Constitutional Procedure for the Impostition of the Death Penalty - Godfrey v. Georgia

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CONSTITUTIONAL PROCEDURE FOR THE IMPOSITION OF THE DEATH PENALTY—GODFREY V. GEORGIA

The Supreme Court has never held capital punishment to be unconstitutional per se. This irreversible and uniquely severe penalty, however, has been subject to special restriction and control under the eighth and fourteenth amendments. Most of these restrictions have concerned the procedure under which the death penalty can be imposed. In the landmark case of Furman v. Georgia the Supreme Court held that the death penalty could not be imposed under procedures that create a substantial risk that the punishment will be inflicted in an arbitrary, capricious, or discriminatory manner. Although these pressing constitutional mandates severely narrow the scope of the constitutional imposition of the death penalty, the Supreme Court has steadfastly held that compliance with the procedural requisites is possible.

Recently, in Godfrey v. Georgia, the Supreme Court again demonstrated an unwillingness to abandon the struggle to meet the demands of Furman. The petitioner in Godfrey was sentenced to death on the basis of a facially ambiguous sentencing provision. The Supreme Court reversed the death penalty without addressing the underlying problem of inadequate jury sentencing guidance. Instead, the Court appeared to view the case as an aberration from an otherwise consistent sentencing procedure.

The Godfrey decision is of greater import for state capital sentencing procedures than the holding would suggest. The Court appears to have shifted its scrutiny from the operation of the sentencing procedure to the responsibility of the state supreme court. Such a change in emphasis has the de facto effect of transferring the sentencing burden in capital cases from the

1. See, e.g., Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153 (1976). The Gregg Court upheld a Georgia statute that recommended the death penalty for six crimes. After determination of guilt at trial, the statute mandates that a pre-sentencing hearing be held to consider aggravating and mitigating circumstances. At least one of ten specific aggravating acts must be found beyond a reasonable doubt before the death penalty may be imposed. If the death sentence is imposed, there is automatic state supreme court review of the trial and sentencing hearing. See also Ga. Code Ann. § 27-2534.1 (1978).


3. See notes 33 & 34 and accompanying text infra.

4. Justices Marshall and Brennan disagree. They maintain that the death penalty is a per se violation of the eighth amendment's prohibition of cruel and unusual punishment. Complete statements of their basic arguments appear in Furman v. Georgia, 408 U.S. 238, 315-74 (1972) (Brennan & Marshall, JJ., concurring).

5. 446 U.S. 420 (1980).

6. Ga. Code Ann. § 27-2534.1(b)(7)(1978). This section provides that the death penalty may be imposed if “[t]he offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.”

7. 446 U.S. at 433.

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jury to the reviewing court. In addition, the Court's emphasis on the responsibility of the reviewing court, rather than the need to rectify procedural inadequacies, may be indicative of a waning faith in the capability of capital sentencing procedures to comply with Furman.8

To understand the full import of Godfrey it is necessary to view the decision in light of the constitutional mandates and procedural difficulties surrounding the capital punishment issue. Therefore, the history of capital punishment in the United States is reviewed briefly to bring into focus the competing constitutional restrictions on the imposition of the death penalty. With reference to this history, an analysis of the Godfrey decision reveals an important change in emphasis from Supreme Court precedent. Further, the hidden factors behind the Court's shift are examined to clarify this change in emphasis. Finally, the possible implications of such a shift for capital sentencing procedures, and for the constitutionality of capital punishment as a whole are explored.

**HISTORICAL BACKGROUND**

A review of the history of capital punishment for murder in common law England reveals a continuing attempt to predetermine which crimes should warrant the death penalty.9 In 17th century England capital punishment was mandatorily imposed for a conviction of murder.10 In an attempt to mitigate this harsh procedure, it became the practice in this country to confer full sentencing discretion on the jury, which could grant mercy in any case in which the death penalty was thought to be unjustified.11 In McGautha v. California12 the Supreme Court dismissed a challenge to the unguided sentencing discretion of the jury,13 noting that: "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. Discretionary judgment

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8. Note Justice White's criticism in Godfrey that "the majority today endorses the argument that I thought we had rejected in Gregg; namely, '[t]hat no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it.'" Id. at 456 (White, J., dissenting) (quoting Gregg v. Georgia, 428 U.S. 153, 226 (1976)).


13. McGautha was convicted of first-degree murder and was sentenced to death by a jury vested with absolute sentencing discretion. He petitioned the Supreme Court to consider the question of whether the standardless imposition of the death penalty was a violation of his constitutional rights. Id. at 196.
on the facts of each case is the only way in which they can be equitably distinguished.”

One year later the Supreme Court held that the states were constitutionally required to provide the "reasonable criterion" that had been found to be impossible in *McGautha*, and to limit the broad scope of the jury's discretion. In *Furman v. Georgia*, the landmark capital punishment decision, each Justice wrote a separate opinion. The core of the holding was that the cruel and unusual punishment clause of the eighth amendment proscribes the "arbitrary infliction of severe punishments." The Court reasoned that there must be some "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." The Court then noted that legislatures must write penal laws that are "evenhanded, nonselective, and non-arbitrary." Moreover, judges must "see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." The effect of this neologic constitutional mandate was to invalidate the capital punishment statutes of Georgia, thirty-five other states, the District of Columbia, and the Federal Criminal Code which all left the death penalty issue to the untrammelled judgment of the jury.

