with the spirit of the law. Such discretion should, therefore, follow established rule-making procedures and internal guidelines. In so doing, the prosecutor would avoid any appearance of unfairness, uncertainty, and arbitrariness. At the same time, the establishment of such guidelines would virtually eliminate any charges that this

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the original bill. See H. DEB. on H.B. 10, 80th G.A., 1977 Sess. 21-22 (March 8, 1977) (remarks of Reps. Kosinski and Huskey). The only discussion of the proposed changes consisted of a reference to the amendment as "mak[ing] other changes." *ILLINOIS LEGISLATIVE REFERENCE BUREAU, LEGISLATIVE SYNOPSIS AND DIGEST* 954 (1977). Nevertheless, the amendment was passed and the prosecutorial power to request a sentencing hearing was born.

104. See note 16 supra.
105. See note 77 supra.
106. See notes 15 & 19 supra.
109. See generally Note, Capital Punishment Statutes After Furman, 35 OHIO ST. L. REV. 651, 684-85 (1974). The author advocates that all capital punishment be declared unconstitutional under the cruel and unusual punishments clause because the criminal justice system, even in the wake of *Furman*, could not ensure a non-arbitrary application of the death penalty due in part to the exercise of discretion by the prosecutor.
110. It has been argued that there is no reason why prosecutors’ offices should not be required to issue current public guidelines to regulate the exercise of prosecutorial discretion. Vorenberg, Narrowing the Discretion of Criminal Justice Officials, 1976 DUKE L. REV. 651,
exercise of prosecutorial discretion leads to the wanton and freakish imposition of the death penalty.

CONCLUSION

In Cousins, the Illinois Supreme Court upheld the constitutionality of a statutory provision giving prosecutors the unbridled discretion to set the death penalty procedure in motion. By sustaining this provision, the court permitted the prosecutor to make decisions having a direct and immediate effect on the imposition of the death penalty without any controls or limitations on such decision-making power. Nevertheless, the life of section 9-1(d) still may be threatened by potential challenges to its constitutionality on other grounds. Furthermore, the majority's perception of the power to request a sentencing hearing as being nothing more than another prosecutorial power leaves open the possibility that even greater discretion could be vested in the prosecutor, as long as such discretion does not directly interfere with the sentencing process.

Therefore, the Illinois legislature should amend the Illinois death penalty statute to remove this discretionary power from prosecutors. If the statute is not amended, the lack of statutory guidance available to prosecutors cannot help but result in an uneven application of the law. The abolition of such discretionary power would greatly minimize the risk of the death penalty being imposed in an arbitrary or capricious manner, while at the same time not adversely affecting the capital punishment structure in Illinois. Considering the stakes involved in even one misapplication of this power, such an amendment to the death penalty statute should be a foremost priority of the Illinois General Assembly.

William G. Potratz

681-82. It has been further argued that extraneous factors relied upon by prosecutors in exercising their discretionary power should be controlled by administrative procedures and internal guidelines. The creation of such procedures and guidelines is intended to direct and control the prosecutorial discretion which affects the sentencing of a defendant. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 125 U. PA. L. REV. 550, 575 n.73 (1978).