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addition, the defendant may not receive credit when she will serve the federal sentence consecutively with the state sentence.\(^{2264}\)

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**CAPITAL PUNISHMENT**

**Proportionality.** Although the Eighth Amendment’s ban on cruel and unusual punishment does not prohibit capital punishment,\(^{2265}\) it does prohibit death sentences that are disproportionate for certain crimes or individuals.\(^{2266}\) To determine whether a particular sentence is excessive, traditionally the Court examines society's views of the challenged punishment as expressed by objective evidence of community values, including legislative judgments,\(^{2267}\) sen-

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\(^{2264}\) See Pinaud v. James, 851 F.2d 27, 31-32 (2d Cir. 1988) (time served under state sentence later vacated does not apply toward unrelated federal sentence when state and federal sentences to be served consecutively); U.S. v. Grimes, 641 F.2d 96, 99-100 (3d Cir. 1981) (same); Sinito v. Kindt, 954 F.2d 467, 470 (7th Cir.) (per curiam) (time served under initial sentence from date of habeas appeal to date of longer concurrent sentence may not be applied to longer sentence), cert. denied, 112 S. Ct. 2316 (1992); Cox v. Federal Bureau of Prisons, 643 F.2d 534, 537 (8th Cir. 1981) (per curiam) (time served under state sentence does not entitle defendant to federal credit because federal sentence not concurrent to state sentence); Meagher v. Clark, 943 F.2d 1277, 1282-83 (11th Cir. 1991) (time served under state sentence later vacated does not apply toward federal sentence even if sentences intended under original plea bargain to run concurrently).

\(^{2265}\) Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion). Gregg was the first death penalty challenge to reach the Court after Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), struck down existing state death penalty statutes. In Furman, all nine Justices filed separate opinions, but several dominant themes emerged from the fragmented five-to-four decision. Only Justices Brennan and Marshall found capital punishment unconstitutional per se. \textit{Id.} at 305 (Brennan, J., concurring); \textit{id.} at 370-72 (Marshall, J., concurring). Three other concurring Justices were concerned that unfettered jury discretion in imposing the death penalty led to its arbitrary exercise. \textit{Id.} at 309 (Stewart, J., concurring); \textit{id.} at 256-57 (Douglas, J., concurring); \textit{id.} at 313 (White, J., concurring). The four dissenters urged deference to legislative judgment as the most reliable indicator of social values. \textit{Id.} at 385 (Burger, C.J., Blackmun, Powell & Rehnquist, JJ., dissenting).


\(^{2267}\) Compare Stanford v. Kentucky, 492 U.S. 361, 370-73 (1989) (plurality opinion) (majority of states permitting capital punishment for 16-year-olds sufficient to show absence of national consensus against the practice and supports holding that practice does not violate Eighth Amendment); Tison, 481 U.S. at 154 (several states authorizing death penalty for felony murder regardless of intent to kill "powerfully suggests" society does not reject death penalty in those circumstances and supports holding that practice does not violate Eighth Amendment) and Gregg, 428 U.S. at 179-80 (plurality opinion) (35 states reenacting capital punishment statutes in response to Furman indicates social endorsement of death penalty for murder and supports holding that death penalty for murder does not under all circumstances violate Eighth Amend-
tences imposed by juries, public opinion, and international practices. By linking interpretation of the Eighth Amendment to this evidence, the Court seeks to give effect to "the evolving standards of decency that mark the progress of a maturing society." The Court also engages in an independent

with Thompson, 487 U.S. at 831-32 (plurality opinion) (state legislation relating to rights and duties of children compared with those of adults and state legislation authorizing capital punishment supports holding that imposition of death penalty on 15-year-old offender violates Eighth Amendment); Ford v. Wainwright, 477 U.S. 399, 408 (1986) (fact that no state legislature permits execution of insane supports holding that execution of insane defendant violates Eighth Amendment); Enmund v. Florida, 458 U.S. 782, 792-93 (1982) (state legislative judgment against imposing death penalty for unintended felony murder, although not dispositive, supports holding that capital punishment for that offense violates Eighth Amendment) and Coker v. Georgia, 433 U.S. 584, 594 (1977) (fact that no other state legislature authorizes death penalty for rape of an adult woman supports holding that death penalty for rape violates Eighth Amendment).

The Court has stressed that legislative judgments are "the clearest and most reliable objective evidence" of community values. Penry v. Lynaugh, 492 U.S. 302, 331 (1989); see also Stanford, 492 U.S. at 370-71 (plurality opinion) ("first" among the 'objective indicia that reflect the public attitude toward a given sanction' are statutes passed by society's elected representatives" (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987))); Gregg, 428 U.S. at 174-75 & n.19 (plurality opinion) (legislative judgment weighs heavily, but not dispositive in ascertaining community values).

2268. See Gregg, 428 U.S. at 181 (plurality opinion) (noting that "[t]he jury . . . is a significant and reliable objective index of contemporary values" in holding death penalty for murder not unconstitutional in all circumstances); Thompson, 487 U.S. at 831-32 (plurality opinion) (noting that juries imposed death sentences on juvenile offenders so infrequently as to "lead[] to the unambiguous conclusion that imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community" and thus unconstitutional); Enmund, 458 U.S. at 794 (noting that juries imposed death penalty upon nontriggerman felony murderers in only six of 362 capital cases since 1954 in holding death sentence for driver of getaway car unconstitutional); Coker, 433 U.S. at 597 (plurality opinion) (noting that juries did not impose death penalty for rape in vast majority of cases in holding death penalty for rape unconstitutional).

2269. Compare Thompson, 487 U.S. at 830 & nn.32 & 33 (plurality opinion) (considering formal opposition of American Bar Association and American Law Institute to death penalty for juveniles in holding death penalty unconstitutional for 15-year-old offender) and Woodson v. North Carolina, 428 U.S. 280, 298 n.34 (1976) (plurality opinion) (considering survey of opinion polls suggesting public does not support mandatory death penalty in holding mandatory death penalty statute unconstitutional) with Gregg, 428 U.S. at 181 & n.25 (plurality opinion) (considering state constitutional referenda, ballot measures, and popular opinion polls supporting capital punishment in finding death penalty for murder not unconstitutional in all circumstances).

2270. See Thompson, 487 U.S. at 830-31 & nn.31 & 34 (plurality opinion) (considering international opinion and practices expressed in statutes and treaties of Anglo-American and Western European nations in holding death penalty unconstitutional for 15-year-old offenders); Coker, 433 U.S. at 596 n.10 (plurality opinion) (considering survey by United Nations in which only three of 60 nations surveyed retained death penalty for rape unaccompanied by killing in holding death penalty for rape unconstitutional).

2271. Gregg, 428 U.S. at 173 (plurality opinion) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). The baseline for discussion of the "evolving standards of decency" has often been common law views of the challenged punishment. See Stanford, 492 U.S. at 368 (plurality opinion) (reviewing common law treatment of juvenile offenders to find execution of 16- and 17-year-old offenders constitutional); Penry, 492 U.S. at 331-33 (reviewing common law treatment of "idiots" and "lunatics" to find execution of mentally retarded defendants constitutional); Ford, 477 U.S. at 406-08 (reviewing long standing common law bar in England and America against executing prisoner who has become insane in holding execution of insane defendant unconstitutional). To successfully challenge a punishment accepted at common law, a
proportionality review, analyzing whether a particular sentence "amounts to the unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the offense."\textsuperscript{2272}

By considering these factors, the Court has held that there are classes of offenses for which the imposition of the death penalty is unconstitutionally severe. In \textit{Coker v. Georgia},\textsuperscript{2273} the Court held that the death penalty was disproportionate punishment for the crime of raping an adult woman.\textsuperscript{2274} A plurality of the Court reasoned that capital punishment is excessive when the life of the victim has not been taken.\textsuperscript{2275} The Court has applied this same reasoning to invalidate death sentences for the crimes of robbery and kidnapping.\textsuperscript{2276}

In addition, the death penalty has been found unconstitutional for certain categories of defendants prosecuted under felony murder statutes. The Court held in \textit{Enmund v. Florida}\textsuperscript{2277} that the death penalty is unconstitutional for one who "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."\textsuperscript{2278} In \textit{Tison v. Arizona},\textsuperscript{2279} however, the Court upheld the constitutionality of the death penalty for those who, although not intending that a killing take place, exhibit a "reckless disregard for human life."\textsuperscript{2280} The Court found that society has approved the death penalty

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\footnote{2272. \textit{Coker}, 433 U.S. at 592 (plurality opinion) (death penalty disproportionate to crime when imposed for rape). If a punishment fails to further penological goals of retribution or deterrence, it amounts to the unnecessary and wanton infliction of pain. \textit{Enmund}, 458 U.S. at 798; Rhodes v. Chapman, 452 U.S. 337, 346 (1981).}

\footnote{2273. 433 U.S. 584 (1977).}

\footnote{2274. \textit{Id.} at 598-600 (plurality opinion); \textit{Id.} at 601 (Powell, J., concurring in judgment in part & dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman").}

\footnote{2275. \textit{Id.} at 598 (plurality opinion).}

\footnote{2276. \textit{See Enmund}, 458 U.S. at 797 (death penalty disproportionate for robbery in which victim not killed); \textit{Hooks v. Georgia}, 433 U.S. 917 (1977) (per curiam) (same).}

\footnote{2277. 458 U.S. 782 (1982).}

\footnote{2278. \textit{Id.} at 797.}

\footnote{2279. 481 U.S. 137 (1987).}


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for defendants with such a culpable mental state\textsuperscript{2281} and that the goals of retribution and deterrence are met by executing this subset of felony murderers.\textsuperscript{2282} The \textit{Tison} majority narrowly construed \textit{Enmund} to prohibit the death penalty only for those felony murderers who lack intent to kill and play a minor role in the crime.\textsuperscript{2283} The Court also read \textit{Enmund} as explicitly permitting capital punishment in all cases in which the defendant intends to kill.\textsuperscript{2284} Finding that the defendants in \textit{Tison} fit neither of these two categories, the Court articulated the "reckless disregard" standard, an intermediate mental state short of intent for which the death penalty could permissibly be imposed.\textsuperscript{2285}

The death penalty may also be disproportionate when applied to certain classes of individuals, regardless of the nature of their crimes. In \textit{Thompson v. Oklahoma},\textsuperscript{2286} the Supreme Court held that the imposition of the death penalty on a defendant who was fifteen years old at the time he committed the murder violated the Eighth Amendment.\textsuperscript{2287} Yet, in \textit{Stanford v. Kentucky},\textsuperscript{2288}

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\textsuperscript{2281} \textit{Tison}, 481 U.S. at 154. The Court noted that, despite \textit{Enmund}, 21 states still authorized the death penalty for felony murderers who were major actors in a crime in which they knew a death was likely to occur. \textit{Id.} at 152-54. The majority found that "[t]his substantial and recent legislative authorization . . . powerfully suggests that our society does not reject the death penalty as grossly excessive under these circumstances." \textit{Id.} at 154.

