CONSTITUTIONAL INFIRMITIES OF THE CAPITAL PUNISHMENT ACT

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I. INTRODUCTION

After a ten year moratorium, the New Jersey Legislature has reenacted a death penalty statute. The most salient feature of the statute[1] is, of course, the reinstatement of the state's power to impose the death penalty.[2] While the statute retains the definitional provi-

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[1] N.J. STAT. ANN. §§ 2C:11-3, :43-7 (West 1982).

[2] In 1971, the United States Supreme Court vacated death sentences imposed under New Jersey law. *See* Funicello v. New Jersey, 403 U.S. 948 (1971) (mem.). The Court offered no explanation as to why the death sentences were reversed. Rather, it simply cited Witherspoon v. Illinois, 391 U.S. 510 (1968), Boulden v. Holman, 394 U.S. 478 (1969), Maxwell v. Bishop, 398 U.S. 262 (1970), and United States v. Jackson, 390 U.S. 570 (1968), as supporting reversal. *Funicello*, 403 U.S. at 948. Since only *Jackson* was applicable to the New Jersey statute, the New Jersey Supreme Court, in State v. Funicello, 60 N.J. 60, 286 A.2d 55, *cert. denied*, 408 U.S. 942 (1972), concluded that the statute ran afoul of *Jackson* which held unconstitutional statutes "needlessly encouraging" guilty pleas. *Id.* at 65-69. This marked a shift in position for the New Jersey Supreme Court, which, four years earlier had concluded that the New Jersey statute was unaffected by *Jackson* since it did not needlessly encourage guilty pleas entered to avoid the death sentence. *See* State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968), *rev'd sub nom.* Funicello v. New Jersey, 403 U.S. 948 (1971) (mem.).

sions of the former murder statute,[3] a penalty phase proceeding has been incorporated into the murder trial.[4] The addition of this penalty phase proceeding illustrates that the death penalty statute has added both substantively[5] and procedurally[6] novel elements to the mechanism for punishing murderers. These elements have been taken from other state death penalty statutes drafted to prevent the arbitrary and capricious imposition of the death sentence.[7] The focus of the death penalty statute is to define the circumstances which compel the imposition of the death sentence and to outline the procedures to be followed in making this determination.

Although constitutionally required to eliminate the arbitrary and capricious imposition of the death sentence, the statute fails in this regard. By eliminating protective devices available to the defendant at trial, omitting a clear definition of the defendant's burden at the penalty phase, and in certain instances, failing fully to define the substantive factors which a jury must consider before imposing the death sentence, the statute actually increases the probability of an arbitrary and capricious sentence. Moreover, the jury's power to dispense mercy—a constitutional safeguard—has been eliminated from the statute. The Act, therefore, represents such a substantial impairment of a capital defendant's constitutional rights that it must be held to be unconstitutional.

II. Constitutional Framework for Death Penalty Statutes

A. McGautha v. California[8]

In *McGautha*, the United States Supreme Court upheld two death sentences imposed under statutes granting juries virtually untrammeled discretion to decide who dies.[9] The petitioners argued that

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[3] N.J. Stat. Ann. § 2C:11-3(a)(1)-(3) (West 1982).

[4] *Id.* § 2C:11-3(c)(1).

[5] *See infra* notes 110-40 and accompanying text.

[6] *See infra* notes 95-109, 141-90, 212-18 and accompanying text.

[7] *Compare* Fla. Stat. Ann. § 921.141(1) (West Cum. Supp. 1983) (separate sentencing proceeding) *and id.* § 921.141(6) (mitigating circumstances) *and* Ga. Code Ann. § 27.2534.1 (Harrison 1983) (aggravating circumstances) *with* N.J. Stat. Ann. § 2C:11-3(c)(1), (4), (5) (West 1982) (New Jersey death penalty statute providing for bifurcated trials and consideration of aggravating and mitigating circumstances).

[8] 402 U.S. 183 (1971).

[9] The California death penalty statute provided in part:

> Evidence may be presented at the further proceeding on the issue of penalty, or the circumstances surrounding the crime, of the defendant's background and history of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury

these statutes violated both the equal protection and due process clauses of the fourteenth amendment.[10] Conceding that the original purpose of jury discretion, to dispense mercy in extraordinary cases, had been constitutionally sound,[11] the petitioners argued that juries were not using discretion in a manner consistent with the purpose for its creation. Instead, juries were using discretion to withhold the death sentence in most instances,[12] while imposing the penalty on a random few. The petitioners contended that they were among the random few whom the jury had selected for death.[13] Since there was no basis for distinguishing the few from the many, they maintained that no justification for the selection process existed. Without such justification, they continued, the statute granted the jury untrammeled discretion with no rational basis for distinguishing murderers, and accordingly violated the equal protection clause.[14] Further, the petitioners maintained that the standardless selection process violated substantive due process.[15]

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trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict.

CAL. PENAL CODE § 190.1 (West 1970) (repealed 1973).

The Ohio statute provided in part:

> No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.
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> Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.

OHIO REV. CODE ANN. § 2901.01 (Baldwin 1964) (repealed 1974).

[10] 402 U.S. at 196. Two cases were consolidated for trial in *McGautha*. The defendant in *McGautha* challenged the California death penalty statute and the defendant in Crampton v. Ohio, 398 U.S. 936 (1970), challenged the Ohio death penalty statute. 402 U.S. at 191, 195.

[11] 402 U.S. at 203.

[12] *Id.* at 203-04. The petitioners agreed that the general imposition of the most severe penalty and the infrequent imposition of life imprisonment comported with the equal protection and due process clauses of the fourteenth amendment. *Id.* They maintained that equal protection was satisfied because almost every defendant convicted of murder would receive the death sentence. Thus, those similarly situated were treated identically. Those instances in which convicted murderers were spared this severe form of punishment would be easily distinguishable as rare cases warranting different treatment. *Id.* Further, they maintained that due process was satisfied because a general application of the death sentence would put all persons on notice that a violation of the statute proscribing murder would lead to imposition of the death sentence. *Id.*

[13] *Id.* at 204. The petitioners argued that the death penalty was being imposed on "far fewer than half the defendants found guilty of capital crimes." *Id.* at 203. In fact, the petitioners' estimate of persons receiving the death sentence who had been convicted of capital crimes was high. In 1967, although approximately 400 persons were under sentence of death in the country, between 1965 and 1969 only 10 people were actually executed. *See* U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1980, National Prisoner Statistics 1, 15 (Dec. 1981).

[14] 402 U.S. at 204.

[15] *Id.* The petitioners argued that "the legislatures have not only failed to provide a rational basis for distinguishing" those who received the death penalty from those who did not receive the

In rejecting the petitioners' claims and upholding the death sentences, Justice Harlan, writing for the majority, viewed the petitioners' arguments primarily from a due process perspective.[16] The Court focused on the history of capital punishment and the numerous unsuccessful attempts which had been made to identify the standards to be used in sentencing decisions.[17] The Court stated that it was "beyond present human ability"[18] to define specifically and explain adequately to the jury the characteristics which would give rise to the imposition of the death penalty.[19] The Court stated that the Model Penal Code illustrated the impossibility of developing uniform sentencing standards,[20] and it maintained that the development of appropriate standards was impossible because of the complexity and uncertainty of the relevant factors.[21] The Court noted that the Code's drafters recog-

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death penalty but that "they have failed even to suggest any basis at all." *Id.*; *cf.* Skinner v. Oklahoma, 316 U.S. 535, 540 (1942) (when sentencing, although abstract symmetry is not required there must be rational basis for distinguishing convicted felons to be sterilized).

[16] 402 U.S. at 196. The petitioners cited the fundamental lawlessness of the failure to provide standards delimiting jury discretion on the punishment issue as violative of the due process clause. *Id.* The Court characterized the petitioners' due process argument as having an undeniable surface appeal, but was not wholly persuaded.

[17] The *McGautha* Court did not explain how the equal protection clause was satisfied by the statutory provisions for standardless jury discretion. The Court's upholding the petitioners' death sentences without analysis of the perceived constitutional infirmity is difficult to justify.

[18] *Id.* at 204.

[19] *Id.* at 197. The Court stated that the history of attempts to define those circumstances which compelled the imposition of the death penalty dated to Biblical times and quoted for support "the laws of Alfred, echoing Exodus 21:12-13 [which] provided: 'Let the man who slayeth another willfully perish by death. Let him who slayeth another of necessity or unwillingly, or unwillfully as God may have set him into his hands, and for whom he has not lain in wait be worthy of his life and of lawful bot if he seek an asylum.' " *Id.*

The Court, in analyzing historical attempts to define standards for the imposition of the death sentence, confused the issue. The Biblical quotation and the laws of Alfred are an attempt to distinguish degrees of murder and subsequent punishment, not degrees of punishment for the same crime. Although different categorizations for an unlawful killing do result in different penalties upon conviction, the distinction the petitioners were asking the Court to recognize was a method for distinguishing the punishment of persons convicted of the *same* crime. The petitioners in *McGautha* were not asserting that they did not commit first degree murder or that they had killed in self-defense. Rather, they argued that there must be standards to distinguish those convicted of first degree murder who would receive the death sentence from those convicted for first degree murder who would not.

[20] 402 U.S. at 205.

[21] *Id.* at 203. In rejecting the standards set forth in the Model Penal Code, the Court stated:

> It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And they provide no protection against the jury determined to decide on whimsy or caprice. In

nized that such factors were too complex to be compressed within a simple formula.[22] Despite this inherent difficulty, the drafters considered it within the realm of possibility to list pertinent circumstances of aggravation and mitigation which should be balanced by the sentencing authority.[23] The Court, however, soundly rejected these standards as providing no more than limited relevant considerations.[24]

The *McGautha* Court also considered the propriety of employing unitary trial proceedings in capital cases.[25] The petitioner argued that a unitary trial proceeding forced him to forfeit either his fifth amendment right against compelled self-incrimination[26] or his due process right to address the jury on the issue of punishment.[27] In this regard the petitioner contended that no legitimate state interest was served by imposing a Hobson's choice on defendants.[28] Accordingly, the petitioner maintained that a bifurcated trial proceeding was constitutionally required to avoid this problem.[29] The Court rejected the

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> short, they do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of "standards" which the history of capital punishment has from the beginning reflected. Thus, they indeed caution against this Court's undertaking to establish such standards itself, or to pronounce at large that standards in this realm are constitutionally required.

Id. at 207.

[22] *Id.* at 205.

[23] *Id.* at 206.

[24] *Id.* at 207.

[25] The *McGautha* Court analyzed unitary trial proceedings in the context of the Ohio statute, which provided for such trials. *See generally supra* note 9.

[26] 402 U.S. at 210-11. Crampton relied upon the explication of his fifth amendment privilege as defined by the Court in Malloy v. Hogan, 378 U.S. 1 (1964). 402 U.S. at 210-11. In *Malloy*, the Court defined the fifth amendment privilege as one free from any compulsion even "so mild a whip" as the refusal to permit a suspect to call his wife unless he confessed to a crime. 378 U.S. at 7. By asserting one's fifth amendment protection, a defendant could shield himself from the prosecution's cross-examination and thereby protect himself from impeachment by prior crimes evidence. *See* U.S. CONST. amend. V; FED. R. EVID. 609.

