

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

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Class Three - Part One

EXCESSIVENESS OR PROPORTIONALITY OF DEATH SENTENCES UNDER THE EIGHTH AMENDMENT

The Role of the Offender in the Crime

Earl Enmund v. Florida

Earl Enmund was the driver of the getaway car in an armed robbery of a dwelling. The occupants of the house, an elderly couple, resisted and Enmund's accomplices killed them. The Florida Supreme Court found the inference that Enmund was the person in the car by the side of the road waiting to help his accomplices escape sufficient to support his sentence of death. Because the evidence was sufficient to find that Enmund was constructively present aiding and abetting the commission of the crime of robbery, it supported a verdict of murder in the first degree on the basis of Florida's felony-murder rule, under which a person who commits a felony is liable for any murder that occurs during the commission of that felony, regardless of whether he or she commits, attempts to commit, or intended to commit that murder.

The Supreme Court, in an opinion by Justice White for five members of the Court, found a broad societal consensus that the death penalty was disproportionate to the crime of robbery-felony murder in these circumstances. *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982). The Court noted that although 32

American jurisdictions permitted the imposition of the death penalty for felony murders under a variety of circumstances, Florida was one of only eight jurisdictions that authorized the death penalty "solely for participation in a robbery in which another robber takes life."

At the other end of the spectrum, eight States required a finding of intent to kill before death could be imposed in a felony-murder case and one State required actual participation in the killing. The remaining States authorizing capital punishment for felony murders fell into two overlapping middle categories: three authorized the death penalty when the defendant acted with recklessness or extreme indifference to human life, and nine others required a finding of some aggravating factor beyond the fact that the killing had occurred during the course of a felony before a capital sentence might be imposed. Two more jurisdictions required a finding that the defendant's participation in the felony was not "relatively minor" before authorizing a capital sentence.

After surveying the States' felony-murder statutes, the Court examined the behavior of juries in cases like Enmund's in its attempt to assess American attitudes toward capital punishment in felony-murder cases. Of 739 inmates under death sentence in the United States at the time *Enmund* was decided, only 41 did not participate in the fatal assault. All but 16 of these were physically present at the scene of the murder and of these only three, including Enmund, were sentenced to death in the absence of a finding that they had collaborated in a scheme designed to kill. The Court found the fact that only three of 739 death row inmates had been sentenced to death absent

an intent to kill, physical presence, or direct participation in the fatal assault persuasive evidence that American juries considered the death sentence disproportional to felony murder simpliciter.

Against this background, the Court undertook its own proportionality analysis. It concluded that armed robbery is a serious offense, but one for which the penalty of death is excessive and violates the Eighth and Fourteenth Amendments' proscription "against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Weems v. United States*, 217 U.S. 349, 371 (1910) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-340).

The Court also found that Enmund's degree of participation in the murders was so tangential that it could not be said to justify a sentence of death. It found that neither the deterrent nor the retributive purposes of the death penalty were advanced by imposing the death penalty upon Enmund. The Court was unconvinced "that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken." In reaching this conclusion, the Court relied upon the fact that killing only rarely occurred during the course of robberies, and such killing as did occur even more rarely resulted in death sentences if the evidence did not support an inference that the defendant intended to kill. The Court acknowledged, however, that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony."

That difference was also related to the second purpose of capital punishment, retribution. The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender. While the States generally have wide discretion in deciding how much retribution to exact in a given case, the death penalty, "unique in its severity and irrevocability," requires the State to inquire into

the relevant facets of "the character and record of the individual offender." Thus, in Enmund's case, "the focus [had to] be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Since Enmund's own participation in the felony murder was so attenuated and since there was no proof that Enmund had any culpable mental state, the death penalty was excessive retribution for his crimes.

Justice O'Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist, dissented, expressing the view that historically society has not rejected capital punishment for homicides committed during the course of a felony; that the death was not disproportionate for the harm caused, loss of life; and that the majority's holding interfered with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law.

**Ricky Wayne TISON and
Raymond Curtis Tison, Petitioners,**
v.
ARIZONA.

United States Supreme Court
481 U.S. 137, 107 S.Ct. 1676 (1987).

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Powell, and Scalia, JJ., joined. Brennan, J., filed a dissenting opinion in which Marshall, J., joined and in parts of which Blackmun and Stevens, JJ., joined.

Justice O'CONNOR delivered the opinion of the Court.