\textsuperscript{2282} \textit{Id.} at 148-49, 157-58. In \textit{Enmund}, the Court reasoned that the death penalty will not deter one who does not kill or has no intention that life be taken and that such a person is not morally culpable enough to merit retribution. \textit{Enmund}, 458 U.S. at 798-801. The \textit{Tison} majority noted that the \textit{Enmund} Court relied heavily on the fact that robberies only rarely escalate into murder and that the deterrent value of capital punishment would be substantially different for robberies in which there is a substantial likelihood that a killing will occur. \textit{Tison}, 481 U.S. at 148-49. Calling personal culpability "[t]he heart of the retribution rationale," \textit{Id.} at 149, the \textit{Tison} Court found that the reckless disregard for human life manifest in "knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state" justifying retribution. \textit{Id.} at 157.

\textsuperscript{2283} \textit{Tison}, 481 U.S. at 151.

\textsuperscript{2284} \textit{Id.}

\textsuperscript{2285} \textit{Id.} at 157-58.

\textsuperscript{2286} 487 U.S. 815 (1988) (plurality opinion).

\textsuperscript{2287} \textit{Id.} at 838. A plurality of four Justices would have invalidated the death penalty for crimes committed by offenders under age 16 by finding such punishment offensive to civilized standards of decency. \textit{Id.} at 821-23. The plurality rejected the view that the existence of death penalty statutes with no minimum age for execution implied that "current standards of decency would still tolerate the execution of 10-year-old children." \textit{Id.} at 826-29. In support of its finding of a national consensus against such executions, the plurality noted the extreme infrequency with which death sentences were imposed on those under 16 and the even rarer frequency with which execution actually occurred. \textit{Id.} at 832-33. The plurality ultimately concluded that the penological goals of retribution and deterrence were not advanced by such a penalty. \textit{Id.} at 836-38.

Justice O'Connor, concurring in the judgment, concluded that because Thompson's death sentence might have resulted from the inadvertent interaction of two Oklahoma statutes, one authorizing capital punishment without setting any minimum age for death-eligibility and the other providing that in some cases a 15-year-old may be tried as an adult, the death sentence lacked the "careful consideration that we have required for other kinds of decisions leading to the death penalty." \textit{Id.} at 857 (O'Connor, J., concurring). Justice O'Connor did not agree with the plurality that a national consensus against such executions had been demonstrated. \textit{Id.}

\textsuperscript{2288} 492 U.S. 361 (1989).
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the Court upheld the imposition of the death penalty on a person who was sixteen years old at the time of the murder.\textsuperscript{2289} Finding "neither a historical nor a modern societal consensus forbidding the imposition" of the death penalty on minors older than fifteen who commit murder, the Court held that the punishment did not violate the Eighth Amendment.\textsuperscript{2290} In a departure from settled Eighth Amendment jurisprudence, however, a plurality of four Justices expressed willingness to limit the proportionality inquiry to the question of how society views the challenged punishment.\textsuperscript{2291}

The Supreme Court has also addressed death penalty challenges based on competency. In \textit{Ford v. Wainwright},\textsuperscript{2292} the Court held that the Eighth Amendment prohibits the execution of a prisoner who becomes insane while awaiting execution.\textsuperscript{2293} In \textit{Penry v. Lynaugh},\textsuperscript{2294} however, the Court rejected the claim that a moderately mentally retarded person lacked the mental culpability necessary to justify the imposition of the death penalty. Finding only one state that explicitly banned the execution of the mentally retarded, the Court

\textsuperscript{2289} Id. at 380 (plurality opinion).

\textsuperscript{2290} Id.; id. at 381 (O'Connor, J., concurring in part & concurring in judgment). A plurality of four Justices, joined by Justice O'Connor, aggregated the 19 states that set no minimum age in their death penalty statutes with the three states that expressly permitted the execution of 16-year-olds and the one state that implicitly allowed the practice to find that a majority of states that permitted capital punishment authorized the execution of 16-year-olds. \textit{Id.} at 370 (majority opinion); \textit{id.} at 381-82 (O'Connor, J., concurring). These five Justices also found that the infrequency with which the death penalty was sought for and imposed on minors could be explained by the small number of capital crimes committed by minors, as well as jury consideration of age as a mitigating factor. \textit{Id.} at 373-74 (majority opinion); \textit{id.} at 381-82 (O'Connor, J., concurring).

\textsuperscript{2291} Id. at 377-80 (plurality opinion). The plurality rejected the contention that "socioscientific" evidence proffered by \textit{amici curiae} on the psychological and emotional development of 16- and 17-year-olds was relevant to the Court's consideration of the death penalty as applied to juveniles: "The audience for these arguments... is not this Court but the citizenry of the United States." \textit{Id.} at 378. The plurality also refused to consider age-based statutory classifications in other areas of the law as relevant to the appropriateness of imposing the death penalty. \textit{Id.} at 376-77.

\textsuperscript{2292} 477 U.S. 399 (1986).

\textsuperscript{2293} Id. at 409-10. The Court held that executing a person "whose mental illness prevents him from comprehending the reasons for the penalty or its implications" was cruel and unusual punishment because it was incompatible with evolving standards of decency and did not contribute to the penological goals of retribution or deterrence. \textit{Id.} at 408-10, 417 (plurality opinion); \textit{id.} at 422 (Powell, J., concurring in part & concurring in judgment). The Court noted that a legacy of historical opposition to this practice was bolstered by the modern fact that no state currently permitted such executions. \textit{Id.} at 408-10 & n.2 (majority opinion); \textit{see} Rector v. Clark, 923 F.2d 570, 572-73 (8th Cir.) (defendant competent to be executed under \textit{Ford} despite failure to meet American Bar Association competency standard that asks additionally "whether the convict possesses the ability to inform counsel or the court of any fact which might exist which would make the punishment unjust or unlawful"), cert. denied, 111 S. Ct. 2872 (1991).

The Court has also upheld against a due process challenge a state statute which created a presumption that a defendant was competent and placed the burden of proving otherwise by a preponderance of the evidence upon the defendant. Medina v. California, 112 S. Ct. 2572 (1992). The Court noted the need to show "substantial deference" toward legislative judgments in matters of criminal procedure. \textit{Id.} at 2577.

\textsuperscript{2294} 492 U.S. 302 (1989).
concluded that there was insufficient evidence of a national consensus in opposition to such punishment.\textsuperscript{2295}

Statutory Capital Punishment Schemes. The Supreme Court has required heightened reliability in the imposition of the death penalty,\textsuperscript{2296} but has not mandated states to adopt any particular statutory approach to capital punishment.\textsuperscript{2297} To minimize the risk of arbitrary action and provide individualized sentencing, the Court has imposed two general requirements on the capital sentencing process. First, a state must channel the sentencer's discretion\textsuperscript{2298} in order to "genuinely narrow the class of persons eligible for the death penalty

\textsuperscript{2295} Id. at 334-35. The majority opinion by Justice O'Connor also examined the common law treatment of individuals with diminished mental capacities and concluded that only those presently qualifying for the insanity defense were exempt from capital punishment. Id. at 332. These findings were sufficient for four concurring Justices to conclude that the execution of a mentally retarded person did not violate the Eighth Amendment. Id. at 351 (Scalia, J., Rehnquist, C.J., & White & Kennedy, JJ., concurring in part & dissenting in part). Justice O'Connor further concluded that evidence proffered by the American Association on Mental Retardation was insufficient to establish that mentally retarded persons "lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." Id. at 338 (plurality opinion).


The defendant must be given adequate notice that the death penalty might be imposed at sentencing. Lankford v. Idaho, 111 S. Ct. 1723, 1733 & n.22 (1991). In Lankford, the prosecutor had formally advised the judge and the defendant that the state would not recommend the death penalty for defendant's murder conviction, and the death penalty was not discussed during the sentencing hearing. Id. at 1726-27. Under these circumstances, the Court found that "petitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned in this case." Id. at 1733.

\textsuperscript{2297} See Spaziano v. Florida, 468 U.S. 447, 464 (1984) ("[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws"); Zant v. Stephens, 462 U.S. 862, 874-75 (1983) ("each distinct system must be examined on an individual basis" (quoting Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion))).

\textsuperscript{2298} Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion). The Court has stated that the need to channel the sentencer's discretion was the "fundamental principle" of Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), which struck down all of the then existing state death penalty statutes. McCleskey v. Kemp, 481 U.S. 279, 302 (1987). This principle was reaffirmed in Gregg: "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189 (plurality opinion). In Godfrey, the Court outlined three criteria to determine whether a statutory scheme effectively channels a sentencer's discretion. Each scheme must provide (1) "clear and objective standards," (2) "specific and detailed guidance," and (3) an opportunity for rational review of the "process for imposing a sentence of death." Godfrey, 446 U.S. at 428 (plurality opinion) (citations omitted).
and ... [thus] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.\textsuperscript{2299} Second, the state may not limit the sentencer's consideration of any relevant evidence that might lead the sentencer to decline to impose the death penalty.\textsuperscript{2300}

The required narrowing of the class of death-eligible defendants may occur at either the guilt or the sentencing phase of a capital trial.\textsuperscript{2301} When narrowing is accomplished during the sentencing phase, the sentencer\textsuperscript{2302} determines whether certain characteristics of the crime, known as aggravating circumstances, distinguish the gravity of the offense so as to justify the imposition of

\textsuperscript{2299} Stephens, 462 U.S. at 877. When statutory procedures prevent arbitrary application of the death penalty by adequately channelling the sentencer's discretion, a capital defendant does not have a constitutional right to proportionality review of her individual sentence. McCleskey, 481 U.S. at 306-07; Pulley v. Harris, 465 U.S. 37, 43-45 (1984); see Evans v. McCotter, 790 F.2d 1232, 1243 (5th Cir.) (Texas capital punishment scheme protects against arbitrary and capricious imposition of death penalty; proportionality review unnecessary), cert. denied, 479 U.S. 922 (1986). Because proportionality review is not constitutionally required, states that do conduct these reviews are given great latitude in their focus and extent. See Barfield v. Harris, 719 F.2d 58, 61-62 (4th Cir. 1983) (North Carolina court's proportionality review constitutionally sufficient despite lack of identification of cases used for comparison purposes and lack of systematic means for identifying and retrieving appropriate cases for comparison), cert. denied, 467 U.S. 1210 (1984); Prejean v. Maggio, 765 F.2d 482, 483-84 (5th Cir. 1985) (Louisiana Supreme Court's single district proportionality review constitutionally sufficient even though court had engaged in broader search for similar cases in other instances), cert. denied, 492 U.S. 925 (1989); McKenzie v. Risley, 842 F.2d 1525, 1542-43 & n.37 (9th Cir.) (en banc) (Montana Supreme Court's proportionality review constitutionally sufficient even though no statutory provision described type of review to be undertaken by state appellate courts), cert. denied, 488 U.S. 901 (1988); Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987) (Alabama appellate courts' proportionality review constitutionally sufficient even though courts' opinions provided no explicit account of such review), cert. denied, 489 U.S. 1059 (1989).