Thus *Furman* was a sudden disavowal of a practice that was not only condoned for two hundred years in this country, but was believed to be necessary for the just dispensation of capital punishment. Although in prior cases untrammelled jury discretion was hailed as a humanitarian practice, changes in the circumstances surrounding the imposition of the death penalty had rendered it violative of the eighth amendment. The percentage of capital crimes for which the death penalty was actually imposed had decreased in the decade preceding *Furman* such that receiving the death penalty was like "being struck by lightning." There was no meaningful way

14. *Id.* at 199 (quoting The Report of the Royal Commission on Capital Punishment, 1949-1953, Cmnd. 8932, ¶ 533(b) (emphasis added)).

15. 408 U.S. 238 (1972). In *Furman*, the Court reviewed three sentences of death—one for murder and two for rape. Each sentence was imposed by a jury vested with absolute, unguided sentencing discretion.

16. *Id.* at 274 (Brennan, J., concurring). Justice Brennan pointed out that arbitrary state action is a violation of human dignity. *Id.* Our cruel and unusual punishment clause was taken directly from the English Declaration of Rights of 1689, which was particularly concerned with protection against the arbitrary and capricious imposition of harsh penalties. *Id.*

17. *Id.* at 313 (White, J., concurring).

18. *Id.* at 256 (Douglas, J., concurring).

19. *Id.*

20. See Gregg v. Georgia, 428 U.S. 153, 179-80 n.23 (1976) (list of thirty-five state statutes revised and reenacted in the wake of *Furman*).


to distinguish those few cases from the majority in which the death penalty was not imposed. Furthermore, the infrequency of its imposition had rendered the threat of execution too attenuated to be of substantial service to criminal justice. For that reason, the death penalty became a purposeless extinction of life. In addition there was empirical evidence available proving that the death penalty had been imposed discriminatorily against the poor and members of unpopular groups.

In the wake of Furman, Ohio reenacted its death penalty statute entirely eliminating the jury's sentencing discretion. The statute attempted to predetermine the circumstances that, if found by the trier of fact, would automatically warrant the death penalty. When the Supreme Court was petitioned to review this statute in Lockett v. Ohio, it concluded that elimination of discretion in the sentencing process was not constitutionally permissible in the wake of Furman. The Lockett Court held that in capital cases the eighth and fourteenth amendments mandate that the sentencer be

24. 408 U.S. at 313 (White, J., concurring). Justice White stated that though he could not "prove" this conclusion statistically, it was based on his "10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty." Id.

25. Id. Justice White pointed out that under the present circumstances the odds that the death penalty would be imposed in a given case were extremely remote. Id. at 311. Because of this, the imposition of the death penalty was incapable of measurably reinforcing community values or of contributing to the deterrence of those crimes for which it could be exacted. Id. at 311-12.

26. Id. at 312 (White, J., concurring).


28. OHIO REV. CODE ANN. §§ 2929.03-.04 (Baldwin 1979). Under this statute the jury may be asked to determine, in addition to the guilt of the defendant, whether any of seven aggravating circumstances existed. The jury does not determine the sentence. Id. § 2929.03(C).

29. Id. § 2929.04(A). If the jury finds any of the statutory aggravating circumstances existed the trial judge is required to impose a sentence of death unless a preponderance of the evidence establishes that either the offense was a product of the offender's psychosis, or of duress, coercion, strong provocation, or unless induced or facilitated by the victim. Id. § 2929.04(B).

30. 438 U.S. 586 (1978). Lockett involved the murder of a pawnbroker during the course of the armed robbery of a pawnshop. Lockett participated by waiting in the car while her brother and a companion conducted the robbery in which the pawnbroker was shot and killed. She later removed the gun from the pawn shop and concealed it. Id. at 590.

Lockett was convicted of aggravated murder with the aggravating circumstance that the murder was committed for the purpose of escaping detection, and during the course of an aggravated robbery. See OHIO REV. CODE ANN. § 2929.04(A)(3), (7) (Baldwin 1976). Because the jury found statutory aggravating circumstances, the trial judge sentenced Lockett to death, stating that he had "no alternative, whether [he] like[d] the law or not." 438 U.S. at 594.

31. Id. at 597-609.
free to give independent mitigating weight to any aspect of the defendant's character or record proffered as a basis for a lesser sentence.  

Thus there appears to exist a dilemma regarding the constitutional imposition of the death penalty. On the one hand, the state may not impose the death penalty arbitrarily. The discretion of the jury must be tempered by rational statutory guidelines in order to produce consistent sentencing results. On the other hand, the jury must not be bound to statutory criteria, but must be free to grant mercy according to its own discretion. The dignity of the individual requires that each person be considered individually, in light of his or her unique character and situation, before a penalty as irreversible as death may be imposed.

The Georgia legislature attempted to rectify this dilemma with a statute enacted shortly after Furman. The goal of the new Georgia capital punishment statute was to eradicate the arbitrariness and inconsistency inherent under the old procedure, without displacing the jury from the sentencing process, by providing clear and objective standards to guide the jury. That statute predetermined ten aggravating circumstances that must be found to exist before the death penalty could be imposed, thus significantly narrowing the scope of the sentencer's discretion.