The question presented is whether the petitioners' participation in the events leading up to and following the murder of four members of a family makes the sentences of death imposed by the Arizona courts constitutionally permissible although neither petitioner specifically intended to kill the victims and neither inflicted the fatal

gunshot wounds. * * *

I

Gary Tison was sentenced to life imprisonment as the result of a prison escape during the course of which he had killed a guard. After he had been in prison a number of years, Gary Tison's wife, their three sons Donald, Ricky, and Raymond, Gary's brother Joseph, and other relatives made plans to help Gary Tison escape again. The Tison family assembled a large arsenal of weapons for this purpose. Plans for escape were discussed with Gary Tison, who insisted that his cellmate, Randy Greenawalt, also a convicted murderer, be included in the prison break. The following facts are largely evidenced by petitioners' detailed confessions given as part of a plea bargain according to the terms of which the State agreed not to seek the death sentence. The Arizona courts interpreted the plea agreement to require that petitioners testify to the planning stages of the breakout. When they refused to do so, the bargain was rescinded and they were tried, convicted, and sentenced to death.

On July 30, 1978, the three Tison brothers entered the Arizona State Prison at Florence carrying a large ice chest filled with guns. The Tisons armed Greenawalt and their father, and the group, brandishing their weapons, locked the prison guards and visitors present in a storage closet. The five men fled the prison grounds in the Tisons' Ford Galaxy automobile. No shots were fired at the prison.

After leaving the prison, the men abandoned the Ford automobile and proceeded on to an isolated house in a white Lincoln automobile that the brothers had parked at a hospital near the prison. At the house, the Lincoln automobile had a flat tire; the only spare tire was pressed into service. After two nights at the house, the group drove toward Flagstaff. As the group traveled on back roads and secondary highways through the desert, another tire blew out. The group decided to flag down a passing motorist and steal a car. Raymond stood out in front of the Lincoln; the other four armed themselves and lay in wait by the side of the road. One car passed by without

stopping, but a second car, a Mazda occupied by John Lyons, his wife Donnela, his 2-year-old son Christopher, and his 15-year-old niece, Theresa Tyson, pulled over to render aid.

As Raymond showed John Lyons the flat tire on the Lincoln, the other Tisons and Greenawalt emerged. The Lyons family was forced into the backseat of the Lincoln. Raymond and Donald drove the Lincoln down a dirt road off the highway and then down a gas line service road farther into the desert; Gary Tison, Ricky Tison, and Randy Greenawalt followed in the Lyons' Mazda. The two cars were parked trunk to trunk and the Lyons family was ordered to stand in front of the Lincoln's headlights. The Tisons transferred their belongings from the Lincoln into the Mazda. They discovered guns and money in the Mazda which they kept, and they put the rest of the Lyons' possessions in the Lincoln.

Gary Tison then told Raymond to drive the Lincoln still farther into the desert. Raymond did so, and, while the others guarded the Lyons and Theresa Tyson, Gary fired his shotgun into the radiator, presumably to completely disable the vehicle. The Lyons and Theresa Tyson were then escorted to the Lincoln and again ordered to stand in its headlights. Ricky Tison reported that John Lyons begged, in comments "more or less directed at everybody," "Jesus, don't kill me." Gary Tison said he was "thinking about it." John Lyons asked the Tisons and Greenawalt to "[g]ive us some water . . . just leave us out here, and you all go home." Gary Tison then told his sons to go back to the Mazda and get some water. Raymond later explained that his father "was like in conflict with himself. . . . What it was, I think it was the baby being there and all this, and he wasn't sure about what to do."

* * * [I]t appears that both [Ricky and Raymond] went back towards the Mazda, along with Donald, while Randy Greenawalt and Gary Tison stayed at the Lincoln guarding the victims. Raymond recalled being at the Mazda filling the water jug "when we started hearing the shots." Ricky said that the brothers gave the water jug to Gary Tison who then, with Randy Greenawalt

went behind the Lincoln, where they spoke briefly, then raised the shotguns and started firing. In any event, petitioners agree they saw Greenawalt and their father brutally murder their four captives with repeated blasts from their shotguns. Neither made an effort to help the victims, though both later stated they were surprised by the shooting. The Tisons got into the Mazda and drove away, continuing their flight. Physical evidence suggested that Theresa Tyson managed to crawl away from the bloodbath, severely injured. She died in the desert after the Tisons left.

Several days later the Tisons and Greenawalt were apprehended after a shootout at a police roadblock. Donald Tison was killed. Gary Tison escaped into the desert where he subsequently died of exposure. Raymond and Ricky Tison and Randy Greenawalt were captured and tried jointly for the crimes associated with the prison break itself and the shootout at the roadblock; each was convicted and sentenced.