\textsuperscript{2300} Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (invalidating death penalty statute permitting consideration of only three mitigating circumstances); Lockett, 438 U.S. at 606-07 (plurality opinion) (same).

The Court has invalidated state statutes that require imposition of the death penalty as the mandatory punishment for certain categories of murder. See Sumner v. Shuman, 483 U.S. 66, 81-82 (1987) (invalidating mandatory death penalty statute because unconstitutionally failed to consider defendants' criminal record or factors affecting state of mind); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (invalidating mandatory death penalty statute because failed to consider defendants' character and record and circumstances of particular offense).

\textsuperscript{2301} Lowenfield, 484 U.S. at 244-45.

\textsuperscript{2302} Either a judge or jury may act as sentencer, even when the sentence turns on specific findings of fact. Clemons v. Mississippi, 494 U.S. 738, 745 (1990) ("Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by ... this Court."); see Walton v. Arizona, 497 U.S. 639, 649 (1990) (upholding capital sentencing schemes that provide for no jury involvement at sentencing stage); Spaziano, 468 U.S. at 459-60 (objectives of "measured, consistent application and fairness to the accused" do not require imposition of death penalty by jury).

The Court has consistently upheld the validity of advisory jury verdicts that are subject to judicial override. See Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (per curiam) (Sixth Amendment not violated by judicial imposition of death sentence following jury's advisory verdict); Baldwin v. Alabama, 472 U.S. 372, 388-89 (1985) (Eighth Amendment not violated by jury advisory opinion subject to override by sentencing judge); Spaziano, 468 U.S. at 465-67 (same).
the death penalty.2303 Although the sentencer may consider both statutorily defined and nonstatutory aggravating circumstances,2304 the death penalty may not be imposed without the finding of at least one statutorily defined aggravating circumstance.2305

However, states may differ in considering the significance of aggravating circumstances after finding a defendant to be death-eligible.2306 Some states require that the sentencer "weigh" the aggravating circumstances against the mitigating circumstances. Others merely require that the sentencer find a proper aggravating circumstance and then, in determining whether the death penalty should be applied, consider all circumstances before it.2307

2303. Stephens, 462 U.S. at 878 (statutory aggravating circumstances “circumscribe the class of persons eligible for the death penalty”). Although the use of aggravating circumstances was initially justified as a way to guide the sentencer’s discretion, it appears that the Court now views them solely as a means to establish death-eligibility. In Blystone v. Pennsylvania, 494 U.S. 299 (1990), the Court held that a state could preclude a sentencer from evaluating the weight of a particular aggravating circumstance and noted that “[t]he presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury.” Id. at 306-07.

2304. Stephens, 462 U.S. at 878; see Proffitt v. Florida, 428 U.S. 242, 256-57 & n.14 (1976) (plurality opinion) (upholding sentence based on combination of statutory and nonstatutory circumstances); Lesko v. Owens, 881 F.2d 44, 59 (3d Cir. 1989) (upholding sentence based on jury finding of two statutory aggravating circumstances when jury also considered nonstatutory aggravating circumstances), cert. denied, 493 U.S. 1036 (1990); Henry v. Wainwright, 721 F.2d 990, 994 (5th Cir. 1983) (upholding sentence based on statutory aggravating circumstances when jury also considered nonstatutory aggravating evidence of defendant resisting arrest and shooting police officer as officer knelt on ground begging not to be shot), cert. denied, 466 U.S. 993 (1984); Mathenia v. Delo, 975 F.2d 444, 451 (8th Cir. 1992) (upholding sentence based on jury finding of only one statutory aggravating circumstance when jury also considered nonstatutory aggravating factors), cert. denied, 113 S. Ct. 1609 (1993).

In Stephens, the Court noted that the defendant’s prior criminal history was properly before the jury as an aggravating circumstance because it described relevant elements of the defendant’s background. Stephens, 462 U.S. at 886-88; see James v. Butler, 827 F.2d 1006, 1012-14 (5th Cir. 1987) (defendant’s previous conviction for murder admissible as nonstatutory aggravating factor despite fact that statutory aggravating circumstance concerning prior history of crime partially or wholly invalid), cert. denied, 486 U.S. 1046 (1988). An invalid conviction, however, may not be considered as an aggravating circumstance. Johnson v. Mississippi, 486 U.S. 578, 585-86 (1988).

The Eleventh Circuit has permitted consideration of the defendant’s being on parole when the murder was committed as an aggravating factor. Lindsey v. Smith, 820 F.2d 1137, 1153 (11th Cir. 1987), cert. denied, 489 U.S. 1137, 1153 (11th Cir. 1987), cert. denied, 489 U.S. 1059 (1989). The Third Circuit has sustained the constitutionality of death sentences based in part on evidence of unadjudicated or unconvicted offenses. Lesko v. Owens, 881 F.2d 44, 56-59 (3d Cir. 1989) (other offenses perpetrated in conjunction with offense being sentenced properly before jury because they aided jury’s individualized assessment of defendant’s character and appropriateness of death penalty), cert. denied, 486 U.S. 1046 (1988). An invalid conviction, however, may not be considered as an aggravating circumstance.

The difference between statutory schemes that allow sentencers to "weigh" aggravating circumstances versus mitigating circumstances and nonweighing schemes is of "critical importance" on review. Id. For example, the prohibition of Godfrey and of Maynard v. Cartwright, 486 U.S. 356 (1988), against death sentences that are based in part upon impermissibly vague aggravating circumstances does not, apply in nonweighing states in which at least one other valid aggravating circumstance is found. Stringer, 112 S. Ct. at 1137. Because in weighing


2307. Id. at 1136. The difference between statutory schemes that allow sentencers to "weigh" aggravating circumstances versus mitigating circumstances and nonweighing schemes is of "critical importance" on review. Id. For example, the prohibition of Godfrey and of Maynard v. Cartwright, 486 U.S. 356 (1988), against death sentences that are based in part upon impermissibly vague aggravating circumstances does not, apply in nonweighing states in which at least one other valid aggravating circumstance is found. Stringer, 112 S. Ct. at 1137. Because in weighing
In a weighing state in which the jury acts as the sentencer, greater emphasis is placed upon limiting the scope of aggravating circumstances that fail to channel the jury's discretion, such as impermissibly vague statutory definitions of aggravating circumstances. A narrowing instruction to the jury, however, or the adoption of a narrowing construction on appellate review can states the sentencer balances the aggravating circumstances against the mitigating, any improper aggravating circumstances upset this process and require substantially greater judicial review in order to cure the defect.

2308. In Stringer, the Supreme Court held that an invalid, vague aggravating circumstance so infected the weighing process that the defendant was unconstitutionally deprived of the individualized sentencing mandated by the Eighth Amendment. Id. at 1138-39. Decisions based on invalid aggravating circumstances must be reversed because they “create[ ] the possibility . . . of randomness,” id. at 1139, and thus may skew the weighing process by placing a “thumb . . . on death's side of the scale,” id. at 1137, “creating[ ] the risk [of] treat[ing] the defendant as more deserving of the death penalty,” or by “creating the possibility . . . of bias in favor of the death penalty,” id. at 1139.

2309. Maynard v. Cartwright, 486 U.S. 356, 358-59, 363-64 (1988) (statutory aggravating circumstance for “especially heinous, atrocious, or cruel” murder unconstitutionally vague). In Godfrey, the Court overturned a death sentence when the trial court instruction gave the jury no guidance concerning the meaning of Georgia's “outrageously or wantonly vile, horrible and inhuman” aggravating circumstance. Godfrey, 446 U.S. at 428-29 (plurality opinion); id. at 435 (Marshall & Brennan, JJ., concurring in judgment). Four Justices found nothing in the words that implied “any inherent restraint on the arbitrary and capricious infliction of the death sentence” and concluded that the instructions made the jury’s interpretation of the phrase “the subject of sheer speculation.” Id. at 428-29 (plurality opinion). Compare Wilcher v. Hargett, 978 F.2d 872, 879 (5th Cir. 1992) (Mississippi statutory aggravating circumstance for “especially heinous, atrocious or cruel” murder unconstitutionally vague as written and construed), cert. denied, 114 S. Ct. 96 (1993) and Moore v. Clarke, 951 F.2d 895, 896-97 (8th Cir. 1991) (Nebraska statutory aggravating circumstance for “especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence” unconstitutionally vague as written and construed), cert. denied, 112 S. Ct. 1995 (1992) with Jeffries v. Blodgett, 988 F.2d 923, 936 (9th Cir.) (Washington statutory aggravating circumstance employing terms “crime” and “plan or scheme” not unconstitutionally vague), amended, 5 F.3d 1180 (1993), and petition for cert. filed, 62 U.S.L.W. 3430 (U.S. Dec. 20, 1993) (No. 93-971).

2310. Walton v. Arizona, 497 U.S. 639 (1990). In Walton, the Supreme Court stated that juries must be instructed in more than “bare terms” regarding vague aggravating circumstances because, unlike judges, juries are not presumed to know the law and be able to apply narrow definitions of vague aggravating circumstances. Id. at 653 (dictum). Compare Shell v. Mississippi, 498 U.S. 1, 1 (1990) (per curiam) (limiting instruction defining “especially heinous, atrocious or cruel” aggravating circumstance in Mississippi death penalty statute as extremely wicked and indifferently inflicting high degree of pain did not provide enough guidance for jury) and Newlon v. Armontrout, 885 F.2d 1328, 1334 (8th Cir. 1989) (judge's refusal to give limiting instruction regarding “depravity of mind” aggravating circumstance did not provide enough guidance for jury), cert. denied, 497 U.S. 1038 (1990) with Lewis v. Jeffers, 497 U.S. 764, 773 (1990) (limiting instruction narrowing Arizona death penalty statute's “especially heinous, cruel and depraved” aggravating circumstance to class of murderers who inflict gratuitous violence and commit murder with relish, provided sufficient guidance for jury); Boggs v. Bair, 892 F.2d 1193, 1197-98 (4th Cir. 1989) (limiting instruction regarding “vileness” aggravating circumstance, which told jury to consider number and nature of batteries inflicted on victim, provided sufficient guidance for jury), cert. denied, 495 U.S. 940 (1990) and Stanley v. Zant, 697 F.2d 955, 971-72 (11th Cir. 1983) (limiting instruction defining “outrageously or wantonly vile, horrible, or inhuman” aggravating circumstance to require both depravity of mind and torture of victim provided sufficient guidance for jury), cert. denied, 467 U.S. 1219 (1984).
cure such a constitutional defect.\textsuperscript{2311} In \textit{Zant v. Stephens},\textsuperscript{2312} the Court upheld a death sentence even though one of the three statutory aggravating circumstances applied by the jury was unconstitutionally vague.\textsuperscript{2313} The Court reasoned that the two valid aggravating circumstances adequately and objectively narrowed the class of defendants eligible for the death penalty.\textsuperscript{2314} Thus, if the sentencer has relied on an invalid or improperly defined aggravating circumstance, an appellate court need not remand for a new sentencing determination, but may reweigh the evidence or conduct harmless error analysis to uphold a death sentence.\textsuperscript{2315} However, reweighing will not cure a constitutional sentencing error unless the reviewing court "actually perform[s] a new sentencing calculus."\textsuperscript{2316} In a nonweighing state, a reviewing court must deter-