32. Id. at 604-05.
34. See Lockett v. Ohio, 438 U.S. 586, 605 (1978) (a valid death penalty statute cannot preclude consideration of relevant mitigating factors). See also Bell v. Ohio, 438 U.S. 637, 642 (1978) (Constitution requires that the state must consider, as a mitigating factor, any aspect of the defendant's character or conduct offered to offset a decree of capital punishment); Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam) (statute invalidated for failing to provide for consideration of mitigating factors prior to imposition of the death penalty).
36. Id. § (b). The aggravating circumstances that may be considered by the jury are:
(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
Accordingly, the jury may not impose the death sentence unless at least one of the ten aggravating circumstances are established; but the jury is not compelled to sentence the defendant to death under any circumstances. The Georgia statute provides some definite guidance for the imposition of the death penalty, but also permits an open-ended consideration of the individual circumstances of the case.

The Supreme Court first reviewed Georgia’s revised capital sentencing procedure in Gregg v. Georgia. The Gregg Court held that the Georgia statute sufficiently restrained the sentencer’s discretion to curtail the influence of passion, prejudice, or any other arbitrary factor. The specified aggravating circumstances, together with an automatic review by the state supreme court of any death sentence, appeared to assure evenhanded and objective sentencing, effectively minimizing or eliminating the “risk that [the death penalty] would be inflicted in an arbitrary and capricious manner.” The Court approved this procedure, noting that jury guidance would obviate many of the problems inherent in jury sentencing, thus meeting the concerns of Furman.

The Gregg Court opined that the play of passion and prejudice could be effectively subdued by limiting the jury’s discretion. Under the old sentencing procedure, jurors’ lack of both sentencing experience and legal

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(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful confinement, of himself or another.

Id. 37. Id. § (c) (death penalty “may be authorized”) (emphasis added).

38. 428 U.S. 153 (1976) (plurality opinion). In Gregg, the defendant was convicted of the armed robbery and murder of two men. The jury found the existence of two statutory aggravating circumstances—the murder was committed while engaged in an armed robbery of the victims, and the murder was committed for the purpose of receiving the victims’ money and automobile—and sentenced the defendant to death. Id. at 161. See also Ga. Code Ann. § 27-2534.1(b)(2), (4)(1978).

The Supreme Court granted certiorari to consider whether the imposition of the death penalty under this statute was cruel and unusual punishment in violation of the eighth and fourteenth amendments. The Supreme Court affirmed the sentence, rejecting the petitioner’s contention that the Georgia statute failed to meet the strictures imposed by Furman. 428 U.S. at 195.


40. Id. at 188.

41. Id. at 192.

42. Id. at 207 (White, J., concurring). Under the procedure invalidated by Furman, not only was the jury’s discretion unlimited, it was completely unguided, leaving the jury with nothing to guide it but its own impulse and emotion. Id. at 222.
knowledge rendered futile their attempts to apply the law in an objective manner.\textsuperscript{43} The Court reasoned that the sentencing standards under the new statutory procedure would compensate for this infirmity.\textsuperscript{44} In addition, the statutory standards allowed the jury to specify the factor it relied upon in making its sentencing decision, providing some basis for meaningful appellate review, which had not been possible under the old procedure.\textsuperscript{45} Finally, by substantially narrowing the circumstances under which the death penalty might be imposed, the Court concluded that juries would impose the death penalty with much more relative frequency, eliminating what the Furman Court believed to be a major deficiency of the prior Georgia procedure.\textsuperscript{46}

The Court noted that in other areas of the law jury instruction has always been essential for the fair deliberation of an issue.\textsuperscript{47} The indispensability of providing sentencing guidance to juries to ensure the evenhanded imposition of the death penalty has been proposed by a number of studies and reports.\textsuperscript{48} In addition, the American Law Institute's model death penalty statute was drafted according to the same theory of jury guidance, providing a number of statutory aggravating and mitigating circumstances to be considered before sentencing.\textsuperscript{49}

Thus, the Gregg Court felt that proper guidance for the jury was the key to consistent sentencing under the Georgia procedure.\textsuperscript{50} The provision for automatic state supreme court review\textsuperscript{51} was regarded as an “additional

\textsuperscript{43} Id. at 192. Being totally inexperienced in criminal sentencing, a jury could not possibly be expected to know what factors concerning the crime and the defendant that the state, representing organized society, deems relevant to the sentencing decision. The statutory standards were intended to compensate for the jury’s lack of experience. Id.

\textsuperscript{44} Id.

\textsuperscript{45} Id. at 195. Under the pre-Furman procedure a reviewing court could only guess what factors were relied upon by the jury in imposing the death penalty, or whether any reasoned deliberation had occurred. Under the present statute, the reviewing court can focus its scrutiny on the aggravating factor specified by the jury. Id.

\textsuperscript{46} Id. at 222 (White, J., concurring). See note 23 and accompanying text supra.

\textsuperscript{47} Id. at 193. In a system that operates on fixed rules of law, the Court commented, it would be virtually unthinkable to authorize a jury to decide the merits of a lawsuit without careful instruction on the law and how to apply it. Jury guidance has always been a “hallmark of our legal system.” Id.

\textsuperscript{48} See, e.g., ABA Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 1.1(c) (1968); The President’s Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society 145 (1967).

\textsuperscript{49} Model Penal Code § 210.6 (Proposed Official Draft 1962).

\textsuperscript{50} 428 U.S. at 195.