The State then individually tried each of the petitioners for capital murder of the four victims as well as for the associated crimes of armed robbery, kidnaping, and car theft. The capital murder charges were based on Arizona felony-murder law providing that a killing occurring during the perpetration of robbery or kidnaping is capital murder, and that each participant in the kidnaping or robbery is legally responsible for the acts of his accomplices. Each of the petitioners was convicted of the four murders under these accomplice liability and felony-murder statutes.

[At the penalty phase,] [t]he judge found three statutory aggravating factors:

- (1) the Tisons had created a grave risk of death to others (not the victims);
- (2) the murders had been committed for pecuniary gain;
- (3) the murders were especially heinous.

The judge found no statutory mitigating factor. Importantly, the judge specifically found that the crime was not mitigated by the fact that each of the petitioner's "participation was relatively minor." Rather, he found that the "participation of each [petitioner] in the crimes giving rise to the application of the felony murder rule in this case was very substantial." The trial judge also specifically found, that each "could reasonably have foreseen that his conduct ... would cause or create a grave risk of ... death." He did find, however, three nonstatutory mitigating factors:

- (1) the petitioners' youth – Ricky was 20 and Raymond was 19;
- (2) neither had prior felony records;
- (3) each had been convicted of the murders under the felony-murder rule.

Nevertheless, the judge sentenced both petitioners to death.

On direct appeal, the Arizona Supreme Court affirmed. * * *

Petitioners then collaterally attacked their death sentences in state postconviction proceedings alleging that *Enmund v. Florida*, which had been decided in the interim, required reversal. * * *

* * *

II

* * *

Petitioners argue strenuously that they did not "intend to kill" as that concept has been generally understood in the common law. We accept this as true. Traditionally, "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." * * * As petitioners point out, there is no evidence that either Ricky or Raymond Tison took any act which he desired to, or was substantially certain would, cause death.

* * * Petitioners do not fall within the “intent to kill” category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment.

On the other hand, it is equally clear that petitioners also fall outside the category of felony murderers for whom *Enmund* explicitly held the death penalty disproportional: their degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life. We take the facts as the Arizona Supreme Court has given them to us.

Raymond Tison brought an arsenal of lethal weapons into the Arizona State Prison which he then handed over to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt. By his own admission he was prepared to kill in furtherance of the prison break. He performed the crucial role of flagging down a passing car occupied by an innocent family whose fate was then entrusted to the known killers he had previously armed. He robbed these people at their direction and then guarded the victims at gunpoint while they considered what next to do. He stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting. Instead, he chose to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown.

Ricky Tison’s behavior differs in slight details only. Like Raymond, he intentionally brought the guns into the prison to arm the murderers. He could have foreseen that lethal force might be used, particularly since he knew that his father’s previous escape attempt had resulted in murder. He, too, participated fully in the kidnaping and robbery and watched the killing after which he chose to aid those whom he had placed in the position to kill rather than their victims.

These facts not only indicate that the Tison brothers’ participation in the crime was anything but minor; they also would clearly support a finding that they both subjectively appreciated

that their acts were likely to result in the taking of innocent life. The issue raised by this case is whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life. *Enmund* does not specifically address this point. * * *

Like the *Enmund* Court, we find the state legislatures’ judgment as to proportionality in these circumstances relevant to this constitutional inquiry. The largest number of States still fall into the two intermediate categories discussed in *Enmund*. Four States authorize the death penalty in felony-murder cases upon a showing of culpable mental state such as recklessness or extreme indifference to human life. Two jurisdictions require that the defendant’s participation be substantial and the statutes of at least six more, including Arizona, take minor participation in the felony expressly into account in mitigation of the murder. These requirements significantly overlap both in this case and in general, for the greater the defendant’s participation in the felony murder, the more likely that he acted with reckless indifference to human life. At a minimum, however, it can be said that all these jurisdictions, as well as six States which *Enmund* classified along with Florida as permitting capital punishment for felony murder simpliciter, and the three States which simply require some additional aggravation before imposing the death penalty upon a felony murderer, specifically authorize the death penalty in a felony-murder case where, though the defendant’s mental state fell short of intent to kill, the defendant was a major actor in a felony in which he knew death was highly likely to occur. On the other hand, even after *Enmund*, only 11 States authorizing capital punishment forbid imposition of the death penalty even though the defendant’s participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness. This substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill powerfully

suggests that our society does not reject the death penalty as grossly excessive under these circumstances. * * *