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\item[2311.] \textit{Cartwright}, 486 U.S. at 460; \textit{Godfrey}, 446 U.S. at 432 (plurality opinion). In \textit{Cartwright}, a unanimous Court invalidated a death sentence based on Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. 486 U.S. at 360. The Court found that the wording was unconstitutionally vague, no guiding instruction had been given to the jury, and no narrowing construction had been adopted by the appellate court. \textit{Id.} In \textit{Proffitt}, however, the Court upheld a death sentence imposed under an "especially heinous, atrocious, or cruel" aggravating circumstance because the Florida Supreme Court had construed the language so as to limit its application to conscienceless or pitiless crimes unnecessarily torturous to victims. 428 U.S. at 255-56 (plurality opinion). In \textit{Arave v. Creech}, 113 S. Ct. 1534 (1993), the Court upheld an Idaho statute with an aggravating circumstance for "utter disregard for human life" because of the state supreme court's limiting construction of the language to mean "cold-blooded, pitiless slayer." \textit{Id.} at 1541. The Court held that by construing the factor to mean "cold-blooded," the state supreme court had constitutionally narrowed the class of defendants eligible for the death penalty to "the subclass of defendants who kill without feeling or sympathy." \textit{Id.} at 1543.

A defendant may lose the right to appeal the use of an impermissibly vague aggravating circumstance to federal court if state law requires an objection to preserve the issue for appeal and the defendant fails to object in a timely fashion. See \textit{Sochor v. Florida}, 112 S. Ct. 2114, 2119-20 (1992) (U.S. Supreme Court lacked authority to address defendant's claim based on jury instruction on "heinousness" factor when state supreme court's decision rested on adequate and independent state ground that defendant had not preserved claim for appeal).\textsuperscript{2312} 462 U.S. 862 (1983).

\item[2313.] \textit{Id.} at 867; see \textit{Barclay}, 463 U.S. at 956-58 (plurality opinion) (erroneous finding of aggravating circumstance harmless error because of existence of other valid aggravating circumstances).

\item[2314.] \textit{Stephens}, 462 U.S. at 879-80.

\item[2315.] \textit{Clemens}, 494 U.S. at 747-49. In \textit{Clemens}, the Court upheld the reweighing process as a means of promoting "reliability and consistency" in the imposition of the death penalty. \textit{Id.} at 749. The Court stated that harmless error analysis is also constitutionally permissible. \textit{Id.} at 752-53. Nevertheless, the Court vacated the lower court's affirmation of a death sentence because it was unclear whether the state appellate court had correctly employed either method. \textit{Id.} at 751-52. \textit{But cf. Rust v. Hopkins}, 984 F.2d 1486, 1493-95 (8th Cir. 1993) (reweighing of aggravating and mitigating factors must be done by sentencing court rather than reviewing court to preserve two-tier structure of review when sentencing error produced by heightening of standard of proof for aggravating factors to beyond a reasonable doubt).

\item[2316.] \textit{Richmond v. Lewis}, 113 S. Ct. 528, 535 (1992). In \textit{Richmond}, the defendant's death sentence was tainted by the sentencing judge's consideration of an unconstitutionally vague aggravating factor. \textit{Id.} at 537. The Court held that the Arizona Supreme Court failed to cure this error when two concurring justices did not actually reweigh the aggravating and mitigating circumstances. \textit{Id.} at 535-37.

In \textit{Stringer}, the Court was explicit that the reviewing court must reconsider the entire mix of aggravating and mitigating circumstances presented to the jury. 112 S. Ct. at 1136-37. The Court noted that it had "not suggested that the Eighth Amendment permits the state appellate court in
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mine that the invalid factor did not affect the jury's determination.\textsuperscript{2317}

Some states permit imposition of the death penalty under a sentencing scheme in which one or more statutory aggravating circumstances are identical to the essential elements of the defendant's underlying capital crime. In \textit{Lowenfield v. Phelps},\textsuperscript{2318} a death sentence imposed under such a statute was challenged on the grounds that the jury could "merely repeat" one of its findings from the guilt phase.\textsuperscript{2319} The Court upheld the statute, reasoning that the required narrowing function had occurred at the guilt phase as a result of the legislature's definition of the criminal offense.\textsuperscript{2320}

The second constitutional requirement for a state statutory scheme is that it must permit the consideration of all relevant mitigating evidence.\textsuperscript{2321} In \textit{Lock}-

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a weighing state to affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process." \textit{Id.} at 1136; see Wiley v. Puckett, 969 F.2d 86, 92-95 (5th Cir. 1992) (finding unconstitutional state supreme court review that only limited vague aggravating circumstance without reweighing other circumstances).

Similarly, in \textit{Parker v. Dugger}, 498 U.S. 308 (1991), the Court reversed a lower court's affirmation of a death sentence because the lower court failed to consider mitigating circumstances when reweighing the evidence. \textit{Id.} at 322. The trial court had not explicitly discussed nonstatutory mitigating circumstances in its sentencing order, but the Court found evidence of such circumstances in the record. \textit{Id.}; see \textit{Jones v. Murray}, 947 F.2d 1106, 1119-20 (4th Cir. 1991) (sentencing court need not specifically address mitigating circumstances if record, taken as whole, cannot be said to have left reasonable juror without vehicle to consider mitigating circumstances), \textit{cert. denied}, 112 S. Ct. 1591 (1992); \textit{Clark v. Ricketts}, 942 F.2d 567, 574-75 (9th Cir. 1991) (sentencing court need not discuss all relevant mitigating circumstances in its written findings if record shows that such circumstances considered), \textit{cert. denied}, 113 S. Ct. 117 (1992).

In \textit{Sochor}, the Court invalidated a state court decision in which it was unclear whether the state court had undertaken harmless error analysis. 112 S. Ct. at 2123. The Court stated that "[a]lthough we do not mean . . . to require a particular formulaic indication by state courts before their review for harmless error will pass federal scrutiny, a plain statement that the judgment survives on such an enquiry is clearly preferable to allusions by citation." \textit{Id.; see Smith v. Dixon}, 996 F.2d 667, 675 (4th Cir. 1993) (state supreme court did not remedy vagueness error because it did not articulate narrowing construction it employed); \textit{Jeffers v. Lewis}, 974 F.2d 1075, 1083-84 (9th Cir. 1992) (state supreme court did not remedy vagueness error in sentencing because it failed to reweigh).

\textit{2318. 484 U.S. 231 (1988).}
\textit{2319. Id. at 241.}
\textit{2320. Id. at 246. In \textit{Lowenfield}, the jury found the defendant guilty of first-degree murder, a capital offense defined under the Louisiana statute as murder with a "specific intent to kill or to inflict great bodily harm upon more than one person." \textit{Id.} at 243. The single aggravating factor found by the jury and upheld by the Louisiana Supreme Court was that the defendant "knowingly created a risk of death or great bodily harm to more than one person." \textit{Id.} The Supreme Court held that when aggravating circumstances act as a means of narrowing the class of death-eligible defendants at the guilt phase, all that is constitutionally required at the sentencing phase is a consideration of mitigating factors. \textit{Id.} at 246; see \textit{Byrne v. Butler}, 845 F.2d 501, 515 n.12 (5th Cir.) (narrowing function may occur at guilt phase when aggravating circumstance identical to element of crime of which defendant convicted), \textit{cert. denied}, 487 U.S. 1242 (1988); \textit{McKenzie v. Risley}, 842 F.2d 1525, 1539-41 (9th Cir.) (en banc) (narrowing function performed by statute providing that homicide by means of torture and aggravated kidnapping punishable by death; list of aggravating factors not required), \textit{cert. denied}, 488 U.S. 901 (1988).

\textit{2321. Hitchcock v. Dugger}, 481 U.S. 393, 394 (1987) ("the sentencer' may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence" (quoting \textit{Skipper v.}}
ett v. Ohio,\textsuperscript{2322} the Court held that a statute may not preclude the sentencer from giving independent weight to evidence of the defendant's character and record or the circumstances of the offense that might justify a less severe penalty than death.\textsuperscript{2323} In Eddings v. Oklahoma,\textsuperscript{2324} the Court reversed a death sentence because the sentencing judge refused to review nonstatutory mitigating evidence.\textsuperscript{2325} To establish that a sentencing jury has been impossibly constrained, however, the defendant must show a "reasonable likelihood that

South Carolina, 476 U.S. 1, 4 (1986)); Eddings, 455 U.S. at 110 (same); Lockett, 438 U.S. at 605-07 (plurality opinion) (same).


2323. Id. at 605 (plurality opinion). The Court has reversed death sentences when different types of relevant mitigating evidence have been excluded. See Hitchcock, 481 U.S. at 398-99 (unconstitutional to exclude evidence of defendant's family background and capacity for rehabilitation); Skipper, 476 U.S. at 8-9 (unconstitutional to exclude evidence of defendant's good behavior while incarcerated after arrest); Eddings, 455 U.S. at 113 (unconstitutional to exclude evidence of defendant's emotional disturbance and troubled family background); Lockett, 438 U.S. at 608 (plurality opinion) (unconstitutional to exclude evidence of defendant's age, minor role in offense, and absence of intent to cause death). Compare Brogdon v. Butler, 824 F.2d 338, 343 (5th Cir.) (per curiam) (refusal to admit evidence that coindictee received life sentence not unconstitutional because irrelevant to consideration of defendant's character, record, or offense), cert. denied, 483 U.S. 1040 (1987); Robison v. Maynard, 943 F.2d 1216, 1217-18 (10th Cir.) (refusal to admit testimony of victim's sister that she did not wish jury to impose death penalty not unconstitutional because not relevant mitigating evidence), cert. denied, 112 S. Ct. 445 (1991) and Martin v. Wainwright, 770 F.2d 918, 935-37 (11th Cir. 1985) (refusal to admit testimony on deterrent effect of capital punishment on mentally ill not unconstitutional because designed to persuade sentencer that legislature erred in enacting statute, not to focus on unique characteristics of particular defendant or crime), modified en banc on other grounds, 781 F.2d 185, and cert. denied, 479 U.S. 909 (1986) with Chaney v. Brown, 730 F.2d 1334, 1351-57 (10th Cir.) (government withholding of FBI reports unconstitutional because evidence mitigating in nature), cert. denied, 469 U.S. 1090 (1984). The Lockett requirement will often conflict with a state's rules of evidence. In Green v. Georgia, 442 U.S. 95 (1979) (per curiam), the Supreme Court intimated that an otherwise valid state evidentiary rule cannot be employed to restrict admission of reliable mitigating evidence. Id. at 97. The Court held that exclusion of highly relevant testimony under Georgia's hearsay rule violated the Due Process Clause by denying the defendant a fair trial on the issue of punishment. Id. Compare Mak v. Blodgett, 970 F.2d 614, 622-24 (9th Cir. 1992) (circumstantial evidence implying that codefendant and third party were responsible for planning crime rather than defendant relevant and admissible as mitigating evidence even though it did not meet state evidentiary standard of relevance), cert. denied, 113 S. Ct. 1363 (1993) and Dutton v. Brown, 812 F.2d 593, 599-602 (10th Cir.) (en banc) (unconstitutional to exclude important mitigating testimony by defendant's mother at sentencing hearing merely because she violated sequestration order when less restrictive alternative existed such as instructing jury that she had heard witnesses' testimony), cert. denied, 484 U.S. 836 (1987) with Edwards v. Scroggy, 849 F.2d 204, 211-12 (5th Cir. 1988) (statements by defendant to mother that he was sorry for participation in murder and that, if spared, he would serve God and statement to priest about type of prison work he wanted to do if spared properly excluded under Mississippi's hearsay rule because not "unnecessarily limiting" and did not render trial "fundamentally unfair;' Green redresses "egregious evidentiary errors"), cert. denied, 489 U.S. 1059 (1989).