\textsuperscript{51} Ga. Code Ann. § 27-2537(c) (1978). The state supreme court must consider:

\begin{enumerate}
  \item Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
  \item Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance as enumerated
safeguard" operating to assure that the jury had followed the statutory
guidelines, and not the passions and prejudices incited by the defendant or
his crime. The purpose of automatic review was to correct any deviation
from consistent jury sentencing. The reviewing court’s standard of review
was whether juries across the state generally imposed capital punishment for
the crime in question. The presumption was that the wanton and freakish
imposition of the death penalty would be substantially cured at the sentenc-
ing level through statutory guidance. If not, the state supreme court would
have no basis from which to overturn an inconsistent sentence when the jury
imposed the death penalty "under the influence of passion, prejudice or any
other arbitrary factor." 5

One of the statutory aggravating circumstances under the post-Furman
Georgia capital sentencing statute, section (b)(7), provides that the death
penalty may be imposed if the jury finds that a murder is "outrageously or
wantonly vile, horrible, or inhuman in that it involved torture, depravity of
mind or an aggravated battery to the victim." 5 In a brief review of section
(b)(7) the Gregg Court noted that the phrase was broad enough on its face to
include any murder. 5 The Court, however, upheld the provision noting
that it was capable of a narrower construction. At that time there was only
one case in Georgia in which the death penalty had been imposed solely on
the basis of section (b)(7). 57 As this murder was characterized as a "horrify-
ing torture-murder," 58 there was no doubt the evidence supported a section
(b)(7) finding that aggravating circumstances were present.

Given the Supreme Court's emphasis at this time on the necessity of jury
guidance, it is reasonable to believe that the Gregg Court envisioned that the
jury would be given a narrowing instruction regarding the meaning of
section (b)(7). In rejecting the petitioner's attack on section (b)(7) as being
inherently vague and incapable of objective guidance, the Gregg Court
concluded that the Georgia court had thus far limited the scope of section
(b)(7), and there was no reason to believe that juries would not be able to

in section 27-2534.1(b), and
(3) Whether the sentence of death is excessive or disproportionate to the penalty
imposed in similar cases, considering both the crime and the defendant.

Id. 52. 428 U.S. at 198.
53. Id. at 223 (White, J., concurring). If juries across the state had rarely imposed the death
penalty for the crime in question, the reviewing court was required to set aside the death
sentence; however, the reviewing court was required to affirm a sentence of death where juries
across the state had generally imposed it for that crime. Id.
55. Id. § 27-2534.1(b)(7).
56. 428 U.S. at 201. The Court noted that it is arguable that any murder involves "depravity
of mind" or an "aggravated battery" to the victim. Id.
victim had been beaten, burned, and raped before being strangled to death.
58. 428 U.S. at 201.
understand and apply this narrow construction of section (b)(7) in a consistent manner. Unfortunately, the Georgia court has never required any narrowing instruction on section (b)(7) to be given to the sentencing jury.

Four years after Gregg, the Supreme Court reviewed the same sentencing provision in Godfrey v. Georgia.

**Godfrey Facts and Procedure**

On September 5, 1977 Robert Franklin Godfrey and his wife engaged in a heated marital dispute. Mrs. Godfrey walked out on her husband and rebuffed his repeated attempts to reconcile their marriage. On September 20, 1977, after one attempt to make reconciliation erupted into an argument, Godfrey shot and killed his wife and mother-in-law with a shotgun. Godfrey surrendered to the police stating “I’ve done a hideous crime . . . but I’ve been thinking about it for eight years . . . I’d do it again.”

Godfrey was tried and convicted of two counts of murder. The jury was instructed that it could impose a sentence of death for either murder if it found beyond a reasonable doubt that the offense “was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.” The jury, applying section (b)(7), imposed sentences of death for both murder convictions, specifying that the murders were “outrageously or wantonly vile, horrible and inhuman.” The Georgia Supreme Court affirmed the convictions and sentences, noting that “the evidence supported the jury’s findings of statutory

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59. Id. at 202 n.54. The Court was referring to the application of § (b)(7) to the McCorquodale case. See note 57 supra.


61. 446 U.S. 420 (1980).

62. This argument was the culmination of a history of marital dissention. Godfrey, who had consumed several cans of beer, threatened his wife with a knife, tearing some of her clothing. Id. at 424.

63. Mrs. Godfrey moved into her mother’s trailer a short distance from their home, taking with her their eleven year old daughter. She subsequently filed suit for divorce and charges of aggravated assault against her husband. Godfrey believed that his mother-in-law was actively instigating his wife’s determination to get a divorce and her refusal to consider a reconciliation. Id. at 424-25.

64. Mrs. Godfrey demanded all the proceeds from the planned sale of their house and reiterated her decision to divorce Godfrey, stating that her mother supported her on this position, and that there was no point in arguing the matter. Aiming through the window of his mother-in-law’s trailer, Godfrey shot and killed his wife. He then reloaded, proceeded into the trailer, and shot his mother-in-law. Id.

65. Id. at 425-26.

66. At the trial photographs were admitted into evidence over defendant’s objection depicting the victims’ wounds and the surrounding area. The shotgun blasts had caused the disfigurement of the bodies and created a gruesome and bloody scene. Godfrey v. State, 243 Ga. 302, 304, 223 S.E.2d 710, 711 (1971), rev’d sub nom. Godfrey v. Georgia, 446 U.S. 420 (1980).


68. 446 U.S. at 426.
aggravating circumstances and that the jury's phraseology was not objectionable."

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The Supreme Court granted a writ of certiorari to consider whether, as applied to petitioner, such a broad and vague construction was given to statutory aggravating circumstance section (b)(7) as to violate the eighth and fourteenth amendments to the United States Constitution. The Court held the imposition of the death penalty in Godfrey's case to be unconstitutional, and reversed the two sentences of death, remanding the case to the Georgia Supreme Court for further proceedings.