[27] 402 U.S. at 211. Crampton argued that his sentence should not have been fixed without the benefit of all relevant evidence. He relied upon Townsend v. Burke, 334 U.S. 736 (1948), in asserting that his testimony was relevant to the jury's decision on the punishment to be imposed. 402 U.S. at 211. In *Townsend*, the Court defined the defendant's due process rights at sentencing as requiring a sentence imposed on the basis of accurate information. 334 U.S. at 741.

[28] 402 U.S. at 211. The petitioner sought to have the Court analyze the legislative effect of requiring the election of constitutional protections in terms of a legitimate state interest test. This test is generally used to determine whether a possible impairment of constitutional rights can be justified because the legislation serves a legitimate state purpose which cannot be achieved in a less intrusive manner. It is unlikely that Ohio could have satisfied the legitimate state interest test since bifurcation would have eliminated the chilling of the petitioner's constitutional rights, thus providing a less intrusive means to promote the state's goal.

[29] *Id.* at 210-11. Crampton argued that the Court's holding in Simmons v. United States, 390 U.S. 377 (1968), compelled bifurcated procedures. 402 U.S. at 211. In *Simmons*, the Court

petitioner's arguments and held that: "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."[30] The Court stated that the constitutionality of decisions requiring this choice depends upon whether the policies behind the rights are impaired "to an appreciable extent."[31] The Court observed that the fifth amendment provides a vehicle to attack " 'the cruel trilemma of self-accusation, perjury or contempt,' "[32] while the due process clause of the fourteenth amendment was intended to promote fundamental fairness and decency. The Court stated that the forced choice to forego fifth amendment protection in favor of exercising fourteenth amendment rights did not impair

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invalidated the prosecution's use of the defendant's testimony from the pretrial motion to suppress the evidence. 390 U.S. at 394. The defendant had asserted his possessory interest in the item seized in order to have standing to bring the motion. *Id.* at 389-93. Thereafter, the prosecution used this testimony at trial to prove his guilt. *Id.* at 389. The defendant in *Simmons* was forced to choose between the assertion of his fourth amendment protection against unreasonable searches and seizures and his fifth amendment protection against self-incrimination. *Id.* at 391-92. The Court found "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394.

[30] 402 U.S. at 213. The *McGautha* Court refused to apply *Simmons* and stated:

> [T]o the extent that [Simmons] was based on a "tension" between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question, and it certainly cannot be given the broad thrust which is attributed to it by Crampton in the present case.

Id. at 212-13. The *McGautha* Court relied on Brady v. United States, 397 U.S. 742 (1970). In *Brady*, a defendant challenged the validity of a kidnapping statute which provided for imposition of the death sentence only after a jury trial, while providing life imprisonment as the maximum penalty if there was no jury trial. *Id.* at 744. After waiving the jury trial and pleading guilty, Brady maintained that the effect of the statute's death penalty provision was to coerce his guilty plea and to induce the waiver of his sixth amendment right to trial by jury. *Id.* at 746. The Supreme Court rejected Brady's argument, stating that "[a]lthough Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful." *Id.* at 758. *But see* United States v. Jackson, 390 U.S. 570 (1968) (death sentence provisions of federal statute unconstitutional because of inherent tensions placed on fifth and sixth amendments).

The Court failed to directly support its position that it does not offend the Constitution to force citizens to choose one constitutional right over another. The Court's discussion of *Simmons* and the limitations *McGautha* places upon *Simmons* is the closest the Court comes to addressing the forced choice issue.

In *Simmons*, the Court defined the issue as one of a waiver of a constitutional right. This approach does not properly define the constitutional dilemma which Crampton faced. Crampton was not making a knowing and intelligent waiver; rather, he was forced to choose between foregoing either his fifth or his fourteenth amendment protections. A waiver, on the other hand, exists only when the petitioner can assert a constitutional protection. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[31] 402 U.S. at 213.

[32] *Id.* at 215 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

the policy behind the fifth amendment.[33] The Court, therefore, held that bifurcated procedures were not constitutionally required.[34]

B. Furman v. Georgia[35]

After the *McGautha* Court had firmly established the constitutionality of standardless jury discretion in death penalty cases,[36] the Supreme Court proceeded in *Furman*, to vacate three death sentences[37] which had been imposed in accordance with the *McGautha* rationale.[38] Five members of the Court[39] joined in a one paragraph *per curiam* opinion, holding that "the imposition and carrying out of the death penalty," in the three consolidated cases would constitute cruel and unusual punishment.[40] The command of *Furman* was un-

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[33] *Id.* at 213-22.

[34] *Id.* at 221. The Court conceded that bifurcated procedures and clearly defined standards were probably superior procedures to determine whether the death penalty should be imposed. *Id.*; *see* Model Penal Code § 210.6 (Proposed Official Draft 1962). Despite these considerations the Court stated, however, that "the Federal Constitution, . . . does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology." 402 U.S. at 221.

[35] 408 U.S. 238 (1972) (per curiam).

[36] *See supra* notes 17-24 and accompanying text.

[37] Three cases were consolidated for the opinion in *Furman*. Jackson v. State, 225 Ga. 790, 171 S.E.2d 501 (1969), *rev'd per curiam sub nom.* Furman v. Georgia, 408 U.S. 238 (1972); Furman v. State, 225 Ga. 253, 167 S.E.2d 628 (1969), *rev'd per curiam*, 408 U.S. 238 (1972); Branch v. State, 447 S.W.2d 932 (Tex. Crim. App. 1969), *rev'd per curiam sub nom.* Furman v. Georgia, 408 U.S. 238 (1972). The defendants in *Branch* and *Jackson* had been convicted of rape and sentenced to death while the defendant in *Furman* had been convicted of murder and sentenced to death. 408 U.S. at 239 (per curiam).

[38] 408 U.S. at 240 (per curiam). The death sentences in these three cases were imposed by juries which were not required to examine aggravating and mitigating circumstances. *Id.* at 240 (Douglas, J., concurring).

[39] The five members of the Court were: Justice Douglas, Justice Brennan, Justice Stewart, Justice White, and Justice Marshall.

[40] 408 U.S. at 239 (per curiam). The Court indicated that imposition of the death penalty in these cases was cruel and unusual punishment violative of the eighth and fourteenth amendments. *Id.* The Court's reliance on the eighth amendment was clear since it provides, in part, that "cruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII. It is unclear whether the Court's reliance on the fourteenth amendment was premised on an equal protection theory, a due process incorporation theory, or a substantive due process theory. *See Furman*, 408 U.S. at 240 (per curiam); *id.* at 249 (Douglas, J., concurring) ("basic theme of equal protection is implicit in 'cruel and unusual punishments' "); *id.* at 257 & n.1 (Brennan, J., concurring) (cruel and unusual punishment clause applicable to states via due process clause of fourteenth amendment); *id.* at 294 (Brennan, J., concurring) ("No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison"); *id.* at 309 (Stewart, J., concurring) ("guarantee against cruel and unusual punishments . . . applicable against the states through the Fourteenth Amendment"); *id.* at 310 (Stewart, J., concurring) ("the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so

clear;[41] thus, the opinion created considerable confusion as to whether the death penalty was per se unconstitutional or whether only certain death penalty statutes were unconstitutional.[42]

C. Gregg v. Georgia[43]

In *Gregg*, the Supreme Court examined the Georgia capital punishment statute enacted in response to *Furman's* equivocal command.[44] *Gregg* sounded the death knell for an eighth amendment challenge[45] to the death penalty as per se violative of the cruel and unusual punishment clause.[46] The plurality relied on three factors in finding the Georgia death penalty statute constitutional: 1) the sub-

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freakishly imposed"); *id.* at 359 n.141 (Marshall, J., concurring) (cruel and unusual punishment analysis parallels substantive due process analysis; when state seeks to deprive individual of fundamental right, it must meet compelling state interest test). For a detailed discussion of the death penalty and equal protection, see Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970).

[41] Although *Furman's* command was unclear, its effect was direct and perspicuous: Six hundred persons on death rows throughout the country had their sentences vacated. *See Furman*, 408 U.S. at 316 (Marshall, J., concurring).

[42] The response to *Furman* demonstrated the confusion it created. Some state legislatures interpreted *Furman* to require mandatory death sentences upon conviction. *See* Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion). Other states did not reenact death penalty legislation after their statutes were invalidated. *Compare* N.J. STAT. ANN. § 2A:113-4 (West 1969) (invalidated in part by State v. Funicello, 60 N.J. 60, 286 A.2d 55, *cert. denied*, 408 U.S. 942 (1972)) *with* N.J. STAT. ANN. § 2C:11-3 (West 1982). Other states interpreted *Furman* to require sentencing standards. *See* Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

[43] 428 U.S. 153 (1976) (plurality opinion).

[44] *Id.* at 188 (plurality opinion). On the same day the Court decided *Gregg*, it also decided four other death penalty cases. *See* Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion) (Louisiana death penalty statute enacted after *Furman*); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion) (North Carolina death penalty statute enacted after *Furman*); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion) (Texas death penalty statute enacted after *Furman*); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion) (Florida death penalty statute enacted after *Furman*).

[45] Prior to *Furman*, the Court had been reluctant to address whether the death penalty violated the eighth amendment. *See* Goldberg & Dershowitz, *supra* note 40, at 1775. The plurality in *Gregg* recognized that there were few emphatic statements declaring the constitutionality of the death penalty. *See Gregg*, 428 U.S. at 168-69 (plurality opinion) ("Court [has] never confronted [whether death penalty] . . . always . . . is cruel and unusual punishment in violation of the Constitution").

[46] 428 U.S. at 187-88 (plurality opinion). The plurality stated: "We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Id.* at 187.

stantive limits placed upon any penalty by the eighth amendment;[47] 2) an assessment of contemporary values concerning the penalty;[48] and 3) the presumption of a punishment's validity.[49] Emphasizing that there was no requirement that state legislatures adopt the least severe punishment,[50] the plurality stated that consideration of these factors required a finding that the death penalty was not unconstitutional.[51] The plurality did not hold, however, that all death penalty statutes were constitutional.[52] Instead, the plurality deemed it necessary to examine the specific death penalty statutes before deciding on their constitutionality.

The *Gregg* plurality upheld the constitutionality of the Georgia death penalty statute,[53] maintaining that the Georgia Legislature's development of standards to be used for sentencing decisions eliminated the constitutional infirmity of the statutes condemned in *Furman*.[54] The plurality stated that the concerns of *Furman* could be met

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[47] *Id.* at 172 (plurality opinion); *see* Robinson v. California, 370 U.S. 660, 667 (1962) (although imprisonment is not cruel and unusual punishment, imprisonment of narcotics addict inflicts "cruel and unusual punishment in violation of fourteenth amendment" since punishment is not proportional to crime).