2324. 455 U.S. 104 (1982).

2325. Id. at 113. In Eddings, the Court found no distinction under Lockett between a statutory provision precluding a judge or jury from considering mitigating evidence and a trial judge's refusal to do so: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14.
the jury has applied a challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.\textsuperscript{2326}

States may establish requirements for proving mitigating evidence as long as the burden does not prevent consideration of relevant evidence.\textsuperscript{2327} For example, the Supreme Court invalidated a statute that required a jury to unanimously find the existence of a mitigating factor before giving it effect.\textsuperscript{2328} The

\textsuperscript{2326}Boye v. California, 494 U.S. 370, 380 (1990). The Boyde Court stated that although a mere "possibility" of improper application would be insufficient to establish a constitutional violation, a defendant "need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction..." \textit{Id.} In Boyde, the trial court had instructed the jury to consider ""[a]ny other circumstance which extenuates the gravity of the crime"" and defined extenuate to mean ""to lessen the seriousness of a crime as by giving an excuse." \textit{Id.} at 381. The Supreme Court found that the instruction was clear on its face given society's long held view that ""any other circumstance"" that might excuse the crime ""certainly includes a defendant's background and character." \textit{Id.} at 382. Even if the instruction was facially unclear, the Court reasoned that a reasonable jury would understand it to permit the consideration of background and character evidence given the ""introduction without objection of volumes of mitigating evidence." \textit{Id.} at 384.


\textsuperscript{2327}See Saffle v. Parks, 494 U.S. 484, 490 (1990) ("There is a simple and logical difference between rules that govern what factors a jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision."); \textit{see also} Hendricks v. Vasquez, 974 F.2d 1099, 1109 (9th Cir. 1992) (jury not constrained from considering all mitigating evidence of emotional disturbance by instruction explicitly requesting them to consider only "extreme" emotional disturbance).

Under certain circumstances, the Court has found that the state has an affirmative duty to assist the defendant in obtaining or preparing certain types of mitigating evidence. For instance, sometimes the trial court must appoint a psychiatrist to assist the defendant in the preparation of mitigating evidence. \textit{See} Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (defendants must be given access to competent psychiatrist at trial or sentencing if mental state in issue); Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990) (due process violated when court-appointed psychiatrist, who reported only to court, did not assist defendant in preparing claims regarding mitigating circumstances during sentencing phase of capital trial).

\textsuperscript{2328}McKoy v. North Carolina, 494 U.S. 433, 444 (1990); Mills v. Maryland, 486 U.S. 367, 384 (1988) (death sentence vacated when ambiguous jury instruction could reasonably be construed to require jury unanimity in finding mitigating factors). \textit{Compare} Kordenbrock v. Scroggy, 919 F.2d 1091, 1109-10 (6th Cir. 1990) (sentence vacated when substantial possibility that jury misled by lack of instruction regarding mitigating factors, given unanimity requirement as to aggravating factors, "common perception" that jury findings should be unanimous, and showing that jury "struggled" with mitigating evidence), \textit{cert. denied}, 111 S. Ct. 1608 (1991) and Kubat v. Thieret, 867 F.2d 351, 373 (7th Cir.) (sentence vacated when substantial possibility that reasonable jury could interpret instruction to require jury unanimity in finding sufficiency of mitigating circumstances), \textit{cert. denied}, 493 U.S. 874 (1989) with Smith v. Dixon, 996 F.2d 667, 679 (4th Cir. 1993) (no substantial possibility jury misled into believing unanimity required when judge failed explicitly to instruct jury that findings of mitigating factors need not be unanimous because no substantial possibility that jury misled into thinking unanimity required), \textit{rev'd en banc on other grounds}, 14 F.3d 956 (1994); James v. Whitley, 926 F.2d 1433, 1448-49 (5th Cir. 1991) (no substantial possibility jury misled into believing unanimity required when instructions stated need to "find" aggravating circumstances, but only to "consider" mitigating circumstances) \textit{and} Gacy
Court reasoned that allowing one "holdout juror" to prevent the other eleven from considering mitigating evidence would violate the constitutional requirement that all such evidence be considered in capital cases.\textsuperscript{2329} In Walton v. Arizona,\textsuperscript{2330} however, the Court refused to invalidate a statute that required the defendant to prove mitigating circumstances by a preponderance of the evidence.\textsuperscript{2331} In Delo v. Lashley,\textsuperscript{2332} the Court held that state courts are not constitutionally required to give mitigating circumstance instructions when the defendant has offered no evidence at trial to support them.\textsuperscript{2333}

A sentencing scheme must also permit the sentencer to give effect to any and all mitigating evidence. In Penry v. Lynaugh,\textsuperscript{2334} the Court vacated a death sentence when the jury was not instructed that it could give effect to all mitigating circumstances, including nonstatutory evidence, by declining to impose the death penalty.\textsuperscript{2335} The Court found that the trial court's failure to instruct had deprived the jury of a "vehicle for expressing its 'reasoned moral response'" to mitigating evidence of the defendant's mental retardation and childhood abuse.\textsuperscript{2336} The possible reach of Penry has been circumscribed by
Graham v. Collins and Johnson v. Texas. In both cases, the Court concluded that the lack of an explicit instruction to consider mitigating evidence about the defendants’ age did not prevent the jury from fully considering the mitigating effect of the defendants’ youth.

When considering mitigating circumstances that might justify a sentence less than death, the sentencer may not exercise unfettered discretion. In California v. Brown, the Court upheld a trial court’s antisympathy instruction that warned the jury not to be swayed by “mere sympathy” in determining whether to impose a death sentence. The Court concluded that a reasonable juror would interpret the instruction to mean she should “ignore emotional responses that are not rooted in the aggravating and mitigating evidence.”

The Eleventh Circuit has held that the judge must instruct an advisory jury to consider both statutory and nonstatutory mitigating evidence when substantial nonstatutory evidence exists. Jackson v. Dugger, 931 F.2d 712, 717 (11th Cir.), cert. denied, 112 S. Ct. 280 (1991).

The Court concluded that it was constitutional to “prohibit[] juries from basing their sentence.

Since Graham and Johnson were decided, the Fifth Circuit has applied their reasoning to uphold death sentences imposed under Texas's statutory special issues framework involving a broad range of mitigating evidence. See Harris v. Collins, 990 F.2d 185, 188-89 (5th Cir.) (special issues framework allowed jury to give full mitigating effect to possibility that defendant played only minor role in crime), cert. denied, 113 S. Ct. 3069 (1993); James v. Collins, 987 F.2d 1116, 1121 (5th Cir.) (special issues framework allowed jury to contemplate full mitigating effect of defendant’s alcohol abuse), cert. denied, 114 S. Ct. 30 (1993); Jernigan v. Collins, 980 F.2d 292, 295 (5th Cir. 1992) (special issues framework allowed jury to fully consider mitigating evidence that defendant was “kind and gentle”), cert. denied, 113 S. Ct. 1977 (1993). Cutting closest to what remains of Perry is Demouchette v. Collins, 972 F.2d 651 (5th Cir.), cert. denied, 113 S. Ct. 27 (1992), in which the Fifth Circuit held that the language of the first special issue allowed the jury to adequately consider the mitigating effect of the defendant’s antisocial personality disorder without further instruction. Id. at 653-54.
When a sentencer determines that no mitigating evidence exists, the state may require the imposition of the death penalty upon a finding of at least one statutory aggravating circumstance. In *Blystone v. Pennsylvania*, the Court rejected a claim that such a statute violated the Eighth Amendment and instead found that a defendant's right to individualized sentencing was fully protected by the jury's ability to consider mitigating circumstances. Furthermore, the Court concluded that a statute may constitutionally require a jury to impose the death penalty after making "certain findings against the defendant beyond the initial conviction for murder." In *Boyde v. California*, the Court upheld a statute mandating the imposition of the death penalty when aggravating circumstances outweigh mitigating circumstances.

**Improper Influences in Capital Cases.** A death sentence may be reversed on grounds that the jury imposing the sentence was influenced or misled by improper evidence, arguments, or instructions. In *Dawson v. Delaware*, the Supreme Court invalidated a death sentence when the penalty phase included a stipulation that the defendant belonged to a "white racist prison gang." Improper Influences in Capital Cases. A death sentence may be reversed on grounds that the jury imposing the sentence was influenced or misled by improper evidence, arguments, or instructions. In *Dawson v. Delaware*, the Supreme Court invalidated a death sentence when the penalty phase included a stipulation that the defendant belonged to a "white racist prison gang."
The Court held that evidence of the gang activity was irrelevant because it "proved nothing more than [the defendant's] abstract beliefs."2351 The Court refused, however, to create a per se barrier against the introduction of evidence concerning membership in an association.2352

In Payne v. Tennessee,2353 the Supreme Court overruled two prior decisions2354 and held that the Eighth Amendment does not prohibit admission of "victim impact" evidence and related prosecutorial argument2355 at the sentencing phase of a capital trial.2356 The Court held that evidence and argument

2351. Id. at 1098.
2352. Id. at 1097-98. A defendant's race, religion, sexual preference or membership in an association may be properly considered by a court only if it is relevant to show motive. Compare Barclay v. Florida, 463 U.S. 939, 948-49 (1983) (plurality opinion) (upholding death sentence when sentencing judge considered defendant's racial motive because defendant's desire to start a racial war could be relevant to "especially heinous, atrocious, or cruel" statutory aggravating circumstance) and Brecht v. Abrahamson, 944 F.2d 1363, 1365 (7th Cir. 1991) (upholding death sentence when evidence of defendant's homosexuality relevant to show motive of retaliation against victim's animosity towards defendant's sexual preference), aff'd on other grounds, 113 S. Ct. 1710 (1993) with Zant v. Stephens, 462 U.S. 862, 865 (1983) (holding "factors that are constitutionally impermissible or totally irrelevant to the sentencing process [include] ... for example the race, religion, or political affiliation of the defendant ... ") and Beam v. Paskett, 3 F.3d 1301, 1310 (9th Cir. 1993) (overturning death sentence when judge considered defendant's history of sexual assault by parents, homosexuality, and relationships with both younger and older women because evidence not linked to statutory aggravating circumstances of future dangerousness).