In reviewing section (b)(7) the Supreme Court noted that, contrary to the mandate of Gregg, the jury was given no instruction or explanation as to the meaning of the inherently ambiguous terms of the sentencing statute. The Court, however, did not dwell on this infirmity, but turned its attention to the role and responsibility of the state supreme court in the sentencing process. Under the Georgia capital sentencing statute the state supreme court has the burden of independently assessing the evidence to determine whether it supports the jury's finding of a statutory aggravating circumstance. The Court held that this obligation should be understood as carrying with it the greater responsibility to apply section (b)(7) within constitutional bounds. Godfrey was improperly sentenced, the Court held, because the state supreme court neglected this expanded responsibility. To exemplify this responsibility the Godfrey Court engaged in a careful review of the previous cases in which the death penalty had been imposed in Georgia pursuant to section (b)(7). The Court focused on the characteristics of the defendant and the crime which arguably brought the case within the parameters of section (b)(7), and also considered limiting constructions the Georgia court


71. The plurality opinion was announced by Justice Stewart, joined by Justices Blackmun, Powell, and Stevens. Justice Marshall concurred in the judgment and filed a separate opinion joined by Justice Brennan.

72. 446 U.S. at 433.

73. Id. at 428-29.

74. Id. at 429.

75. Id.

76. Id. at 432.

77. See, e.g., Blake v. State, 239 Ga. 292, 299, 236 S.E.2d 637, 643 (1977) ("depravity of mind contemplated by the statute is that which results in torture or aggravated battery. . . ."); Harris v. State, 237 Ga. 718, 732-33, 230 S.E.2d 1, 10-11 (1976) (§ (b)(7) not a "catchall"; capital punishment should be imposed only for those few crimes that reflect the extreme depravity contemplated by the statute).
had itself imposed. From this analysis the Court reasoned that "[t]he evidence had to demonstrate torture, depravity of mind, or an aggravated battery to the victim" to warrant imposition of the death penalty under section (b)(7). Since there was no evidence of torture or battery of the victims before death, the Court concluded that the death penalty was imposed unconstitutionally in his case. Thus the decision of the Georgia court was reversed, insofar as it affirmed the petitioner's sentences of death, and remanded to the Georgia Supreme Court for further proceedings.

ANALYSIS OF THE DECISION

Because Furman v. Georgia required that states that wish to impose the death penalty must do so under procedures that obviate unprincipled sentencing discretion, procedural issues abound in the capital punishment area. Procedural issues have become the front line in the battle to abolish capital punishment, but Furman gave no clue as to how a state might fashion an evenhanded procedure. Georgia's revised capital punishment procedure, upheld by the Supreme Court in Gregg v. Georgia, only began the struggle to establish the details of the practical operation of that procedure. The difficulty lies both in that the sentencing procedure for capital crimes differs in a number of important ways from the sentencing procedure for non-capital crimes, and in that it is encumbered with so many constitutional restrictions. The Godfrey decision expands the procedural issue as it shifts sentencing responsibility from the jury to the reviewing court for capital crimes. Though the Gregg Court emphasized that unambiguous and objective jury guidance was crucial in capital sentencing, apparently the Godfrey Court

78. 446 U.S. at 431. The Court interpreted "depravity of mind" as requiring proof that the murderer tortured or committed an aggravated battery upon the victim prior to death. Id. The Court equated "torture" with "aggravated battery," reasoning that both require evidence of "serious physical abuse of the victim prior to death." Id.
79. Id. at 432.
80. Id. at 433.
83. The Georgia capital sentencing procedure is different from other criminal sentencing procedures in a number of respects. First, unlike the sentencing procedure for lesser crimes, the sentencing responsibility is divided between the jury and the reviewing court. GA. CODE ANN. § 27-2537 (1978). Second, the role of the sentencing judge differs from that of the traditional sentencing judge in that it is afforded open-ended mitigation freedom regardless of a finding of statutory aggravating circumstances or analogous cases in which the death penalty had been imposed. Id. § (b). Unlike the sentencing procedure in non-capital cases, under the Georgia capital punishment statute every sentence of death receives an expedited appeal to the Georgia Supreme Court. Id. § (a). The reviewing court's role is also unique under the Georgia capital punishment statute in that it is not expected to treat the jury's findings with the traditional deference. In addition to determining whether the jury's findings are supported by the evidence, the reviewing court must determine whether the penalty is excessive or disproportionate to the penalty imposed in similar cases, and whether the penalty was imposed under the influence of passion, prejudice, or any other arbitrary factor. Id. § 27-2537.
84. See notes 1-3 & 9-34 and accompanying text supra.
did not view the lack of sentencing guidance as the major procedural difficulty. Instead, the Godfrey Court shifted its emphasis to the responsibility of the reviewing court to attain ultimate consistency in sentencing by reviewing each case in light of its own narrow construction of section (b)(7). Furman proscribed the imposition of the death penalty very generally under any procedure that allowed the penalty to be imposed freakishly and arbitrarily.\footnote{Furman v. Georgia, 408 U.S. 238 (1972). See notes 17-22 and accompanying text supra.} Gregg held that a procedure that carefully guides and limits the discretion of the sentencing judge or jury with clear and objective statutory standards, as Georgia's apparently does, satisfied Furman.\footnote{Gregg v. Georgia, 428 U.S. 153, 195. See notes 38-54 and accompanying text supra.} Conversely, the Godfrey Court implied that though statutory guidance of the sentencing judge or jury is desirable, it is the principal burden of the reviewing court to achieve consistent sentencing results, regardless of how inconsistently the punishment is imposed by the jury. Rather than focusing on the lack of jury guidance in Godfrey, the Court held that the validity of the petitioner's death sentences turned on whether the reviewing court met its obligation to keep the imposition of the death penalty within constitutional bounds.\footnote{446 U.S. at 432.} The separate opinion by Justices Marshall and Brennan did not endorse the Court's shift in emphasis. The separate opinion asserted that it is not sufficient for the reviewing court to impose a narrowing construction subsequent to the imposition of the death penalty under an ambiguous statute. To achieve consistency in sentencing it is the sentencer's discretion that must be guided by clear and objective standards.\footnote{\textit{Id.} at 436-37 (Marshall, J., concurring). Justice Marshall indicated that on review of a jury sentence of death a court can only determine whether a properly instructed rational jury might have imposed the death penalty. It is impossible, however, to determine whether a particular jury would have so acted if it had understood the law. Thus, the Court's approach does not satisfy the eighth amendment demand for the reasoned imposition of the death penalty. \textit{Id.} at 437.}