[48] 428 U.S. at 173 (plurality opinion). The plurality observed that society had readily endorsed the death penalty. *Id.* at 179 (plurality opinion); *see id.* at 179 n.23 (listing 35 state statutes providing for death penalty); *id.* at 180 (plurality opinion) (noting federal statute providing for death penalty); *id.* at 181 (plurality opinion) (noting California referendum to amend state constitution to permit capital punishment).

[49] *Id.* at 175 (plurality opinion). The plurality stressed that a defendant "who would attack the judgment of the representatives of the people" as evidenced by legislation creating a death penalty had to carry a heavy burden to invalidate the will of the people. *Id.*; *cf.* Trop v. Dulles, 356 U.S. 86, 103 (1958) ("Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids"); Gore v. United States, 357 U.S. 386, 393 (1958) (courts are powerless to enter domain of penology). *But cf. infra* note 67.

[50] 428 U.S. at 175 (plurality opinion).

[51] See *supra* notes 45 & 46 and accompanying text.

[52] 428 U.S. at 195 (plurality opinion).

[53] 428 U.S. at 206-07 (plurality opinion). Three of the five death penalty statutes considered on the same day as *Gregg* were also upheld. *See* Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion) (Louisiana statute which provided that death sentence was mandatory upon conviction for first degree murder invalidated and first degree murder was specifically defined to include certain types of murder); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion) (North Carolina statute which provided that death penalty was mandatory upon conviction for first degree murder invalidated); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion) (Texas statute which defined five circumstances for which the death penalty could be imposed and provided for separate sentencing hearing where jury was required to answer three questions upheld); Profitt v. Florida, 428 U.S. 242 (1976) (plurality opinion) (Florida statute which provided for two phase proceeding in which eight aggravating and seven mitigating circumstances were weighed by the jury in formulation of advisory verdict to judge upheld).

[54] 428 U.S. at 206 (plurality opinion). The *McGautha* Court rejected the use of standards for sentencing decisions. *See supra* notes 17-24 and accompanying text. The *Furman* Court invali-

by "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."[55] The statute contained a list of aggravating circumstances defining conditions under which the death penalty may be imposed.[56] While the Court had

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dated death sentences which were imposed by juries using standardless discretion. *See supra* note 38 and accompanying text. Therefore, the conflict regarding standards to guide sentencing discretion had to be resolved. The Court would have to define what was constitutionally required for a death penalty statute and the *Gregg* plurality recognized this need. 428 U.S. at 158 (plurality opinion).

[55] 428 U.S. at 195 (plurality opinion).

[56] Upholding the aggravating circumstances selected, the plurality reasoned that the Georgia Legislature's selection process for aggravation was the result of a careful analysis of those who could be deterred. *Id.* at 196-98 (plurality opinion). *But see* ANNUAL CHIEF JUSTICE EARL WARREN CONF. ON ADVOCACY IN THE U.S., THE PENALTY OF DEATH: FINAL REPORT 60-107 (1980), *reprinted in* Lempert, *Desert and Deterrence: An Evaluation of the Moral Bases for Capital Punishment*, 79 MICH. L. REV. 1177 (1981) (argument rejecting deterrence theory). The aggravating circumstances contained in the Georgia statute were:

> (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.
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> (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.
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> (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.
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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.
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> (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 arrest or custody in a place of lawful confinement, of himself or another.

GA. CODE. ANN. § 27.2534.1(b) (Supp. 1975), *reprinted in* 428 U.S. at 165 n.9 (plurality opinion). The plurality emphasized that subsection (b)(7) would have to be construed narrowly to meet constitutional requirements. 428 U.S. at 201 (plurality opinion). Rejecting the petitioner's over-breadth argument, the plurality stated that "there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Id. But see* Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979), *rev'd*, 446 U.S. 420 (1980).

previously rejected such sentencing standards,[57] the *Gregg* plurality viewed the aggravating circumstances as a mechanism to eliminate arbitrariness in the imposition of the death penalty.[58] The Georgia statute provided that aggravating circumstances were to be proved by the prosecution beyond a reasonable doubt and then balanced by the jury against mitigating circumstances in its determination of the sentence to be imposed.[59]

The constitutional framework which the plurality created through the approval of the Georgia statute required a bifurcated trial proceeding.[60] This proceeding required that the jury,[61] after receiving instructions on balancing aggravating and mitigating circumstances, render a sentence to be imposed at the second stage of the proceeding.[62] Georgia's requirement that the jury list the aggravating circum-

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[57] *See supra* notes 17-24 and accompanying text. The standards of aggravation adopted by Georgia resembled the Model Penal Code standards which had been rejected in *McGautha*. The approval of the use of standards compelled the reconciliation of *McGautha* and *Gregg*. *See* 428 U.S. at 195 n.47 (plurality opinion). Distinguishing *McGautha* as a fourteenth amendment case and not an eighth amendment case, the plurality asserted that standardless jury sentencing procedures were not employed in *McGautha* so as to violate the due process clause. *Id.* Therefore, the plurality suggested that the petitioners' death sentences in *McGautha* should be upheld despite *Furman*.

[58] 428 U.S. at 197 (plurality opinion). The plurality stated:

> These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as *Furman's* jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die.

Id.

The plurality observed that the aggravating circumstances of the Model Penal Code "provide[d] guidance to the sentencing authority and thereby reduce[d] the likelihood that [a jury] will impose" a capricious or arbitrary sentence. *Id.* at 193-95 (plurality opinion). Since the Georgia statute and the Model Penal Code were strikingly similar, it was inevitable that the Georgia statute would be upheld. *See id.* at 206 (plurality opinion). *Compare* MODEL PENAL CODE § 210.6(3) (Proposed Official Draft 1962), *reprinted in McGautha*, 402 U.S. at 222 app. 224 (list of aggravating circumstances) *with* GA. CODE ANN. § 27.2534.1(b) (Supp. 1975) (adopting eight of ten aggravating circumstances from Model Penal Code).

[59] 428 U.S. at 196-97 (plurality opinion).

[60] *See id.* at 190-91 (plurality opinion). The plurality observed that although "a bifurcated system is more likely to ensure elimination of . . . constitutional deficiencies," bifurcated proceedings were not constitutionally required. *See id.* at 190-93 (plurality opinion). The plurality intimated that bifurcation was preferable because information relevant to the issue of punishment but prejudicial to the guilt determination process could be admitted at the second stage of a bifurcated proceeding. *Id.*

[61] The plurality emphasized the importance of having the jury sentence the defendant. *Id.* at 190 (plurality opinion). The purpose of having the jury impose the sentence is " '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." ' " *Id.* (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1967) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[62] *See id.* at 192-97 (plurality opinion). The plurality emphasized the importance of an adequately instructed jury, stating that the inherent problems in jury sentencing, although not

stances present was determined by the plurality to provide the necessary record for meaningful appellate review.[63] Further, the plurality acknowledged that the Georgia statute's automatic appellate review provisions provided a safeguard against arbitrary death sentences.[64] The plurality held that in the aggregate these appellate safeguards freed the sentencing decision from arbitrariness.[65] Nevertheless, the jury retained discretion to decide who would receive the death sentence.[66] The plurality, however, did not view this jury discretion as promoting arbitrary and capricious decisions. On the contrary, it viewed this discretion as promoting more guided decisions.[67]

D. *Constitutional Requirements at the Penalty Proceeding*

After the *Gregg* plurality had expressly established the constitutionality of death as a punishment, the Supreme Court focused on the processes employed in imposing the penalty.[68] In order to withstand constitutional scrutiny, the process of imposing the death sentence had to promote enhanced reliability.[69] In *Gardner v. Florida*,[70] the plural-

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totally correctable, can be alleviated if a jury is properly instructed and informed. *Id.* at 192 (plurality opinion).

[63] *Id.* at 195 (plurality opinion).

[64] *Id.* at 198 (plurality opinion).

[65] *Id.*

[66] *Id.* at 197-98 (plurality opinion).

[67] *Id.* at 206-07 (plurality opinion). In Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion), the plurality confronted the tension created by *McGautha* and *Furman*—an elimination of arbitrariness without standards. The obvious solution—mandatory sentencing—was rejected by the plurality. The plurality stated that mandatory sentencing "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.* at 304 (plurality opinion). The plurality maintained "that in capital cases the fundamental respect for humanity . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense" before the death sentence can be constitutionally imposed. *Id.* (citation omitted); *accord* Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion).

[68] *See, e.g.*, Eddings v. Oklahoma, 102 S. Ct. 869 (1982) (death sentence invalidated because sentencing process excluded relevant mitigating evidence); Bell v. Ohio, 438 U.S. 637 (1978) (plurality opinion) (death sentence invalidated because statutory sentencing process excluded relevant mitigating evidence); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (death sentence invalidated because statutory sentencing process excluded relevant mitigating evidence); Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion) (death sentence invalidated because sentencing process did not meet requirements of due process).

[69] In Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion), the plurality stated:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. *Because of that qualitative*

ity adopted specific constitutional requirements for the sentencing trial.[71] The *Gardner* plurality stated that because of the ultimate distinction that exists between death and every other form of punishment, it is essential that both the trial and the sentencing process meet the demands of reason and the due process clause.[72] The plurality, therefore, maintained that both procedural and substantive due process elements had to be satisfied.[73]

In *Lockett v. Ohio*,[74] a plurality of the Court invalidated an Ohio statutory scheme which limited the amount of mitigating evidence which a jury could consider before imposing the death sentence.[75] The *Lockett* plurality stated that preventing the sentencer from giving "independent mitigating weight" to the mitigating circumstances "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[76] In order to satisfy constitutional requirements, concluded the plurality, the sentencer must consider all relevant mitigating circumstances when determining whether to impose the death penalty.[77]

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difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305 (plurality opinion) (emphasis added).

[70] 430 U.S. 349 (1977) (plurality opinion).

[71] *See id.* at 355-56 (plurality opinion); *supra* note 69. The plurality rejected the use of a presentence report to impose the death sentence when the defendant had not been given a copy of the report and had no opportunity to refute the allegations therein. 430 U.S. at 360-62 (plurality opinion); *cf.* Estelle v. Smith, 451 U.S. 454 (1980) (defendant must be warned of rights before allowing psychiatrist to speak with him if psychiatric testimony will be used to seek death penalty). *But cf.* Williams v. New York, 337 U.S. 241 (1949) (death penalty imposed on basis of presentence report affirmed although report had not been shared with defendant, but defendant was permitted to rebut report after judge read relevant section aloud).

[72] 430 U.S. at 357-58 (plurality opinion); *cf.* Specht v. Patterson, 386 U.S. 605 (1967) (due process protections available at hearing in which sentence may be imposed); Townsend v. Burke, 334 U.S. 736 (1948) (sentencing stage is critical stage in criminal proceeding). The *Gardner* plurality maintained that a majority of the Court had agreed that death was a different kind of punishment. To gain this "majority," the plurality aggregated the separate opinions (including concurrences and dissents) of five Justices in two different cases: *Gregg* and *Furman*. *See Gardner*, 430 U.S. at 357 (plurality opinion).