2355. Misconduct or improper remarks by defense counsel more appropriately fall under ineffective assistance of counsel claims. See Stewart v. Dugger, 877 F.2d 851, 855 n.4 (11th Cir. 1989) (claim that defense attorney's comments misled jury properly brought under Sixth Amendment right to counsel rather than under Eighth Amendment right to reasoned sentencing determination), cert. denied, 495 U.S. 962 (1990). Ineffectiveness of counsel is discussed in greater detail in Ineffective Assistance of Counsel in RIGHT TO COUNSEL in Part III.

2356. In Payne, the trial court admitted the testimony of a grandmother describing a three-year-old's suffering due to the killing of his mother and two-year-old sister. Payne, 111 S. Ct. at 2603-04; see also Wiley v. Puckett, 969 F.2d 86, 105 (5th Cir. 1992) (testimony of victim's wife regarding victim's character and reputation in community admissible); Williams v. Chrans, 945 F.2d 926, 946-47 (7th Cir. 1991) (report describing victim as nurse, mother, and wife admissible), cert. denied, 112 S. Ct. 1516 (1992). The trial court also allowed the prosecutor's closing argument regarding the continuing effect of the deaths on the victims' family. Payne, 111 S. Ct. at 2603-04; see also Horton v. Zant, 941 F.2d 1449, 1465-66 (11th Cir. 1991) (prosecutor's repeated references to victim's occupation as District Attorney admissible), cert. denied, 112 S. Ct. 1516 (1992).

The Court's previous decisions in Booth, 482 U.S. at 496, and Gathers, 490 U.S. at 805, had prohibited the admission of three categories of evidence: (1) the victim's personal characteristics; (2) the impact of the victim's death on the victim's family; and (3) the victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence. Payne, 111 S. Ct. at 2611 n.2; id. at 2614 n.1 (Souter & Kennedy, JJ., concurring). In Payne, the Court overruled Booth and Gathers to permit the admission of the first and second categories of evidence. Id. at 2611 n.2 (majority opinion). The Payne Court did not address the third category of evidence excluded under Booth. Id. at 2611 n.2; id. at 2614 n.1 (Souter & Kennedy, JJ., concurring) ("This case presents no challenge to the Court's holding in Booth v. Maryland that a sentencing authority should not receive a third category of information concerning a victim's
relating to the victim's personal characteristics and the impact of the victim's death on the victim's family are legitimate means of informing the sentencer about the specific harm caused by the defendant's acts.\textsuperscript{2357} The Court suggested that when admission of such evidence is unfairly prejudicial, the defendant may obtain relief under the Fourteenth Amendment's Due Process Clause.\textsuperscript{2358}

family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence.\textsuperscript{3}); see Robison v. Maynard, 943 F.2d 1216, 1217 (10th Cir. 1991) (Payne did not remove barrier to admission of opinion testimony offered by victim's sister that she did not wish death penalty to be imposed upon defendant), \textit{cert. denied}, 112 S. Ct. 1285 (1992).


2358. \textit{Id.} (citing Darden v. Wainwright, 477 U.S. 168, 179-83 (1986)). Improper comments by the prosecutor have required reversal when they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." \textit{Darden}, 477 U.S. at 181 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). In \textit{Darden}, the Court found no denial of due process even though the prosecutor referred to the defendant as an "animal" and on multiple occasions expressed his belief that someone should have "blown [the defendant's] head off." \textit{Id.} at 182-83. The majority emphasized that the comments were an "invited response" to defense counsel's arguments. \textit{Id.} at 182. Moreover, the remarks did not manipulate or misstate evidence, nor implicate other specific rights of the defendant. \textit{Id.}

Analyzing the totality of the circumstances, circuit courts generally have rejected due process challenges to prosecutorial comments that allegedly influenced the sentencing determination. Compare Lawson v. Dixon, 3 F.3d 743, 755 (4th Cir. 1993) (prosecutor's comments that victim's house was his "crucifixion block," that defendant's constitutional rights should be compared to those of victim, and that other countries summarily hung convicted first-degree murderers not due process violation), \textit{cert. denied}, 114 S. Ct. 1208 (1994); Drew v. Collins, 964 F.2d 411, 417-19 (5th Cir. 1992) (prosecutor's comments that defendant was "sadistic killer" and that jury should return swift verdict to avoid insulting victim's family not due process violation), \textit{cert. denied}, 113 S. Ct. 3044 (1993); Resnover v. Pearson, 965 F.2d 1453, 1465 (7th Cir. 1992) (prosecutor's comment that defendant not present at penalty phase not due process violation because comment only indicated factual situation and did not implicate defendant's self-incrimination right), \textit{cert. denied}, 113 S. Ct. 2935 (1993); Pickens v. Lockhart, 4 F.3d 1446, 1453 (8th Cir. 1993) (prosecutor's comments regarding race of victims improper but not due process violation), \textit{cert. denied}, 114 S. Ct. 1206 (1994); Jeffries v. Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993) (prosecutor's comment concerning state law procedure allowing defendant to make statement during closing argument without cross-examination not due process violation because comment rebutted defendant's claim of innocence), \textit{petition for cert. filed}, 62 U.S.L.W. 3505 (U.S. Dec. 20, 1993) (No. 93-971) and \textit{Bush} v. Singletary, 988 F.2d 1082, 1088 (11th Cir. 1993) (prosecutor's isolated comment suggesting defendant was triggerman, although inconsistent with prosecutor's overall presentation and argument and unnecessary to sustain first-degree murder conviction, not due process violation), \textit{cert. denied}, 114 S. Ct. 705 (1994) \textit{with} Lesko v. Lehman, 925 F.2d 1527, 1541, 1545-46 (3d Cir.) (prosecutor's appeal to jurors to take vengeance on defendant violated due process), \textit{cert. denied}, 112 S. Ct. 273 (1991); Newlon v. Armontrout, 885 F.2d 1328, 1336-37 (8th Cir. 1989) (prosecutor's statements expressing personal beliefs about death penalty, comparing defendant to other mass murderers, and insinuating that all murderers should be executed "totally infected the proceedings" with unfairness and violated due process), \textit{cert. denied}, 497 U.S. 1038 (1990) and Nelson v. Nagle, 995 F.2d 1549, 1555-57 (11th Cir. 1993) (prosecutor's reading of anachronistic Georgia Supreme Court case to jury violated due process because improperly suggested that jury could not consider mercy even though mercy implicitly a proper mitigating consideration).

Comments regarding penological justifications for imposition of the death penalty have been held proper for closing argument. See \textit{King} v. Puckett, 1 F.3d 280, 286 (5th Cir. 1993) (prosecutor's argument that death penalty serves as deterrent permissible); Williams v. Chrans, 945 F.2d 926, 949-50 (7th Cir. 1991) (prosecutor's comments that death sentence appropriate to show that defendant's behavior should not be tolerated held permissible), \textit{cert. denied}, 112 S. Ct. 3002

\textsuperscript{2357} 114 S. Ct. 705 (1994); Newlon v. Armontrout, 885 F.2d 1328, 1336-37 (8th Cir. 1989) (prosecutor's comments expressing personal beliefs about death penalty, comparing defendant to other mass murderers, and insinuating that all murderers should be executed "totally infected the proceedings" with unfairness and violated due process), \textit{cert. denied}, 497 U.S. 1038 (1990) and Nelson v. Nagle, 995 F.2d 1549, 1555-57 (11th Cir. 1993) (prosecutor's reading of anachronistic Georgia Supreme Court case to jury violated due process because improperly suggested that jury could not consider mercy even though mercy implicitly a proper mitigating consideration).

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If jurors are potentially misled concerning their roles in sentencing, the "Eighth Amendment's heightened need for reliability"\textsuperscript{2359} may require reversal. In \textit{Caldwell v. Mississippi},\textsuperscript{2360} the prosecutor suggested that the jury's decision to impose the death penalty would not be final because it would be reviewed for correctness by an appellate court.\textsuperscript{2361} In vacating the sentence, the Court found it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."\textsuperscript{2362} When a defendant claims that improper jury instructions...
resulted in a *Caldwell* violation, she "must show that the remarks to the jury improperly described the role assigned to the jury by local law."\(^{2363}\)

In *California v. Ramos*,\(^{2364}\) the Court rejected an argument that the jury was misled when an instruction informed them of the governor's power to commute a life sentence without parole, but not of his power to commute a death

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To evaluate the effect of the challenged statements, circuit courts consider the entire trial record. See *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir.) (court should not consider prosecutor's argument in isolation, but in context of general purpose of argument), *cert. denied*, 112 S. Ct. 959 (1992);*Hopkinson v. Shillinger*, 888 F.2d 1286, 1295-96 (10th Cir. 1989) (court must consider whether prosecutor's statements, taken in context, would have altered sentencing decision), *cert. denied*, 497 U.S. 1010 (1990); *Bush v. Singletary*, 988 F.2d 1082, 1089 (11th Cir. 1993) (court considered instructions given by trial judge, not just the prosecutor's comment that majority vote of seven needed for any recommendation; trial judge clearly explained that six or more votes adequate for recommendation of no death penalty), *cert. denied*, 114 S. Ct. 705 (1994). Curative instructions by the trial judge can correct misleading statements by the prosecutor. See *McCorquodale v. Kemp*, 829 F.2d 1035, 1037 (11th Cir.) (per curiam) (court's strong criticism of prosecutorial emphasis of appellate court's role in reviewing jury's sentencing determination corrected mistaken jury impression and avoided *Caldwell* violation), *cert. denied*, 483 U.S. 1055 (1987). However, the Eleventh Circuit has held that an advisory jury recommendation tainted by a *Caldwell* violation cannot be cleansed by the trial court's error-free sentencing determination. See *Mann v. Dugger*, 844 F.2d 1446, 1454 (11th Cir. 1988) (*Caldwell* violation triggered when advisory sentencing jury misled as to role, and otherwise error-free final sentencing by court cannot cure constitutional error), *cert. denied*, 489 U.S. 1071 (1989). The Fifth Circuit has permitted allegedly improper *Caldwell* remarks when such remarks rebut defense counsel arguments. See *Smith v. Black*, 904 F.2d 950, 980 (5th Cir. 1990) (prosecutor's repeated reference to possibility of defendant's parole not *Caldwell* violation when issue introduced by defense counsel), *vacated on other grounds*, 112 S. Ct. 1463 (1992).