Chief Justice Burger, in dissent, criticized the plurality for substituting its own construction of section (b)(7) for that of the Georgia court.\footnote{\textit{Id.} at 442-44 (Burger, C.J., dissenting). As an example, Justice Burger pointed out that the plurality's interpretation of § (b)(7) requiring evidence of serious physical abuse before the death penalty could be imposed was "arbitrary and unfounded and trivializes the Constitution." \textit{Id.}} Justices White and Rehnquist, in a separate dissent, argued that the plurality overstepped its authority in finding that the facts in Godfrey did not support a section (b)(7) finding of aggravating circumstances, for the facts reasonably could fit within the statutory language notwithstanding the plurality's limiting construction of that language.\footnote{\textit{Id.} at 449-51 (White, J., dissenting). Justice White believed that the plurality's review of the case deviated from the standard of review previously adhered to by the Supreme Court. In prior cases the Court took the position that the issue on review is not what the Court's verdict would have been, but whether any rational factfinder could have found the existence of an aggravating circumstance. \textit{Id.} (citing Jackson v. Virginia, 443 U.S. 307, 313 (1979)).} But the significance of the plurality's
tedious analysis was not to tell the Georgia court which hideous, intentional murders warrant the death penalty, as the dissent asserted. The Godfrey decision may be read more productively as illustrating the plurality's view of the role of the reviewing court in the sentencing process. The plurality's analysis illustrates that the reviewing court must play a more predominant role in the sentencing of capital offenders.

The jury and reviewing court play a dual role in sentencing under the Georgia capital sentencing scheme. The division of responsibility was characterized by the Gregg Court as jury sentencing and appellate court review. The jury had the primary responsibility to sentence, to determine the facts, and to weigh the statutory aggravating circumstances against the mitigating circumstances. The responsibility of the state supreme court on automatic appeal was principally to correct error and prejudice in the sentencing procedure. The division of responsibility resulting from Godfrey, however, is best characterized as a jury advisory opinion with reviewing court sentencing. The principal sentencing burden for capital cases rests on the reviewing court to articulate a standard through a review of all the prior cases, and to determine whether or not the present case falls within that standard.

There are a number of factors that may have contributed to this implicit shift in sentencing responsibility from the jury to the reviewing court. First, there had been a continuing dissatisfaction with the practical operation of the new sentencing procedure. Two Justices, Marshall and Brennan, expressed their doubt that the imposition of the death penalty could ever comply with constitutional mandates by indicating that nearly every week of the year the Court is presented with at least one petition for certiorari raising troublesome issues of noncompliance with the strictures of Gregg and its progeny. Recent statistics suggest that racial discrimination manifest in the capital sentencing procedure has not been corrected under the new statute. Isolating the source of the problem is difficult. Furman and its progeny focus only on the sentencing level of the criminal process. However, other aspects of the criminal system such as prosecutorial discretion, plea

91. 446 U.S. at 443-44 (Burger, C.J., dissenting).
93. Id. at 438 (Brennan & Marshall, JJ., concurring).
94. One study yielded the conclusion that legislative efforts have failed to eliminate the arbitrariness inherent in our criminal justice system. Riedel, Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman, 49 TEMPLE L.Q. 261 (1976). A more recent analysis of the operation of the appellate review process concluded that the goal of objective sentencing standards has not been achieved under the Georgia system. Dix, Appellate Review of the Decision to Impose Death, 68 GEO. L.J. 97 (1979). Further, according to recent statistics, over 40% of the persons on death row are black. NAACP LEGAL DEFENSE FUND, Death Row USA 1 (April 20, 1980). See also U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1978, 25-30 (1979).
95. It has been argued that the prosecutor's power to decide both who and what to prosecute is essentially undefined, unchecked, and absolute. The prosecutor's decision ultimately turns on
bargaining,96 trial fallibility,97 and executive clemency,98 have also been attacked as inherently arbitrary. Some authorities have argued that there is a degree of arbitrariness inherent in the system as a whole beyond what is constitutionally tolerable for the imposition of the death penalty.99 Yet in spite of the statistics, argument, and attack on the system, a majority of the Supreme Court are not willing to abandon the quest to achieve procedural consistency launched in Gregg.100 A reasonable reaction to these continuing problems might be to place a greater burden on the state supreme court to oversee the sentencing process, thus achieving some ultimate consistency in the imposition of the death penalty.