[73] The plurality did not maintain, however, that the entire spectrum of due process rights was required. It noted that the question of what process is due must be answered in accordance with the demands of each particular situation. *Id.* at 358 n.9 (plurality opinion) (construing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[74] 438 U.S. 586 (1978) (plurality opinion).

[75] *Id.* at 608 (plurality opinion); *accord* Bell v. Ohio, 438 U.S. 637 (1978) (plurality opinion).

[76] 438 U.S. at 605 (plurality opinion).

[77] *Id.* at 608 (plurality opinion). The *Lockett* plurality recognized that the " 'character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death.' " *Id.* at 601 (quoting *Woodson*, 428 U.S. at 304 (plurality opinion)); *cf.* Enmund v. Florida, 102 S. Ct. 3368 (1982)

In *Godfrey v. Georgia*,[78] four members of the Court[79] joined in a plurality opinion invalidating a death sentence because the Georgia Supreme Court had construed one of Georgia's statutory aggravating circumstances too broadly.[80] The plurality determined that since this broad statutory construction would encompass all murders, Georgia had impermissibly expanded the scope of the statute beyond the constitutional requirement that the statute operate to distinguish the few murders for which the death penalty is appropriate from the many for which it is not.[81] Moreover, the plurality intimated that certain mitigating circumstances had not been adequately balanced against the aggravating circumstances.[82] This failure to balance adequately, postulated the plurality, resulted in an unfair imposition of the death sentence.[83] To satisfy constitutional scrutiny, all mitigating evidence must be balanced against all aggravating evidence.[84]

In *Bullington v. Missouri*,[85] the Supreme Court held that the penalty proceeding, during which mitigating and aggravating circumstances are balanced, was a separate trial[86] with binding decisions

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(death sentence vacated because jury did not attach sufficient mitigating weight to defendant's relatively minor role in murder); Eddings v. Oklahoma, 102 S. Ct. 869 (1982) (death sentence vacated because trial court failed to consider emotional disturbance of 16-year-old youth).

[78] 446 U.S. 420 (1980) (plurality opinion).

[79] Justice Stewart, who authored the opinion of the Court, was joined by Justices Blackmun, Powell, and Stevens. *Id.* at 422 (plurality opinion).

[80] *Id.* at 432 (plurality opinion). The aggravating circumstance found to exist is codified at subsection (b)(7) of the Georgia statute. This subsection defines aggravation as a murder which "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE § 27-2534.1 (1978), *reprinted in* 446 U.S. at 422 (plurality opinion). The defendant in *Godfrey* killed his wife and mother-in-law by firing a single shotgun shell into each victim's head. The jury found beyond a reasonable doubt that each offense was "outrageously or wantonly vile, horrible and inhuman." 446 U.S. at 426 (plurality opinion).

[81] 446 U.S. at 433 (plurality opinion).

[82] *See id.* The plurality observed that relevant mitigating circumstances which were not considered included the following: The defendant's "victims were killed instantaneously"; the defendant suffered emotional trauma caused by his victims; and he accepted responsibility for the crimes. *Id.*

[83] *Id.* The plurality found it vitally important to both the defendant and the community that a sentence of death be and appear to be the result of reason and not of caprice and emotion. *Id.*

[84] *See Lockett*, 438 U.S. at 608 (plurality opinion); *Woodson*, 428 U.S. at 304 (plurality opinion); *Gregg*, 428 U.S. at 189 (plurality opinion); *cf.* Zant v. Stephens, 102 S. Ct. 1856 (1982) (question certified to Georgia Supreme Court inquiring why Georgia death penalty statute was interpreted to allow death sentence when one of statutory aggravating circumstances found to exist by the jury was declared unconstitutional).

[85] 451 U.S. 430 (1981).

[86] *See id.* at 438-39. The Court examined characteristics of the sentencing proceeding and determined that the sentencing proceeding was in fact a trial. *Id.* The characteristics that were statutorily prescribed were: counsel makes opening statements, testimony is taken, evidence is presented, jury instructions are given, final arguments are made, and jury deliberations result before a sentence is imposed. *Id.* at 438 n.10.

which could not be disturbed even if the initial proceeding determining guilt results in a mistrial.[87] The Court observed that the Missouri statute required that the aggravating circumstances be proved beyond a reasonable doubt.[88] In so doing, the Court recognized that the magnitude of the defendant's interest demands the protection of these interests by such a great standard of proof.[89] The Court stated that " 'our society imposes almost the entire risk of error upon itself.' "[90] The *Bullington* Court, therefore, accorded the sentencing proceeding in death penalty cases a significance not previously recognized.

III. The Constitutional Framework of the Capital Punishment Act

A. *Overview*

Consistent with the Supreme Court plurality opinions approving standards and procedures to impose the death penalty, the New Jersey Legislature enacted the Capital Punishment Act (the Act) which became effective August 6, 1982.[91] N.J. Stat. Ann. § 2C:11-3 provides for bifurcated trial proceedings[92] in capital cases and has defined both aggravating[93] and mitigating circumstances.[94]

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[87] *See id.* at 438-46. The Court distinguished United States v. DiFrancesco, 449 U.S. 117 (1981). It maintained that although the bifurcated proceeding at issue in *DiFrancesco* was used to enhance the defendant's sentence, the proceeding, unlike the *Bullington* bifurcated proceeding, was not *de novo* and the *DiFrancesco* sentencing judge, unlike the *Bullington* sentencer, was not limited to the disparate sentencing choice between life or death. 451 U.S. at 440.

[88] 451 U.S. at 441.

[89] *Id.*

[90] *Id.* (quoting Addington v. Texas, 441 U.S. 418, 423-24 (1979)).

[91] N.J. Stat. Ann. § 2C:11-3 (West 1982) (editor's commentary).

[92] *Id.* § 2C:11-3(c)(1) provides: "The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death." The New Jersey Rules of Evidence will apply at the penalty phase of the bifurcated proceeding. An earlier version of the death penalty statute provided that the rules of evidence would be relaxed for the defendant's introduction of any mitigating evidence. Capital Punishment Act, ch. 111, § 1, 1982 N.J. Sess. Law Serv. 417, 419 (West) (deleted from Act by Senate Committee amendments adopted Mar. 1, 1981). The Senate Judiciary Committee deleted this material because the committee "felt that inclusion of this provision could have led to the introduction by the defense of totally irrelevant material solely as a delaying tactic." Senate Judiciary Comm., 200th Leg., 1st Sess., Statement to Senate No. 112, at 2 (Bill Statement 1982) [hereinafter cited as Bill Statement]. Accordingly, since the provisions providing for the nonapplicability of the rules of evidence has been deleted and there is no language indicating a contrary intent, it is fair to assume that the rules of evidence apply at the penalty trial.

[93] *See* N.J. Stat. Ann. § 2C:11-3(c)(4). The aggravating factors which the jury may consider in deciding whether to impose the death penalty are whether:

(a) The defendant has previously been convicted of murder;

(b) In the commission of the murder, the defendant purposely or knowingly created

B. *Bifurcated Trials*

The bifurcated trial requires two distinct proceedings within the single murder trial.[95] The first proceeding mirrors the traditional adversarial proceeding determining guilt.[96] The second proceeding is a penalty phase proceeding during which the parties present to the

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a grave risk of death to another person in addition to the victim;
(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of any thing of pecuniary value;
(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;
(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;
(g) The offense was committted while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary or kidnapping; or
(h) The defendant murdered a public servant, as defined in 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

Id.

[94] *See id.* § 2C:11-3(c)(5). The mitigating factors which the jury may consider in deciding if the death penalty is warranted are whether:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;
(b) The victim solicited, participated in or consented to the conduct which resulted in his death;
(c) The age of the defendant at the time of the murder;
(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;
(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;
(f) The defendant has no significant history of prior criminal activity;
(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or
(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

Id.

[95] *See* Comment, *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50 (1964) [hereinafter cited as Comment, *Two-Trial System*]; Comment, *The Constitutionality and Desirability of Bifurcated Trials and Sentencing Standards*, 2 SETON HALL L. REV. 427 (1971) [hereinafter cited as Comment, *Constitutionality of Bifurcated Trials*]. *See generally* Comment, *The California Penalty Trial*, 52 CALIF. L. REV. 386 (1964) (benefits of bifurcation when sentencing); *Study of the California Penalty Jury in First Degree Murder Cases*, 21 STAN. L. REV. 1297 (1969) (empirical research conducted on the bifurcated and unitary systems) [hereinafter cited as Comment, *California Penalty*].

[96] *See* N.J. STAT. ANN. § 2C:11-3(c)(1).

jury aggravating and mitigating circumstances so that the jury may weigh these factors and determine whether aggravation outweighs mitigation.[97] The court will then impose a sentence consistent with the jury's verdict.[98]

The penalty phase proceeding commences after the judge or jury has rendered a guilty verdict or the defendant has entered a guilty plea.[99] The sentencer will then weigh the aggravating and mitigating circumstances in the sentencing process.[100] The use of the bifurcated trial is not new.[101] Bifurcated trials serve two functions. First, the defendant can assert his fifth amendment privilege not to testify at the guilt determining stage while preserving his right to testify at the penalty phase prior to sentencing.[102] This procedure was followed to ensure more reliable sentencing decisions. Second, bifurcation provides the prosecution with the opportunity to introduce into evidence proof of prior crimes.[103] With the advent of statutorily defined aggra-

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[97] *Id.* § 2C:11-3(c)(3).

[98] *Id.*

[99] *Id.* § 2C:11-3(c)(1).

[100] *Id.* The Act provides in pertinent part:

> Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury.

Id.

A new jury may be empaneled for the penalty trial for good cause. *Id.* The drafters cited an illness of the defendant which would result in a "lengthy delay" as an example of good cause. Bill Statement, *supra* note 92, at 1.

[101] Bifurcated trials have been used for over 20 years. *See* Comment, *The Two-Trial System*, *supra* note 95, at 58 (California, Connecticut, New York, and Pennsylvania have employed bifurcated systems in capital cases). Furthermore, bifurcated trials had been used prior to the development of sentencing standards in capital cases. *See* Comment, *California Penalty*, *supra* note 95, at 1297 (California, Connecticut, New York, Pennsylvania and Texas provided bifurcated trials without sentencing standards).

[102] *See* Comment, *Constitutionality of Bifurcated Trials*, *supra* note 95, at 428 (unitary proceeding "forces a defendant to choose between his fifth and fourteenth amendment rights against self-incrimination and his fourteenth amendment right to be heard"); *see also supra* notes 25-34 and accompanying text.