The three circuit courts reaching the issue have applied different standards to determine whether *Caldwell*-violative statements require vacation of a sentence. See *Sawyer v. Butler*, 881 F.2d 1273, 1284-85 (5th Cir. 1989) (en banc) (sentence must be vacated unless statements had "no effect" upon jury), *aff'd on other grounds*, 497 U.S. 227 (1990); *Hopkinson v. Shillinger*, 888 F.2d 1286, 1295 (10th Cir. 1989) (sentence must be vacated when "substantial possibility" that prosecutor's statements affected sentencing decision), *cert. denied*, 497 U.S. 1010 (1990); *Tucker v. Kemp*, 802 F.2d 1293, 1295-96 (11th Cir. 1986) (en banc) (per curiam) (sentence must be vacated when "reasonable probability" that, but for *Caldwell* error, outcome would be different), *cert. denied*, 480 U.S. 911 (1987). The Eighth Circuit used the "reasonable probability" standard when considering a prosecutorial misconduct challenge to which *Caldwell* did not apply for procedural reasons. *Newlon v. Armontrout*, 885 F.2d 1328, 1336-37 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990).

In *Sawyer v. Smith*, 497 U.S. 227 (1990), the Supreme Court held that *Caldwell* announced a "new rule" and therefore defendants whose convictions became final prior to the decision in *Caldwell* are not entitled to federal habeas corpus relief based on a *Caldwell* error. *Id.* at 241. For a discussion of the retroactive application of new constitutional rules of criminal procedure, see *Cognizable Issues* in HABEAS RELIEF FOR STATE PRISONERS in Part V.

sentence. The Court held that the jury's appreciation of the gravity of its role was not affected because the instruction was accurate and relevant to a legitimate state interest.

Generally, a judge is not obliged to instruct juries that the defendant may be convicted of a lesser included offense in lieu of the capital offense. Such an instruction must be given only "if the evidence would permit a jury rationally to find a defendant guilty of the lesser offense and acquit him of the [capital offense]." Nevertheless, in Schad v. Arizona, the Court held that a

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2365. Id. at 1013.

2366. Id. at 1004 n.19, 1009. In light of the sentencing alternatives, the death penalty or a life sentence without parole, the Court found that the actual jury instruction supplied accurate information to correct any possible misimpression that a defendant sentenced to life without parole could not have her sentence commuted by the governor to include the possibility of parole. Id. at 1004 n.19.

2367. Id. at 1005-09. The Court dismissed the claim that the instruction was speculative and determined that its essential effect was to invite the jury to assess the aggravating factor of future dangerousness. Id. at 1003, 1008.

2368. See id. at 1004 n.19 (state has interest in accurately characterizing sentencing choices). The Court also noted that an instruction disclosing the governor's power to commute a death sentence could operate to the defendant's disadvantage because the jury's appreciation of the gravity of its sentencing decision might be diminished. Id. at 1011.

The Fourth Circuit has held that states may decide what, if anything, the jury should be told about commutation, pardon, and parole. Peterson v. Murray, 904 F.2d 882, 886-87 (4th Cir.), cert. denied, 498 U.S. 992 (1990). The Fifth Circuit has held that the judge is not required to instruct a jury that it could return a life sentence even when it found aggravating, but no mitigating, circumstances. Hill v. Black, 887 F.2d 513, 520 (5th Cir. 1989), vacated, 498 U.S. 801, and reinstated, 920 F.2d 249 (5th Cir. 1990).

2369. Hopper v. Evans, 456 U.S. 605, 611 (1982). But see Beck v. Alabama, 447 U.S. 625, 642-43 (1980) (invalidating state statute prohibiting lesser included offense instructions in capital cases). In Beck, the Court was concerned that the Alabama statute forced the jury to decide between acquittal and conviction for the capital offense. Id. While a capital conviction might be unwarranted, if jurors believed that the defendant committed some crime, they might still convict the defendant of the capital offense simply to ensure that some punishment was imposed. Id.

2370. Hopper, 456 U.S. at 612 (citing Keeble v. U.S., 412 U.S. 205, 208 (1973)). Compare Cantu v. Collins, 967 F.2d 1006, 1014 (5th Cir. 1992) (court has no duty to offer instruction on lesser included offense of noncapital murder when defendant offered only "unsupported conjecture" to satisfy elements of lesser offense), cert. denied, 113 S. Ct. 3045 (1993); Kubat v. Thieret, 867 F.2d 351, 365-66 (7th Cir.) (court has no duty, sua sponte, to offer instruction on lesser included offense of unlawful restraint when defendant, charged with murder and kidnapping, may have made strategic decision not to request unlawful restraint instruction), cert. denied, 493 U.S. 874 (1989); Williams v. Armontrout, 912 F.2d 924, 930 (8th Cir. 1990) (court has no duty to offer instruction on lesser included offense of kidnapping when abduction part of capital offense), cert. denied, 498 U.S. 1127 (1991) and U.S. v. Chandler, 996 F.2d 1073, 1099 (11th Cir. 1993) (court has no duty, sua sponte, to offer instruction on lesser offense of murder-for-hire when defendant, charged with murder while engaged in and in furtherance of continuing criminal enterprise, may have made strategic decision not to request murder-for-hire instruction), petition for cert. filed, 62 U.S.L.W. 3454 (U.S. Dec. 28, 1993) (No. 93-1033) with Wiggerfall v. Jones, 918 F.2d 1544, 1550 (11th Cir. 1990) (court must offer instruction on lesser included noncapital offense of felony murder when evidence would support finding of guilt as to noncapital offense and acquittal as to capital offense).

The Supreme Court has held that a defendant is not entitled to have the jury instructed about a lesser included offense for which the statute of limitations has expired, unless she chooses to waive her statute of limitations defense. Spaziano v. Florida, 468 U.S. 447, 455-56 (1984).
defendant is not entitled to an instruction on every lesser included offense supported by the evidence as long as the jury has been provided with a "third option" to acquittal or capital conviction.\textsuperscript{2372}

Although the Court has sought to direct and limit the discretion of capital sentencing bodies, the Court has stated that "the requirement of heightened rationality in the imposition of capital punishment does not 'place[e] totally unrealistic conditions on its use.'"\textsuperscript{2373} In \textit{McCleskey v. Kemp},\textsuperscript{2374} the Court held that statistical evidence of racial discrepancies in capital sentencing does not demonstrate arbitrary, capricious, or discriminatory application of the death penalty without a showing that purposeful discrimination produced an unfair sentence in a particular case.\textsuperscript{2375} The Court concluded that once the method for imposing the death penalty was surrounded with sufficient procedural safeguards, any discretion exercised by the jury was constitutionally permissible.\textsuperscript{2376}

\textbf{Death Qualification.} As with any criminal penalty, a death sentence may be reversed if the jury fails to meet the due process requirements of fairness and impartiality.\textsuperscript{2377} In \textit{Wainwright v. Witt},\textsuperscript{2378} the Court held that potential jurors

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\item \textsuperscript{2372} Id. at 2504-05. In \textit{Schad}, the defendant was indicted for first-degree capital murder. \textit{Id.} at 2495. The trial court refused the defendant's request for a jury instruction on robbery as a lesser included offense, but did instruct the jury on second-degree, noncapital murder. \textit{Id.} The Supreme Court reasoned that the instruction on second-degree murder, as a "third option" to acquittal or capital conviction, was sufficient to ensure the reliability of the jury's capital murder verdict. \textit{Id.} at 2505; \textit{see} \textit{Terry v. Petsock}, 974 F.2d 372, 377 (3d Cir. 1992) (court not required to give instruction on lesser included homicide offense when jury knew that defendant, life prisoner, would return to prison even if acquitted; jury also given \textit{Schad} third option through instructions on lesser included nonhomicide offense), \textit{cert. denied}, 113 S. Ct. 1338 (1993).
\item \textsuperscript{2373} \textit{McCleskey v. Kemp}, 481 U.S. 279, 313 n.37 (1987) (quoting \textit{Gregg v. Georgia}, 428 U.S. 153, 199 n.50 (1976) (plurality opinion)). In \textit{McCleskey}, the majority objected to the dissent's call for "a uniquely high degree of rationality in imposing the death penalty," \textit{id.} at 335 (Brennan, Marshall, Blackmun, & Stevens, JJ., dissenting), arguing that the "unprecedented safeguards" inherent in current capital sentencing statutes "ensure a degree of care in the imposition of the sentence of death that can be described only as unique." \textit{Id.} at 313 n.37 (majority opinion).
\item \textsuperscript{2374} 481 U.S. 279 (1987).
\item \textsuperscript{2375} \textit{Id.} at 292-93. In \textit{McCleskey}, the Court reasoned that when the state legislature has legitimate nondiscriminatory reasons for enacting its capital punishment statute, when there is no evidence that the legislature maintained the statute because of its racially disproportionate impact, and when the capital sentencing system is able to operate in a fair and neutral manner, there is no inference of discriminatory purpose. \textit{Id.} at 298.
\item \textsuperscript{2376} \textit{Id.} at 313. Although noting that the statistics demonstrated a risk that racial bias affected Georgia's capital sentencing process, the Court concluded that any such risk was not "constitutionally significant." \textit{Id.; see} \textit{King v. Puckett}, 1 F.3d 280, 286-87 (5th Cir. 1993) (defendant's statistical evidence that African-American males accused of killing white victims more likely to receive death penalty, prosecutor's remarks about "black minister" during closing argument, and prosecutor's use of peremptory challenges to remove African-American jurors from venire fall short of demonstrating purposeful racial discrimination).
\item \textsuperscript{2377} \textit{Witherspoon v. Illinois}, 391 U.S. 510, 522 (1968). In \textit{Witherspoon}, the trial judge summarily excused for cause 47 venire members—about half the total—who expressed some misgivings about the death penalty. \textit{Id.} at 513. The Court held that the jury resulting from this method was "uncommonly willing to condemn a man to die," and that the method violated the Due Process Clause and the Sixth Amendment. \textit{Id.} at 518, 521.
\item \textsuperscript{2378} 469 U.S. 412 (1985).
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who are opposed to the death penalty may be excluded for cause because they might otherwise frustrate a state's legitimate interest in administering its capital sentencing statute.\textsuperscript{2379} The Court noted that such views "would prevent or substantially impair the performance of [a juror's] duties... in accordance with his instructions and his oath."\textsuperscript{2380} Similarly, the Court in

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2379. Id. at 423. The Court in Witt emphasized that its holding was not "a ground for challenging any juror. It is rather a limitation on the state's power to exclude..." Id. (quoting Adams v. Texas, 448 U.S. 38, 47-48 (1980)). The Court stated that it's holding was merely an application of the Sixth Amendment's requirement of a fair and impartial trial to a capital sentencing procedure. Id.

2380. Id. at 420 (quoting Adams, 448 U.S. at 45). In establishing this standard, the Court sought to dispel lower court confusion and to clarify that more stringent Witherspoon language was not controlling. Id. at 422. Dicta in Witherspoon had limited exclusion for cause to those extreme venirepersons who made it "unmistakably clear (1) that they would automatically vote against capital punishment... or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon, 391 U.S. at 522-23 n.21.