A second factor may be related to the role of the jury in the sentencing process. The original purpose or function of the jury as a sentencer in capital cases was to mitigate the harshness of a mechanically imposed death penalty.101 The jury was never believed to be a sentencing body superior to the court. In fact, the opposite is true. The lack of sentencing experience and legal knowledge make consistent jury sentencing nearly impossible.102 It was recognized that many convicted murderer's did not deserve to be sentenced to death, and also that it would be impossible to account for all the factors that might affect whether the defendant deserved the death penalty.103

This jury function has been reinforced by subsequent Supreme Court decisions stressing that the eighth amendment "must draw its meaning from economy of court time, resources, and political considerations rather than on justice. Yet the prosecutor plays the single most important role in determining the fate of the defendant. See generally Comment, Prosecutorial Discretion—A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse, 21 DePaul L. Rev. 485 (1971).

96. Plea bargaining is closely related to prosecutorial discretion in that the prosecutor determines the charges according to the defendant's willingness to plead guilty. This system inherently coerces the defendant to plead guilty in order to avoid being prosecuted for a more serious offense. Approximately 90% of all convicted defendants plead guilty rather than exercise their right to trial by court or jury. See Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50 (1968).

97. In recent years compelling evidence has emerged that many innocent persons have been executed due to the inherent fallibility of the trial system. See, e.g., The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1289-90 & n.175 (1968).

98. In most states the Governor has the power to bestow mercy on a person sentenced to death in complete disregard of the standards for imposition recognized by the criminal sentencing procedure of that state. The result is that a substantial portion of all death sentences are arbitrarily commuted to a less severe sentence. Note, Executive Clemency in Capital Cases, 39 N.Y.U. L. Rev. 136, 191 (1964).


100. In Godfrey Justices Stewart, Blackmun, Powell, Stevens, White and Chief Justice Burger took this position.

101. See note 11 and accompanying text supra.

102. See Knowlton, supra note 11, at 1131. See also note 48 supra.

103. See note 14 and accompanying text supra. See also Knowlton, supra note 11, at 1102-03.
the evolving standards of decency that mark the progress of a maturing society,"104 and that the meaning of "cruel and unusual punishment" is "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice."105 After these decisions, jury sentencing was considered desirable in capital cases in order to "maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"106

Giving the jury full sentencing responsibility, however, is not the only way to maintain this link between contemporary community values and the penal system. Under the Florida capital sentencing procedure107 the jury's verdict is only advisory;108 the actual sentence is determined by the trial judge. The Florida Supreme Court, however, has held that in order to affirm a sentence of death following a jury recommendation of life imprisonment, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.109 The state bears a very heavy burden of persuasion to override a jury recommendation of life imprisonment.110 Thus, under the Florida procedure the jury recommendation preserves that crucial link between contemporary community values and the penal system without generating the flood of procedural difficulties that accompany jury sentencing.

In a review of the Florida procedure the Supreme Court approved its division of sentencing responsibility between the jury and court.111 The Court recognized that the experience of the trial judge made him a better sentencing body than the jury, and that the important societal function of the jury does not constitutionally mandate jury sentencing.112 The Court concluded that the Florida system would, if anything, lead to greater sentencing consistency.113

110. Of those Florida cases decided between November 4, 1974 and February 22, 1979, 13 of 15 death sentences that were reversed on their merits received jury recommendations of life imprisonment, whereas in only 5 of 33 affirmed were there jury recommendations of life imprisonment. Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97, 125 (1979).
112. Id. at 252.
113. Id. In this review of the Florida procedure the Court contrasted it with the Georgia procedure approved in Gregg. The Court noted that the basic difference between the two systems was that in Florida the sentence is determined by the judge rather than by the jury. Id. Thus the Court's remark that the Florida system should lead to greater consistency in the
The implicit shift in sentencing responsibility, as illustrated in Godfrey, to the reviewing court might be an attempt to circumvent the unresolved problems inherent in jury sentencing. Although the jury’s role has been decreased, its essential function of providing a link with contemporary community values has been preserved since a jury recommendation of life imprisonment is final.\textsuperscript{114}

The third factor is the effect the “evolving standards” concept has had on the needs of the sentencing process. The “evolving standards” concept has been incorporated into the Georgia procedure by giving the jury sentencing responsibility with open-ended power to mitigate. Though it is necessary for the jury to find at least one statutory aggravating circumstance before it can recommend death,\textsuperscript{115} the jury is never \textit{compelled} to impose death upon the finding of any number of aggravating circumstances.\textsuperscript{116} Thus, as society’s evolving standards become manifest through actual jury sentencing decisions, the standards of the statute become increasingly obsolete. For example, armed robbery is punishable by death under the Georgia statute;\textsuperscript{117} however, the Georgia court vacated a sentence of death for armed robbery based on its observation that the death penalty had been imposed so rarely for the crime of armed robbery as to make it presently excessive for that crime.\textsuperscript{118}

The “evolving standards” concept has generated additional unforeseen problems for jury sentencing of capital cases. As sentencing standards evolve it becomes increasingly improbable that a jury could make an intelligent sentencing decision on the basis of the statute. Yet the Georgia court has rejected arguments that the jury should be allowed to consider the facts of other cases for comparison with the defendant’s case.\textsuperscript{119} The Georgia court views matters of proportionality as cruel and unusual punishment concerns for the court and not the jury.\textsuperscript{120} As a result of the evolving standards aspect of capital sentencing the responsibility of the sentencer is uniquely complex.

\begin{itemize}
  \item \textsuperscript{114} GA. CODE ANN. § 26-3102 (1977) provides in part: Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. \textit{Id}.
  \item \textsuperscript{115} No finding of a statutory aggravating circumstance is necessary to impose the death penalty in cases of treason or aircraft hijacking. \textit{Id}.
  \item \textsuperscript{116} \textit{Id}.
  \item \textsuperscript{117} GA. CODE ANN. § 26-1902 (1977 & Supp. 1981) makes armed robbery punishable by death, imprisonment for life, or by imprisonment for not less than twenty years.
  \item \textsuperscript{120} Blake v. State, 239 Ga. 292, 297, 236 S.E.2d 637, 642 (1977).
\end{itemize}
The Georgia court has already recognized that the task of reconciling the evolution of societal standards with consistency in the application of the death penalty is beyond the capacity of a jury. Thus, the Supreme Court's shift may have resulted from this emerging need of the sentencing procedure.