[103] *See, e.g.*, ALA. CODE tit. 13, § 13A-5-40 (Michie Supp. 1981) (murder by defendant who has been convicted of any other murder in the 20 years preceding the crime defined as aggravating circumstance provided that murder meets current definition under statute); COLO. REV. STAT. § 16-11-103(6)(a) (Bradford-Robinson 1978) (previous murder conviction defined as aggravating circumstance); CONN. GEN. STAT. ANN. § 53a-46a (West Cum. Supp. 1982) (two or more state offenses or federal offenses punishable by more than one year imprisonment and

vating circumstances under the *Gregg* rationale, bifurcation operates as an expedient to allow evidence of prior crimes to be introduced, although this evidence would have been inadmissible at the defendant's guilt trial.[104] While the Supreme Court has distinguished the introduction of prior crimes evidence at the guilt trial from the punishment trial,[105] the New Jersey Supreme Court has been reluctant to ignore the prejudicial impact of this evidence regardless of whether the trial is limited to capital sentencing.[106] In *State v. Forcella*,[107] the court recognized that because bifurcated proceedings permitted this evidence to be introduced, bifurcation was not unequivocally better for defendants.[108] Indeed, when prior crimes evidence is admitted, the likelihood that the death penalty will be imposed is enhanced.[109]

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which involved serious bodily injury defined as aggravating circumstance); FLA. STAT. ANN. § 921, 141(5)(b) (West Cum. Supp. 1983) (previous capital felony or felony involving use or threat of violence defined as aggravating circumstance). *But see* DEL. CODE tit. 11, § 4209 (Michie Cum. Supp. 1982) (prior conviction for murder is not defined as aggravating circumstance).

[104] *See* Michelson v. United States, 335 U.S. 469 (1948).

[105] *Compare* Spencer v. Texas, 385 U.S. 554, 560 (1967) (prior crimes evidence generally excluded at guilt trial unless "particularly probative in showing . . . intent, . . . malice, . . . motive") *and* Michelson v. United States, 335 U.S. 469, 475 (although logically probative, prosecution in its presentation of case-in-chief may not utilize specific criminal acts) *with Gregg*, 428 U.S. at 191-92 (plurality opinion) (prior crimes evidence admissible at penalty trial).

[106] *See infra* notes 118-20 and accompanying text.

[107] 52 N.J. 263, 245 A.2d 181 (1968), *rev'd on other grounds sub nom.* Funicello v. New Jersey, 403 U.S. 948 (1971) (mem.).

[108] *See id.* at 288-89, 245 A.2d at 194-95. The court stated:

> A few States use the bifurcated trial, so that the subject of punishment may be heard after the jury has decided upon guilt. Some defendants may well fare better under that plan. But if there were a separate hearing on punishment, the one-way street we now have would likely be opened to the State too, and for many defendants that would be devastating. We have serious doubts as to whether the bifurcated trial would not worsen the lot of defendants as a group, and for that reason, wholly apart from the question whether our statute is so phrased as to permit bifurcation, we have been reluctant to act until some hard facts are available. If the prosecutor were now free to offer everything relevant to punishment at the trial of guilt, defendants might well gain from bifurcation, but, as we have said, that is not our scene; and it is in the light of what we have that we hesitate to change without some clear evidence that the bifurcated trial would be an improvement here.

Id. at 289, 245 A.2d at 195; *accord* State v. Laws, 51 N.J. 494, 513, 242 A.2d 333, 344 (absent express evidence that bifurcated trials do not prejudice defendants, "it would be 'loath to compel unwilling defendants to submit to a procedure which is devised for their benefit but which may be prejudicial in its application to a particular case' ") (quoting United States v. Curry, 358 F.2d 904, 914 (2d Cir.), *cert. denied*, 385 U.S. 873 (1966)), *cert. denied*, 393 U.S. 971 (1968); *see also infra* notes 118 & 119 and accompanying text.

[109] *See* Comment, *California Penalty*, *supra* note 95, at 1326. The Supreme Court has relied on *Gregg* in determining that prior crimes evidence is admissible during the penalty trial. The *Gregg* plurality stated:

C. *New Jersey's Selection of Aggravating Circumstances*

The aggravating circumstances selected by the New Jersey Legislature[110] mirror the aggravating circumstances selected by the Georgia Legislature which were challenged in *Gregg*.[111] Although the Georgia statute withstood constitutional scrutiny, it is by no means certain that New Jersey's statutory aggravating circumstances can withstand a federal constitutional challenge.[112] The *Gregg* plurality stated that the legislatures, when drafting death penalty legislation, should "evaluate the results of statistical studies in terms of their own local conditions [and determine] those crimes and those criminals for which capital punishment is most probably an effective deterrent."[113] This process would ensure that the punishment "makes [a] measurable

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> Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure—one in which the question of sentence is not considered until the determination of guilt has been made—is the best answer.

428 U.S. at 190-91 (plurality opinion) (footnotes omitted). In *Gregg*, the plurality ignored the prejudicial impact which prior crimes evidence can have on a jury which is deciding whether to impose the death sentence. To support the argument that prior crimes evidence should be admitted, the plurality cited Spencer v. Texas, 385 U.S. 554 (1967), in which a conviction under the Habitual Offenders Act was upheld although prior crimes evidence was admitted to support the conviction and extend the term of the sentence. *Id.* at 568-79. The *Gregg* plurality's reliance on *Spencer*, however, is specious since it has the effect of comparing a trial for the death penalty with a trial for an extended term of years. Such a comparison ignores the command in *Woodson* that the death penalty cannot be compared to a prison sentence, however long. *See Woodson*, 428 U.S. at 305 (plurality opinion).

[110] *See supra* note 93.

[111] *Compare supra* note 93 *with supra* note 56. Georgia's aggravating circumstances differ from New Jersey's in that the Georgia statute defines rape and armed robbery as capital crimes punishable by death when an aggravating circumstance is present. *See* GA. CODE ANN. § 27.2534.1 (Supp. 1975). In a post *Gregg* decision, four members of the Court held that the death penalty was an excessive punishment for rape even when aggravating circumstances were present. Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion). The *Coker* plurality stated:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and the public, it does not compare with murder which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person.

Id. at 598 (plurality opinion) (footnote omitted). *A fortiori*, imposition of the death penalty for armed robbery is also excessive. *See Gregg*, 428 U.S. at 205-06 (plurality opinion) (death sentence upheld for murder while death sentence for armed robbery invalidated).

[112] In *Gregg*, the plurality emphasized that individual states must analyze their local conditions in drafting death penalty statutes which will withstand constitutional scrutiny. 428 U.S. at 186 (plurality opinion).

[113] *Id.* (citing *Furman*, 408 U.S. at 403-05 (Burger, C.J., dissenting)).

contribution to acceptable goals of punishment and hence is . . . more than the purposeless and needless imposition of pain and suffering."[114] Therefore, the constitutionality of the New Jersey death penalty depends upon an assessment of deterrence statistics as they relate to New Jersey in order to determine whether a "measurable contribution to the acceptable goals of punishment" will be made. Although an analysis of deterrence statistics is required of legislatures drafting death penalty statutes, there is no evidence that the New Jersey Legislature performed this analysis in drafting the Capital Punishment Act.[115] Senator John Russo, one of the sponsors of the death penalty bill, stated: "[I] have never attempted to justify the death penalty on an empirical deterrence argument. It cannot be done."[116] Since this evidence has not been presented, the Act cannot be justified as making a measurable contribution to acceptable goals of punishment. The discussion during the public hearings indicates that deterrence research was not used to support the legislative decision to draft a death penalty statute.[117]

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[114] Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). The *Coker* plurality cited *Gregg* in maintaining that punishment is excessive and unconstitutional when it is purposeless and disproportionate to the gravity of the crime. *Id.*

[115] The statement which accompanied the death penalty bill to the full Senate contained no reference to the statistical analysis envisioned by the *Gregg* plurality. In fact, there is no reference to deterrent effect. *See* Bill Statement, *supra* note 92; *see also Capital Punishment Act: Hearings on S. 112 Before the N.J. Senate Judiciary Comm.*, 200th Legis., 2d Sess. 31 (1982) (statement of Sen. Russo) [hereinafter cited as *Senate Hearings*].

[116] *Senate Hearings*, *supra* note 115, at 31 (statement of Sen. John Russo made in response to Mr. Stanley Van Ness, Public Defender of the State of New Jersey).

[117] *See id.* Senator Russo, Chairman of the Senate Judiciary Committee, did not perceive a requirement to justify the death penalty in such a manner.

> Senator Russo: I will not argue because you can't prove that having a death penalty will deter murders. I have a feeling that it will, but I can't prove it. I could not argue that you are wrong. So, I simply say that when we—You might say, how many murders would there have been of cops in New York had we had no death penalty. Would there have been more? I don't know.
>
> Mr. Van Ness: I am sorry to cut in. I suppose that what I am trying to suggest is that there should be a burden on you and on those of you who favored your position to demonstrate the utility, not the burden on me to demonstrate the reverse.
>
> Senator Russo: Well, yes, Senator Vreeland says, "Why." I say, "Why," too. I don't think there is any—
>
> Senator Vreeland: Why do you make that statement?
>
> Mr. Van Ness: Well, because you are now talking about passing an act that will result at somewhere along the way in all probability in somebody's life being taken. I think there ought to be somebody's clear justification for that. Now, if you have it in your mind and you tell me you don't think it is deterrence—
>
> Senator Russo: I didn't say that. I said I can't prove it is a deterrent.
>
> Mr. Van Ness: You can't prove those deterrents. You think there might be some deterrent. If that satisfies enough of you, then by all means we will have a law. But,

Additionally, the New Jersey Legislature selected the aggravating circumstance of previous conviction for murder, despite the ruling of the New Jersey Supreme Court in *Forcella* that prior crimes evidence was inadmissible against a defendant even at the penalty stage of a bifurcated proceeding in a capital case.[118] The court stated that "*the State may not prove a defendant's criminal record for the purpose of a jury's consideration of punishment.*"[119] While the Federal Constitution may permit the introduction of prior crimes evidence into the punishment phase of the bifurcated trial, the New Jersey Supreme Court can decide this material is too prejudicial[120] and hold under state constitutional law that its introduction into evidence violates the due process clause of the New Jersey Constitution.[121]

Another troublesome area of the Capital Punishment Act is the provision which designates as an aggravating circumstance that "[t]he murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[122] The New Jersey Legislature adopted this particular aggravating circumstance verbatim from the Georgia death penalty statute.[123] This provision must be construed narrowly to meet consti-

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> in my judgment that isn't sufficient justification, and you ought to be sure that when you do something as drastic as this thing that you are contemplating that you know what you are doing. I say that respectfully.
>
> Senator Russo: I think if we were to assume or agree with you on that, then, yes, it would be a different situation. I don't think that it is a prerequisite to voting for the death penalty, that I can be sure. You are dealing with human events. You are never going to be sure. You have to make the judgment you think is right and hope that you can live with it.

Id.

[118] *Forcella*, 52 N.J. at 288-89, 245 A.2d at 194-95.

[119] *Id.* at 288, 245 A.2d at 194 (emphasis added).