The Witt majority asserted that the "prevent or substantially impair" standard is better suited to the current duties of capital sentencing juries. Witt, 469 U.S. at 424. The Witherspoon jury of the late 1960s was vested with unlimited discretion; thus a juror who was willing to consider the death penalty was able to follow the law and abide by her oath. Id. at 421. Since Witherspoon, however, many states have enacted capital sentencing schemes in which jurors are asked specific factual questions, the answers to which determine punishment. Id. at 422. In this context, a state may properly exclude a venireperson who would be unable to answer truthfully questions that could lead to imposition of the death penalty. Id.

Circuit courts have differed as to when the Witt standard has been satisfied. Compare Lesko v. Lehman, 925 F.2d 1527, 1548 (3d Cir.) (potential juror properly excluded when answers during voir dire indicated that personal opposition to death penalty would preclude her from considering all lawful penalties), cert. denied, 112 S. Ct. 273 (1991); Nethery v. Collins, 993 F.2d 1154, 1160 (5th Cir. 1993) (potential juror properly excluded when she expressed disapproval of death penalty and difficulty to cast aside convictions in favor of court's instructions), cert. denied, 1993 WL 495451 (U.S. Apr. 4, 1994) (No. 93-6862); Hatley v. Lockhart, 990 F.2d 1070, 1072 (8th Cir. 1993) (potential juror properly excluded when she repeatedly expressed opposition to death penalty and remarked that, if defendant found guilty, she would automatically vote for life without parole) and Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992) (potential jurors properly excluded when they told court they would automatically vote against death penalty) with Davis v. Maynard, 869 F.2d 1401, 1408 (10th Cir. 1989) (exclusion proper only when potential juror could not subordinate conscientious scruples against death penalty to legal duty as juror; question of whether imposing capital punishment would harm individual's conscience and soul irrelevant), vacated, 494 U.S. 1050, aff'd in part and rev'd in part per curiam, 911 F.2d 415 (1990).

The Eleventh Circuit applies the Witt rule even when the jury's role is advisory. See Bundy v. Dugger, 850 F.2d 1402, 1420-21 (11th Cir. 1988) (force of Witt not diminished by Florida jury's advisory role), cert. denied, 488 U.S. 1034 (1989).

The trial court's exclusion of cause is a finding of fact bearing a presumption of correctness. Witt, 469 U.S. at 428-29; see Darden v. Wainwright, 477 U.S. 168, 175, 178 (1986) (trial judge entitled to deference in excluding potential jurors because judge present during voir dire questioning); Russell v. Collins, 998 F.2d 1287, 1293 (5th Cir. 1993) (trial judge's factual finding of juror bias entitled to deference when potential juror "did not believe in" death penalty and did not think he could impose death penalty except possibly if murder victim was small child), cert. denied, 114 S. Ct. 1236 (1994); Hulsey v. Sargent, 865 F.2d 954, 957-59 (8th Cir.) (trial judge entitled to deference in excluding potential juror who continually equivocated during voir dire, even though prosecutor failed to ask if juror could follow law despite personal beliefs), cert. denied, 493 U.S. 923 (1989); Stewart v. Dugger, 877 F.2d 851, 855-57 (11th Cir. 1989) (trial judge entitled to deference in excluding potential juror when judge found that juror did not believe in
Morgan v. Illinois, held that venire members who would automatically vote for the death penalty for every eligible defendant must be excluded for cause.

A jury is considered "death qualified" once death penalty-opposed jurors are excluded. In Lockhart v. McCree, the Court rejected the claim that "death qualified" jurors violate the defendant's right to have her guilt or innocence determined by an impartial jury selected from a cross-section of the community. The Court held that "an impartial jury consists of nothing capital punishment "at all," except possibly for Charles Manson, cert. denied, 495 U.S. 962 (1990).

Both the Fourth and Fifth Circuits have expressed unwillingness to require the judge or defense counsel to attempt to rehabilitate jurors who state their opposition to the death penalty. See Boggs v. Bair, 892 F.2d 1193, 1201 (4th Cir. 1989) (trial judge not constitutionally required to "rehabilitate by his personal questioning" jurors who could not put aside personal beliefs), cert. denied, 495 U.S. 940 (1990); Smith v. Black, 904 F.2d 950, 978-79 (5th Cir. 1990) (defense counsel not required to rehabilitate disqualifiable jurors when jurors "clearly and unmistakably" stated that their opposition to death penalty would affect decision about defendant's guilt), vacated on other grounds, 112 S. Ct. 1463 (1992).

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The Court held that the impartiality requirement of the Due Process Clause. Id. The Court also held that a judge is required in voir dire to conduct, upon defendant's request, a direct inquiry into the views of the venire members concerning capital punishment. Id. at 2230.

Although the Court in Morgan reaffirmed the Witt standard, id. at 2229, it is unclear what standard lower courts will apply when excluding jurors whose opposition to capital punishment might make them unfairly partial. See Bunch v. Thompson, 949 F.2d 1554, 1567 (4th Cir. 1991) (jurors properly seated when, although agreeing that death penalty should be imposed in every case of murder, "both changed their positions upon immediate requestioning"), cert. denied, 112 S. Ct. 3056 (1992); Mathenia v. Delo, 975 F.2d 444, 453 (8th Cir. 1992) (juror properly seated despite statements he would automatically vote for death penalty following capital murder conviction; venireman also failed to respond when judge asked whether anyone would not follow instructions on aggravating and mitigating circumstances), cert. denied, 113 S. Ct. 1609 (1993); U.S. v. Chandler, 996 F.2d 1073, 1103 (11th Cir. 1993) (jurors properly seated when, although proponents of death penalty, would not automatically vote for death penalty if defendant found guilty), petition for cert. filed, 62 U.S.L.W. 3454 (U.S. Dec. 28, 1993) (No. 93-1033).

In Lockhart, the Court discounted as unreliable and irrelevant the defendant's proffered statistical studies which concluded that "death qualified" jurors are "more prone to convict." Id. at 168-73. The Court stated that removal of Witherspoon-excludables would be constitutional even if it resulted in conviction-prone juries because the fair cross-section requirement does not apply to petit juries, but only to the general venire. Id. at 173-74. Moreover, under Lockhart, the Constitution is violated only when a "distinctive group" in the community, such as blacks or women, is arbitrarily excluded; death qualification serves a valid state interest in efficient administration of laws, and groups defined solely by shared attitudes are not "distinctive groups" for Sixth Amendment purposes. Id. at 174-77; cf. Brown v. Dixon, 891 F.2d 490, 497 (4th Cir. 1989) (no Sixth Amendment violation to use peremptory challenges to purge jury of members, not excludable for cause or under Witherspoon, who expressed reservations about death penalty), cert. denied, 495 U.S. 953 (1990); U.S. v. Villareal, 963 F.2d 725, 728-29 (5th Cir.) (no First or Fifth Amendment violation to use peremptory challenges to exclude all potential jurors who expressed general opposition to death penalty when political belief not valid basis for claim against discrimination in jury service), cert. denied, 113 S. Ct. 353 (1992).
more than 'jurors who will conscientiously apply the law and find the facts.'

**Stays and Holds.** An individual Supreme Court Justice or a majority of the Court may grant a stay of execution while a prisoner seeks review of a denial of habeas relief. A majority of the Court may set aside a stay already granted by either a lower court or by an individual Justice.

An individual Supreme Court Justice may grant an in-chambers stay only in extraordinary circumstances. A stay should not be granted by an individual Justice unless that Justice finds "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; . . . a significant possibility of reversal of the lower court's decision; and . . . a likelihood that irreparable harm will result if that decision is not stayed."
Historically, when four members of the Court voted to grant certiorari, another Justice automatically cast the fifth vote necessary to issue a stay. Recently, however, the Court has denied stays of execution in cases in which four Justices have granted certiorari. This change in practice may dispel the controversy regarding whether to grant stays of execution in cases being "held" pending resolution of similar cases on the merits.

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PROBATION

Imposition of probation is governed by the Sentencing Reform Act of 1984, which applies to all defendants convicted of crimes committed on or after November 1, 1987. The Act treats probation as a sentence in its own

2392. See Autry v. Estelle, 464 U.S. 1, 2 (1983) (per curiam) ("Had appellant convinced four members of this Court that certiorari would be granted on any of his claims, a stay would issue."). Without the fifth vote to stay an execution, a capital case can be mooted by an execution before the Court considers the case on the merits. Id. at 1134-35.

2393. Herrera v. Collins, 112 S. Ct. 1074 (1992) (mem.). After the Court's decision to grant certiorari but to deny the stay, the state court in Texas stayed the execution. Ex parte Herrera, 828 S.W.2d 8, 9 (Tex. Crim. App. 1992) (en banc); see also Hamilton v. Texas, 497 U.S. 1016 (1990) (mem.). In Hamilton, however, no stays were issued, and the prisoner was executed, thereby mooting his claim. Id. at 1016-17 (Brennan & Marshall, JJ., dissenting from denial of stay); Hamilton v. Texas, 498 U.S. 908, 913 (1990) (Stevens & Blackmun, JJ., concurring in denial of petition for writ of certiorari) (noting that petitioner's claim had been mooted by his execution).

2394. A "hold" is an informal practice used to delay disposition of cases pending resolution of similar cases that are before the Court on their merits. Only three votes are required to "hold" a case. Watson v. Butler, 483 U.S. 1037, 1038 (1987) (Brennan, Marshall & Blackmun, JJ., dissenting from denial of stay).

2395. The controversy arose because individual members of the Court held differing views as to the significance of a "hold." Compare Straight v. Wainwright, 476 U.S. 1132, 1133 n.2 (1986) (Powell, J., Burger, C.J., & Rehnquist & O'Connor, JJ., concurring in denial of stay) (cases frequently held for reasons other than their merits; merits of "held" cases may not be affected by disposition of case for which they were held) with id. at 1135 (Brennan, Marshall & Blackmun, JJ., dissenting from denial of stay) (hold analogous to grant of certiorari and has implications as to merits).

Over dissent, the Court has generally refused to grant a stay in "held" cases. For example, the Court denied a stay of execution in Streetman v. Lynaugh, 484 U.S. 992 (1988), even though the case was being held pending resolution of an identical challenge to Texas' death sentencing scheme in Franklin v. Lynaugh, 487 U.S. 164 (1988). Streetman, 484 U.S. at 995-96; accord Watson v. Butler, 483 U.S. 1037, 1037-38 (1987) (Brennan, Marshall & Blackmun, JJ., dissenting) (stay of execution denied although four Justices voted to hold case pending resolution of Lowenfield v. Phelps, 484 U.S. 231 (1988)); Straight, 476 U.S. at 1134-35 (Brennan, Marshall & Blackmun, JJ., dissenting) (stay of execution denied although four Justices voted to hold case pending resolution of Darden v. Wainwright, 477 U.S. 168 (1986)).