The Godfrey decision concurrently expanded the role of the Georgia court and contracted the role of the jury in the sentencing process. Under the pressure of continuing procedural difficulties and compelling constitutional mandates the Supreme Court has backed into an approach that may prove to provide a feasible resolution of the capital sentencing issue. By emphasizing the responsibility of the state court to keep the imposition of the death penalty within constitutional bounds the Supreme Court has relieved the state of the pressure to remedy the myriad of procedural difficulties inherent in jury sentencing. Yet the jury has been retained as a mitigating element in the sentencing process, and as a link with the evolving standards of the community. Through a careful, independent review of the facts of each case in light of analogous cases, the state court may succeed in clothing a faulty system with the vestiture of consistency.

**THE EFFECT OF GODFREY ON CAPITAL SENTENCING**

It has been presumed that the sentencer under the Georgia system is the jury, and that the responsibility of the appellate court is principally to review that sentence. If this is the case, then the jury must be adequately guided to impose the death penalty in a rational and consistent manner. Under the present practice, the jury's guidance consists of only the words of the appropriate statutory aggravating circumstances. For a group of lay persons who are inexperienced at sentencing and uneducated in legal terminology, it is doubtful whether this language alone could clearly and objectively guide their sentencing discretion. This is particularly true with a subjective provision such as section (b)(7), which the Supreme Court has characterized as without "any inherent restraint on the arbitrary and capricious infliction of the death sentence." In addition, to the extent that the statutory standards do not correspond to the standards of the community they are necessarily incapable of providing sentencing guidance. Yet the jury has not been allowed to consider analogous cases for comparison. The Gregg Court upheld Georgia's new capital punishment statute as facially constitutional, in other words, capable of meeting the requirements of Furman. However, the present practice raises serious constitutional questions if the jury is vested with the responsibility of sentencing.

The de facto effect of Godfrey, however, should be to shift the ultimate sentencing responsibility under the Georgia procedure to the reviewing court in those cases deemed capital by the jury. If this is the result, it would never

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121. Id.
be acceptable for the reviewing court to affirm the jury’s recommendation of
death with a simple conclusory remark that the evidence supported the jury’s
finding of an aggravating circumstance, as has often been the practice. It is
imperative that the reviewing court emulate the analysis conducted by the
Godfrey Court. The reviewing court must articulate the current standards
from analogous cases, then apply those standards to the case in question.

The impact of Godfrey is to further refine the procedural requirements for
the constitutional imposition of capital punishment. Godfrey clarifies the
division of sentencing responsibility between the jury and reviewing court,
which is ambiguous not only because the Georgia capital sentencing pro-
dure is unlike noncapital sentencing procedures, but also because it is so
closely regulated by constitutional requirements. The Godfrey Court’s focus
on the responsibility of the reviewing court to conduct an independent
review, and general failure to address the need for unambiguous jury sen-
tencing guidance, places a de facto burden on the reviewing court to sen-
tence in those cases deemed capital by the jury. The Godfrey opinion itself is
exemplary of the reviewing court’s role under state capital sentencing pro-
ductions such as Georgia’s. Finally, to the extent that an independent analysis
such as that conducted by the Godfrey Court has not been diligently adhered
to by state courts, Godfrey mandates reform of the present capital sentencing
practice.

CONCLUSION

The Godfrey decision indicates that the competing constitutional restric-
tions on the imposition of the death penalty have not yet been resolved. It
also indicates that the majority of the Court is unwilling to abandon the
enterprise embarked on in Gregg. Yet the Court has taken a significant turn
from this enterprise by placing the burden to rectify the infirmities of capital
sentencing procedures on state supreme courts. This analysis indicates that
the Court is not satisfied with prior efforts to refine the procedure to comply
with Furman. The imposition of this burden on state supreme courts may be
a final attempt to save capital punishment from abolition because of its own
inherent procedural infirmities. The ultimate fate of capital punishment in
the United States may turn on the success of state courts in bearing this heavy
burden imposed by Godfrey.

Lennine Occhino

Georgia, 446 U.S. 420 (1980); Willis v. State, 243 Ga. 185, 253 S.E.2d 70, cert. denied, 444 U.S.
257 S.E.2d 242, cert. denied, 444 U.S. 984 (1979); Green v. State, 242 Ga. 261, 249 S.E.2d 1
(1978), rev’d on other grounds sub nom. Green v. Georgia, 442 U.S. 95 (1979); Young v. State,
239 Ga. 53, 236 S.E.2d 1, cert. denied, 434 U.S. 1002 (1977); Caddis v. State, 239 Ga. 238, 236
S.E.2d 594 (1977), cert. denied, 434 U.S. 1088 (1978); Davis v. State, 236 Ga. 804, 225 S.E.2d