[120] *See* State v. Laws, 51 N.J. 494, 514, 242 A.2d 333, 344 (consideration of prior criminal records on punishment alone is "inhumanely . . . death oriented"), *cert. denied*, 393 U.S. 971 (1968).

[121] *Cf.* State v. Alston, 88 N.J. 211, 440 A.2d 1333 (1982) (broader constitutional rights granted under New Jersey Constitution than available under United States Constitution in area of standing to challenge search and seizure); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980) (broader constitutional rights granted under New Jersey Constitution than available under United States Constitution in area of free speech); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (broader constitutional rights granted under New Jersey Constitution than available under United States Constitution in area of consent searches). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Mosk, *The New States Rights*, 10 CAL. J. LAW ENFORCEMENT 8 (1976).

[122] N.J. STAT. ANN. § 2C:11-3(c)(4)(c).

[123] *Compare id. with* GA. CODE ANN. § 27.2534.1(b)(7) (Harrison 1983).

tutional standards,[124] but New Jersey courts will be troubled in attempting to provide a consistent interpretation to this vague standard.[125] The failure to give notice of what conduct will be specifically punishable with death constitutes a due process impairment.

D. *New Jersey's Selection of Mitigating Circumstances*

The mitigating circumstances in the Act[126] resemble those of the Model Penal Code and the Florida statute which was upheld in *Profitt v. Florida*.[127] There is a constitutional requirement that the defendant be permitted to introduce all mitigating evidence.[128] The *Lockett* plurality stated:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[129]

Although the sentencer must consider as mitigation "[a]ny other factor which is relevant to the defendant's character or record or to the circumstances of the offense,"[130] certain mitigating circumstances selected by the New Jersey Legislature eviscerate protections afforded

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[124] *See Godfrey*, 446 U.S. at 430-31 (plurality opinion) (provision includes only torture, depravity of mind, or aggravated battery with specific definitions applying to each item); *Gregg*, 428 U.S. at 201 (plurality opinion) (provision cannot be given "open-ended construction").

[125] *See* Holton v. State, 243 Ga. 312, 253 S.E.2d 736 (aggravating circumstance of death "by reason of depravity of mind" present when shooting preceded by infliction of wounds with kitchen knife, spear, and tomahawk), *cert. denied*, 444 U.S. 925 (1979); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (shooting of 11 year old child in head found to be "horrible and inhuman" thus aggravating circumstance), *cert. denied*, 444 U.S. 995 (1979); Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (throwing of child off bridge into water resulting in drowning of child held to be aggravating circumstance), *cert. denied*, 434 U.S. 960 (1977).

[126] See *supra* note 92.

[127] 428 U.S. 242 (1976) (plurality opinion). *Compare* N.J. STAT. ANN. § 2C:11-3(c)(5) *with* FLA. STAT. ANN. § 782.04 (Supp. 1976-1977) *and* MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). The New Jersey statute differs from the Florida statute and the Model Penal Code in that it adds as a mitigating circumstance that "[t]he defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder." N.J. STAT. ANN. § 2C:11-3(c)(5)(g).

[128] *See Lockett*, 438 U.S. at 604 (plurality opinion).

[129] *Id.* (footnotes omitted) (emphasis in original); *cf.* Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) ("In these unique circumstances, 'the hearsay rule may not be applied mechanistically [during penalty trial] to defeat the ends of justice' ") (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978).

[130] N.J. STAT. ANN. § 2C:11-3(c)(5)(h).

defendants under prior law, expand the class of individuals now susceptible to the death penalty, and circumvent commands of the Supreme Court. The statute provides as a mitigating circumstance the age of the defendant at the time of the murder, thus changing prior law which had specifically prohibited imposing capital punishment on youths.[131] The New Jersey Legislature has circumvented the Supreme Court command that no limitation may be placed on the jury's consideration and weighing of mitigation. This has been done by providing that "unusual and substantial duress insufficient to constitute a defense to prosecution" is a mitigating circumstance.[132] Duress is an affirmative defense[133] but it is insufficient to constitute an absolute defense to murder; rather it is an affirmative defense which reduces murder to manslaughter.[134] A defendant who attempts to establish duress will introduce such evidence at the guilt stage of the murder trial in an effort to be found guilty of the lesser offense. If the defendant is unsuccessful at the guilt stage, he will again introduce evidence of duress at the penalty phase.[135] This presents a problem for the defendant. The judge will instruct the jury that the mitigating circumstance of duress requires a finding of "unusual and substantial duress insufficient to constitute a defense to prosecution." Having already concluded that duress sufficient "to constitute a defense to prosecution" was not present, the jury must then consider the defendant's evidence of duress for mitigation, cognizant that the evidence must show that the duress was "unusual and substantial." Since the duress defense for the murder charge does not require the "unusual and substantial" standard, the jury will presume that the mitigating factor of duress represents a higher threshold. If the defendant cannot meet the lower threshold at the guilt trial, he will be unable to meet the higher standard at the penalty trial. Therefore, a finding of "unu-

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[131] *See* State v. Monahan, 15 N.J. 34, 104 A.2d 21 (1954) (persons under age of 16 at time of commission of crime could not receive capital sentence in New Jersey). *See generally* Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964).

[132] N.J. STAT. ANN. § 2C:11-3(c)(5)(e).

[133] *Id.* § 2C:2-9(a) (West 1982) provides in pertinent part that:

> [I]t is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

Id.

[134] *Id.* § 2C:2-9(b) provides in pertinent part: "In a prosecution for murder, the [duress] defense is only available to reduce the degree of the crime to manslaughter."

[135] *Id.* § 2C:11-3(c)(2) provides that "[t]he defendant shall have the burden of producing evidence of the existence of any mitigating factors."

sual and substantial" duress requires a conclusion contrary to the verdict reached at the guilt trial.

Similarly, the legislature has circumvented the command of the Supreme Court by providing that "extreme mental or emotional disturbance" is a mitigating circumstance.[136] At the guilt trial, "[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense."[137] The defendant is required to prove this defect by a preponderance of the evidence.[138] If the defendant fails to prove mental disease at the guilt trial, he will be in a similar position at the penalty trial as the defendant seeking to establish duress as a mitigating circumstance. The same limitation on the jury's consideration and weighing exists because the legislature has defined mental or emotional disturbance as "extreme" in order to constitute a mitigating circumstance, thus connoting a higher threshold to establish mitigation. These inferential results are contrary to the constitutional requirement that the jury give independent consideration and weight to the defendant's mitigating evidence.[139] Therefore, the New Jersey Legislature's limitation of duress as "unusual and substantial" and "mental or emotional disturbance as extreme" "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[140]

E. *Establishing Aggravating and Mitigating Circumstances at the Penalty Trial*

In order to impose the death sentence, the prosecution must prove beyond a reasonable doubt during the penalty trial that one of the statutorily defined aggravating circumstances is present.[141] If the prosecution fails to make this showing, the defendant may be sentenced to thirty years imprisonment or life imprisonment with no eligibility for parole for thirty years.[142] Conversely, if the defendant is to avoid the death sentence after the prosecution has established the existence of an aggravating circumstance, he must establish the exis-

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[136] *Id.* § 2C:11-3(c)(5)(a).

[137] *Id.* § 2C:4-2.

[138] *Id.*

[139] *Lockett*, 438 U.S. at 605 (plurality opinion); *see also supra* notes 68-84 and accompanying text.

[140] *Lockett*, 438 U.S. at 605 (plurality opinion).

[141] N.J. STAT. ANN. § 2C:11-3(c)(2), (c)(3)(a).

[142] *Id.*; § 2C:11-3(c)(3)(b); *cf. In re* Winship, 397 U.S. 358 (1969) (all elements of crime must be proved beyond reasonable doubt to comport with due process of law).

tence of sufficient mitigation to outweigh the aggravating circumstance.[143]

Under the Capital Punishment Act, the defendant bears the burden of producing evidence[144] to establish mitigating circumstances.[145] The burden of persuasion[146] for mitigating circumstances, however, is not defined in the Act.[147] The legislative history of the Act reveals that differing opinions concerning this burden were present.[148] In an earlier draft of the Capital Punishment Act, the Senate Judiciary Committee included a provision requiring the defendant to prove mitigating circumstances by a preponderance of the evidence.[149] This requirement, however, was eliminated in anticipation of a constitutional challenge.[150] Concern was voiced that allocating the burden of proof to the defendant by a preponderance of the evidence would require a quantum of mitigating evidence before the jury could find the existence of a mitigating factor.[151] The Attorney General's office stated that the resulting effect would be that the defendant's evidence of mitigation would be totally rejected if the jury found it insufficient to satisfy the preponderance of the evidence standard.[152] Thus, the defendant may have introduced mitigating evidence which the jury would be precluded from giving independent mitigating weight be-

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[143] N.J. STAT. ANN. § 2C:11-3(c)(3)(b).

[144] *Id.* § 2C:11-3(c)(2). N.J. R. EVID. 1 (5) defines the burden of producing evidence as "the obligation of a party to introduce evidence when necessary to avoid the risk of a judgment or peremptory finding against him on a material issue of fact." *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 336 (E. Cleary 2d ed. 1972); 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2483 (J. Chadbourn rev. ed. 1981).

[145] N.J. STAT. ANN. § 2C:11-3(c)(2).

[146] In New Jersey the "[b]urden of proof is synonymous with the 'burden of persuasion.' " N.J. R. EVID. 1(4). " 'Burden of proof' means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be." *Id. See generally* C. MCCORMICK, *supra* note 144, §§ 336-338; 9 J. WIGMORE, *supra* note 144, §§ 2483-2489.

[147] *See* N.J. STAT. ANN. § 2C:11-3.

[148] *Compare Senate Hearings, supra* note 115, at 11 (statement of Mr. Edwin Stier) ("The defendant has no burden of proof on those mitigating factors") *with id.* at 12 (statement of Sen. Russo) (original bill provided that "defendant had the burden of proof by a preponderance of the evidence only on mitigating factors").

[149] Capital Punishment Act, ch. 111, § 1, 1982 N.J. Sess. Law Serv. 417, 419 (West) (proposed bill).

[150] *See Senate Hearings, supra* note 115, at 13 (statement of Mr. Edwin Stier).

[151] *Id.* Preponderance of the evidence has been defined as the obligation to prove "that a desired inference is more probable than not." NEW JERSEY RULES OF EVIDENCE comment 5 to N.J. R. EVID. 1(4) (R. Biunno & F. Guarini eds. 1983). "If the evidence is in equipoise, the burden has not been met." *Id.*

[152] *See Senate Hearings, supra* note 115, at 13 (statement of Mr. Edwin Stier).

cause of the proposed burden of persuasion.[153] Due to an anticipated *Lockett* challenge,[154] the burden of persuasion was totally eliminated from the statute.[155]

The legislative decision in New Jersey to eliminate a burden of proof for mitigation was error, since the Supreme Court has stated that the allocation of the burden of proof "may be decisive of the outcome."[156] The Supreme Court, therefore, has carefully reviewed legislative decisions to allocate the burden of proof in criminal trials.[157] Authorities have recognized that rules "allocating and describing [the burden of proof] could not be discarded by a rational legal system."[158] These rules serve as a guide for juries in determining whether certain facts exist. To illustrate, in circumstances in which the evidence is insufficient, equivalent, or credible on both sides, the jury will be unable to determine whether mitigating circumstances exist. Constitutional considerations command that the burden of proof must, at times,[159] be assigned to the prosecution.[160] In *In re Winship*,[161] the Court held that the burden to prove every element of the crime must be assigned to the prosecution.[162] The Court recognized that the due process clause required that " 'no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' "[163] Likewise, the burden to prove that the defendant deserves the death sentence must be placed upon the prosecution because no man should lose his life unless the government has convinced the factfinder that there is insufficient mitigation.

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[153] *See generally* Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317 (1981).

[154] *See supra* notes 74-77, 129, 139 & 140 and accompanying text.

[155] *See Senate Hearings*, *supra* note 115, at 13 (statements of Mr. Edwin Stier, Sen. John Russo).

[156] Speiser v. Randall, 357 U.S. 513, 525 (1958). *See generally* Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 21 n.100 (1980); Liebman & Shephard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate:" Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 821 n.277 (1978).

[157] *See* Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 358 (1970); Speiser v. Randall, 357 U.S. 513 (1958).

[158] C. MCCORMICK, *supra* note 144, § 336.

[159] *See infra* note 211.

[160] In addition to the constitutional significance of assigning a burden of proof to guide the jury in its decisionmaking function, the burden aids the trial process itself. C. MCCORMICK, *supra* note 144, § 336.

[161] 397 U.S. 358 (1970).

[162] *Id.* at 364.

[163] *Id.* (quoting Dorsen & Rezneck, *In Re* Gault *and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 26 (1967) (omission in original)).

Other provisions of the criminal code cannot be used to define the burden of proof in the Capital Punishment Act. N.J. Stat. Ann. § 2C:1-13(d) provides:

> When the application of the code depends upon the finding of a fact which is not an element of an offense, unless the code otherwise provides:
> (1) The burden of proving the fact is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made; and
> (2) The fact must be proved to the satisfaction of the court or jury, as the case may be.[164]

To use this provision of the Code to supply the missing elements of the Act would require that the state be viewed as the "party whose interest is furthered" since the drafters of the Act clearly intended that no burden of proof be placed upon the defendant.[165] The state's interest at the penalty trial, however, is not imposing the death sentence, but is ensuring that justice is done.[166] Even if this provision were used to supplement the Act, the resulting effect could not withstand constitutional scrutiny.[167] Describing the level of proof to a jury as proof to their satisfaction is so vague[168] that the jurors are likely to develop their own standard of proof.[169] Additionally, the discretion afforded by this provision gives the jury the type of untrammeled discretion condemned in *Furman*.[170] Further, the legislative history of this provision reveals that it was drafted for the express purpose of broadening the discretion of the court.[171] Not since *McGautha* has the discretion of the sentencing authority to impose the death sentence been broadened. This provision, when used during the penalty trial,

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[164] N.J. STAT. ANN. § 2C:1-13(d) (West 1982).

[165] *See supra* notes 147-55 and accompanying text.

[166] *See* Berger v. United States, 295 U.S. 78, 88 (1935); *see also* MODEL CODE OF PROFESSIONAL CONDUCT EC 7-13 (1981).

[167] Moreover, the legislative history indicates that the drafters did not intend to use this provision of the criminal code to define the burden of proof. *See Senate Hearings*, *supra* note 115, at 11-13.

[168] NEW JERSEY CRIMINAL LAW REVISION COMM'N, 2 NEW JERSEY PENAL CODE: FINAL REPORT 39 (1971) ("[t]he standard of proof. . . i.e., that the fact 'be established to the satisfaction' of the tribunal is intentionally ambiguous").

[169] *See infra* notes 180-82 and accompanying text.

[170] *See supra* text accompanying notes 37-40.

[171] This provision was modeled after MODEL PENAL CODE § 1.12 (Tent. Draft No. 4, 1955). N.J. STAT. ANN. § 2C:1-13 (West 1982) (historical note). The commentary to this provision of the Model Penal Code reveals that it was drafted to "broaden the discretion of the court." MODEL PENAL CODE § 1.12 commentary at 108 (Tent. Draft No. 4, 1955).

therefore, actually reduces a criminal defendant's protections.[172] Ambiguous terms and reduced procedural protections cannot be utilized when the state seeks to impose its most severe form of punishment "different in both its severity and its finality."[173]

Additionally, because the burden of proof is not defined in the statute, the trial judge will not be required to instruct the jury regarding the standard of proof for mitigation. If jury instructions on mitigating circumstances are not provided, the defendant will be denied the benefits which naturally arise therefrom. This is evident because jury instructions have been recognized as: (1) explaining a party's legal theory and the manner in which the evidence supports it; (2) reinforcing the evidence in the minds of the jurors; and (3) cloaking the evidence with the court's authority by having the trial judge discuss the evidence.[174]

In *Gregg*, the plurality recognized that the jury was "unlikely to be skilled in dealing with the information they are given."[175] The problem created by an untrained jury making a capital sentencing decision is alleviated, the plurality reasoned, by giving the jury guidance and instructions.[176] Citing the standard practice of giving juries "careful instructions on the law and how to apply it before they are authorized to decide,"[177] the plurality stated "[i]t would be virtually unthinkable to follow any other course,"[178] since jury instructions and the guidance which they provide are the "hallmark of our legal system."[179]

The elimination of an evidentiary requirement for mitigation from the Capital Punishment Act and consequential elimination of jury instructions for mitigation denies a capital defendant due process

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[172] *See* MODEL PENAL CODE § 1.13 commentary at 108 (Tent. Draft No. 4, 1955). ("To the extent that it permits a finding that will result in increase of sentence, upon less than proof beyond a reasonable doubt, it is in terms less favorable to defendants").

[173] *Gardner*, 430 U.S. at 357 (plurality opinion). The plurality in *Gardner* stressed that "[t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* at 358 (plurality opinion).

[174] Hertz & Weisberg, *supra* note 153, at 347.

[175] 428 U.S. at 192 (plurality opinion).

[176] *Id.*

[177] *Id.* at 193 (plurality opinion).

[178] *Id.*; *see* Gasoline Prods. Co. v. Champlin Co., 283 U.S. 494, 498 (1931).

[179] 428 U.S. at 193 (plurality opinion). The Supreme Court has maintained that proper jury instructions are critical to a fair trial and thus has overturned convictions for improper instructions. *See, e.g.*, Cool v. United States, 409 U.S. 100 (1972).

rights.[180] With no instruction on the standard of proof for establishing mitigation, the jurors are provided no guidance on how to weigh the defendant's evidence of mitigation and the prosecution's evidence rebutting the existing mitigation. It is a reasonable assumption that the individual jurors will place the burden of persuasion for mitigation on the defendant since the defendant has the burden of production and will benefit by proof of mitigation.[181] The defendant's mitigating evidence will be subjected to a standard of proof which requires the defendant to introduce the greater weight of the evidence in order to establish mitigating factors. This preponderance of the evidence standard focuses the jurors' minds on the weight of the evidence.[182] Yet, the quantity of evidence introduced is often a function of the resources available to a party.[183] The state, therefore, will be in a better position to introduce the greater weight of the evidence that mitigating circumstances were not present. Since the jury will subject the mitigating evidence to a quantitative analysis, it will conclude that mitigating circumstances are not present when in fact they are. Thus, the defendant will receive the death sentence when the jury rejects mitigating evidence which is insufficient in quantity. This is precisely the harm sought to be eliminated by the drafters.[184]

Without guidance, a jury cannot meet *Gregg's* constitutional command that "sentencing procedures should not create 'a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.' "[185] Furthermore, the significance of mitigating circumstances is effectively diminished because the defendant's evidence of mitigation will not receive any of the benefits flowing from jury instructions.[186] In contrast, the state's evidence supporting the existence of aggravating circumstances will receive all of the benefits flowing from jury instructions. The inference that aggravating cir-

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[180] *Cf. Lockett*, 430 U.S. at 606-07 (plurality opinion) (insufficient to permit defendant to introduce all evidence of mitigation when death penalty statute operates as device placing limitation on sentencing authority's evaluation of evidence).

[181] *See* C. McCormick, *supra* note 144, § 336 ("[if no burden of proof were defined] the trier of fact would itself assign a burden of persuasion, describing that burden as it saw fit by substituting its own notions of policy for those now made available . . . as a matter of law").

[182] *Id.* § 339.

[183] *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (state holds superior position in criminal trial); *see also* Wardius v. Oregon, 412 U.S. 470 (1973); State v. Cook, 43 N.J. 560, 206 A.2d 359 (1965).

[184] *See Senate Hearings*, *supra* note 115, at 13 (statement of Mr. Edwin Stier).

[185] *Lockett*, 438 U.S. at 601 (plurality opinion) (quoting *Gregg*, 428 U.S. at 188 (plurality opinion)).

[186] *See supra* note 146 and accompanying text.

cumstances have a special significance which mitigating circumstances do not will be made easily.[187] The legal emphasis placed upon aggravating evidence and corresponding de-emphasis placed on mitigating evidence will effect the jurors' assignment of weights to this evidence.[188] Aggravating factors will be accorded an increased weight while mitigating factors will be accorded a reduced weight.[189] Accordingly, a death sentence will be more likely "in spite of factors which may call for a less severe penalty."[190]

The best method to insure that the defendant will not be prejudiced by the statute is to create a presumption concerning evidence of mitigation.[191] The drafters of the Capital Punishment Act recognized that the statute contained many elements of a presumption.[192] Consequently, they considered creating a statutory presumption that "there are no mitigating factors."[193] The drafters, however, misstated what the presumption should be. The trial judge must instruct the jury that the law presumes that the defendant does not deserve a death sentence when evidence of mitigation is introduced. Creating a presumption clearly shifts the burden of production on mitigation to the state once the defendant introduces evidence of mitigation since the state must now introduce evidence to rebut this presumption.[194] This shift of the burden of production is effectively no different than the procedure for establishing mitigation created by the Act. The statute provides that

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[187] *See* Hertz & Weisberg, *supra* note 153, at 348. Hertz and Weisberg maintain that there must be a counter-balance to any benefit which the prosecution receives. *See id.* at 348-49 & nn.148, 151 (construing Wardius v. Oregon, 412 U.S. 470, 474 n.6 (1973)) ("This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial").

[188] *Id.* at 348-49.

[189] *Id.*

[190] *Lockett*, 438 U.S. at 605 (plurality opinion); *see also supra* notes 74-77 and accompanying text. *See generally* Hertz & Weisberg, *supra* note 153, at 346-50; Liebman & Shephard, *supra* note 156, at 776.

[191] A presumption shifts the burden of producing evidence and operates to assign the burden of persuasion. C. MCCORMICK, *supra* note 144, § 342; *see* Doe v. City of Trenton, 75 N.J. 137, 380 A.2d 703 (1977) (per curiam), *aff'g* 143 N.J. Super. 128, 362 A.2d 1200 (App. Div. 1976). *See generally* Ranney, *Presumptions in Criminal Cases: A New Look at an Old Problem*, 41 MONT. L. REV. 21 (1980).

[192] *Senate Hearings*, *supra* note 115, at 13-14 (statements of Mr. Edwin Stier, Sen. John Dorsey).

[193] *Id.*

[194] The right to jury instructions on a presumption when no rebuttal evidence is submitted by the opposing party is generally accepted. *See* C. MCCORMICK, *supra* note 144, § 345(A). When there is rebuttal evidence submitted, there are diverging views whether jury instructions concerning the presumption are proper. *See id.*

the defendant has the burden of production for mitigation, and in the event the state wants to rebut the defendant's evidence, it can be inferred that the state has a burden of production to produce evidence of the absence of mitigation.[195]

After the production of mitigating evidence, instructing the jury that the law presumes that the defendant does not deserve the death sentence informs the jury of the legal importance of mitigating evidence,[196] and injects into the penalty trial the limiting principle that death is a penalty reserved for few convicted murderers.[197] This presumption additionally compels the state to prove the absence of mitigation or risk that the defendant's mitigation will be found as a matter of law.[198] This is consistent with the legislative intent that the state should not have to establish the absence of mitigation until the defendant introduces evidence of mitigation.[199] Allocating the burden of proof for the absence of mitigation goes beyond the statute and its legislative history,[200] however, it was the drafters' intent to place no burden of proof on the defendant.[201] Since the reasons for defining a burden of proof are compelling, and the drafters viewed the allocation of the burden to the defendant as unconstitutional, the burden must be placed on the state.

The state's burden of proof regarding the absence of mitigating circumstances must meet the standard of beyond a reasonable doubt. This presents a logical corollary to the drafters' intent that the state must prove "beyond a reasonable doubt, . . . sufficient aggravating factors to outweigh the mitigating factors."[202] In effect, requiring the state to prove the absence of mitigation, is tantamount to requiring the state to prove insufficient evidence of mitigation. In each instance, the state will have to discredit the existence of mitigation. Since the drafters intended that the state would be required to prove beyond a reasonable doubt that aggravating factors outweighed the mitigating

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[195] *See* N.J. STAT. ANN. § 2C:11-3(c)(2). Although the Act does not specifically provide that the burden of production shifts to the prosecution once the defendant has introduced mitigating evidence, *see id.*, the provision for rebuttal evidence has the same effect.

[196] *See supra* notes 174-79 and accompanying text; *cf.* C. MCCORMICK, *supra* note 144, § 342 (recognizing importance of jury instruction of presumption of innocence).

[197] *See Lockett*, 438 U.S. at 601 (plurality opinion); *Gregg*, 428 U.S. at 188 (plurality opinion); *Furman*, 408 U.S. at 313 (White, J., concurring).

[198] *See* Sandstrom v. Montana, 442 U.S. 510, 518 (1979); *see also* C. MCCORMICK, *supra* note 144, § 342.

[199] *Senate Hearings*, *supra* note 115, at 13-14 (statement of Mr. Edwin Stier).

[200] *Id.*; *see* N.J. STAT. ANN. § 2C:11-3.

[201] *Senate Hearings*, *supra* note 115, at 13 (statement of Mr. Edwin Stier).

[202] *Id.* at 11.

factors,[203] the drafters' have demonstrated an intent requiring the same level of proof for the absence of mitigation.

Although the Supreme Court has never answered directly whether the state is constitutionally required to prove the absence of mitigation beyond a reasonable doubt in capital cases,[204] a recent decision suggests this conclusion. In *Bullington*, a majority of the Court recognized that in a penalty trial during which the jury decides whether to impose the death sentence, " 'society imposes almost the entire risk of error upon itself.' "[205] The Court emphasized that " 'the interests of the defendant are of such magnitude' " in a capital case, " 'that . . . they [are] protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' "[206] The Court has recognized that the reasonable doubt standard is "indispensable" to inform the trier of fact of the need to reach a state of certainty on the facts in issue.[207] A mistaken judgment which operates to the disadvantage of the defendant is an intolerable error[208] and the Court has demonstrated a willingness to accept error only when it operates to the defendant's advantage.[209] Thus, the requirement that the possibility of error be reduced is, in essence, a guideline for the allocation of the burden of proof as well as a mandate that the reasonable doubt standard be applied. Furthermore, the Court has found untenable a state's attempt to use the same standard of proof in a criminal case as would suffice in a civil case since in a criminal case a defendant's liberty is at stake.[210] *A fortiori*, when the defendant's life is at stake, there are even more compelling reasons to use the most stringent standard of proof.[211] Therefore, although the reasonable

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[203] *Id.* at 11 (statement of Mr. Edwin Stier) ("What we have tried to do is establish the State's burden beyond a reasonable doubt, to establish sufficient aggravating factors to outweigh the mitigating factors which exist").

[204] *See Lockett*, 438 U.S. at 609 n.16 (plurality opinion).

[205] *Bullington*, 451 U.S. at 441 (quoting Addington v. Texas, 441 U.S. 418, 423-24 (1979)); *see also supra* notes 85-90 and accompanying text; *cf.* Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L.J. 1515, 1534 (1978) (placing burden of persuasion on prosecution will lead to more appropriate sentencing decisions).

[206] *Bullington*, 451 U.S. at 441 (quoting Addington v. Texas, 441 U.S. 418, 423-24 (1979)). The reasonable doubt standard has a history of use whenever the risk of error is sought to be reduced. *See, e.g., Winship*, 397 U.S. at 364; Speiser v. Randall, 357 U.S. 513, 525 (1958).

[207] *Winship*, 397 U.S. at 364; *cf. Lockett*, 438 U.S. at 604 (plurality opinion) (mandating that sentencing proceeding be more reliable).

[208] *See Winship*, 397 U.S. at 364.

[209] *Id.*

[210] *Id.* at 363.

[211] *But cf.* Patterson v. New York, 432 U.S. 197, 209 (1977) (state's recognition of mitigating circumstances to lessen degree of criminality or punishment "does not require the State to prove

doubt standard may place a heavy burden on the state, fundamental fairness mandates that the state bear this burden of proof.

F. *The Denial of Mercy*

The Act eliminates the discretion of the jury to impose mercy in capital cases. "If the jury . . . *finds* that any aggravating factor exists and *is not outweighed* by one or more mitigating factors, the court *shall sentence* the defendant to death."[212] If an aggravating circumstance is found to exist and mitigating circumstances are found to be insufficient or totally lacking, there is no provision in the statute permitting the jury to use discretion and recommend a life sentence. In *Gregg*, the Supreme Court stated that it would be unconstitutional to prohibit the use of discretion for mercy from the determination of guilt to executive clemency.[213] The Court specifically stated that the power of the jury to find the defendant guilty of a lesser crime to prevent exposure to the death penalty is constitutionally protected.[214] In addition, the New Jersey Supreme Court recently restated the principle that "a jury has the prerogative of returning a verdict of innocence in the face of overwhelming evidence of guilt."[215] If the jury is permitted to decide against the weight of the evidence as to guilt or innocence, then their power to recommend a life sentence rather than the death penalty is unquestionable. This constitutional principle, recognized by the United States[216] and New Jersey[217] Su-

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its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate") (footnote omitted).

Patterson, however, can be distinguished from a death penalty trial. First, the mitigation discussed in *Patterson* involved an affirmative defense which operated to reduce the degree of the crime. Mitigation in a death penalty case does not have this effect. Further, the *Patterson* Court partially based its decision to reject disproof of mitigating evidence on the recognition that the state legislatures would abandon the use of affirmative defenses if this requirement were imposed. *Id.* at 209 n.11, 211 n.12, 214 n.15. Such an argument could not be made in death penalty cases, since consideration of mitigation is constitutionally required. *Lockett*, 438 U.S. at 605 (plurality opinion). Additionally, the *Patterson* Court stated that this burden of proof was not required because it would increase the likelihood that some guilty defendants would go free. 432 U.S. at 209. This argument is inapplicable in a bifurcated death penalty trial where guilt has already been determined. The effect of the allocation of the burden would be that more defendants would receive life imprisonment rather than the death penalty.

[212] N.J . STAT. ANN. § 2C:11-3(c)(3)(a) (emphasis added).

[213] *Gregg*, 428 U.S. at 199 n.50 (plurality opinion). *See generally* Liebman & Shephard, *supra* note 156.

[214] *Gregg*, 428 U.S. at 199 n.50.

[215] State v. Ingenito, 87 N.J. 204, 212, 432 A.2d 912, 916 (1981).

[216] *See* United States v. Quarles, 350 U.S. 11 (1955).

[217] *See* State v. Ingenito, 87 N.J. 204, 432 A.2d 912 (1981). The New Jersey Supreme Court has cloaked this principle with the added protection of an interpretation of the state constitution. *See id. See generally supra* notes 120 & 121 and accompanying text.

preme Courts, derives from the "belief that the jury in a criminal prosecution serves as the conscience of the community and the embodiment of the common sense and feelings reflective of society as a whole."[218] Thus, the defendant's constitutional right to mercy cannot be impaired by legislative action. Accordingly, the provision which prevents the court from imposing a life sentence when mitigation is not found to outweigh aggravating circumstances must be eliminated. A specific statutory provision must be drafted to provide that the jury always has the power to recommend a life sentence.

IV. Conclusion

The Capital Punishment Act as currently drafted, is unconstitutional. The statute does not represent an intent to assess the types of murderers who will be deterred. Without an ability to deter, the statute lacks one of its constitutional underpinnings. The decision to make a previous conviction for murder an aggravating factor was error. This evidence is so prejudicial that no matter what mitigating circumstances are present, it is unlikely that a jury will recommend a sentence other than death. Furthermore, it is unclear whether a bifurcated trial, which expedites introduction of this evidence, actually protects a capital defendant. The statute, by not providing an evidentiary requirement for mitigation, effectively denies due process rights to a capital defendant. Without instructions on how to weigh the mitigating evidence, juries will act inconsistently with respect to similar mitigating evidence. This will result in the arbitrary and capricious imposition of the death penalty—condemned in both *Furman* and *Gregg*.

Creation of the presumption that a capital defendant does not deserve a death sentence when he presents mitigating evidence eliminates some of the arbitrariness in the imposition of the death sentence. The creation of a presumption also reduces the likelihood that the jury will summarily reject the defendant's mitigating evidence. Finally, the statutory provision denying a jury discretion to grant mercy to an accused facing the death penalty must be held to be unconstitutional consistent with decisions of the United States and New Jersey Supreme Courts.

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[218] State v. Ingenito, 87 N.J. 204, 212, 432 A.2d 912, 916 (1981).