Moreover, a number of state courts have interpreted *Enmund* to permit the imposition of the death penalty in such aggravated felony murders. * * *

* * *

A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished. * * *

A narrow focus on the question of whether or not a given defendant “intended to kill,” however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all – those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty – those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim’s property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an “intent to kill.” Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders. * * * [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into

account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

The petitioners’ own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, “substantial.” * * *

* * * [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement. * * *

Justice BRENNAN, with whom Justice MARSHALL joins, and with whom Justice BLACKMUN and Justice STEVENS join as to Parts I through IV-A, dissenting.

The murders that Gary Tison and Randy Greenawalt committed revolt and grieve all who learn of them. When the deaths of the Lyons family and Theresa Tyson were first reported, many in Arizona erupted “in a towering yell” for retribution and justice. Yet Gary Tison, the central figure in this tragedy, the man who had his family arrange his and Greenawalt’s escape from prison, and the man who chose, with Greenawalt, to murder this family while his sons stood by, died of exposure in the desert before society could arrest him and bring him to trial. The question this case presents is what punishment Arizona may constitutionally exact from two of Gary Tison’s sons for their role in these events. * * *

I
* * *

The Court has chosen * * * to announce a new substantive standard for capital liability: a defendant’s “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.” * * *

I join no part of this. First, the Court’s dictum that its new category of mens rea is applicable to these petitioners is not supported by the record. Second, even assuming petitioners may be so

categorized, objective evidence and this Court's Eighth Amendment jurisprudence demonstrate that the death penalty is disproportionate punishment for this category of defendants. Finally, the fact that the Court reaches a different conclusion is illustrative of the profound problems that continue to plague capital sentencing.

II
* * *

The evidence in the record overlooked today regarding petitioners' mental states with respect to the shootings is not trivial. For example, while the Court has found that petitioners made no effort prior to the shooting to assist the victims, the uncontradicted statements of both petitioners are that just prior to the shootings they were attempting to find a jug of water to give to the family. * * * Neither stated that they anticipated that the shootings would occur, or that they could have done anything to prevent them or to help the victims afterward. Both, however, expressed feelings of surprise, helplessness, and regret. * * *

* * *
III
A
* * *

* * * The applicability of the death penalty * * * turns entirely on the defendant's mental state with regard to an act committed by another. Factors such as the defendant's major participation in the events surrounding the killing or the defendant's presence at the scene are relevant insofar as they illuminate the defendant's mental state with regard to the killings. They cannot serve, however, as independent grounds for imposing the death penalty.

* * * The person who chooses to act recklessly and is indifferent to the possibility of fatal consequences often deserves serious punishment. But because that person has not chosen to kill, his or her moral and criminal culpability is of a different degree than that of one who killed or intended to kill.

The importance of distinguishing between these different choices is rooted in our belief in the "freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." To be faithful to this belief, which is "universal and persistent in mature systems of law," the criminal law must ensure that the punishment an individual receives conforms to the choices that individual has made. * * * The State's ultimate sanction – if it is ever to be used – must be reserved for those whose culpability is greatest. * * *

* * *

B

* * * The Court would * * * have us believe that "the majority of American jurisdictions clearly authorize capital punishment" in cases such as this. This is not the case. First, the Court excludes from its survey those jurisdictions that have abolished the death penalty and those that have authorized it only in circumstances different from those presented here. When these jurisdictions are included, and are considered with those jurisdictions that require a finding of intent to kill in order to impose the death sentence for felony murder, one discovers that approximately three-fifths of American jurisdictions do not authorize the death penalty for a nontriggerman absent a finding that he intended to kill. * * *

* * *

Second, it is critical to examine not simply those jurisdictions that authorize the death penalty in a given circumstance, but those that actually impose it. * * *

* * * ["W]e are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed." * * * Thus, like Enmund, the Tisons' sentence appears to be an aberration within Arizona itself as well as nationally and internationally. * * *

C
* * *

* * * Ricky and Raymond Tison are similarly situated with Earl Enmund in every respect that mattered to the decision in *Enmund*. Like Enmund, the Tisons neither killed nor attempted or intended to kill anyone. Like Enmund, the Tisons have been sentenced to death for the intentional acts of others which the Tisons did not expect, which were not essential to the felony, and over which they had no control. Unlike Enmund, however, the Tisons will be the first individuals in over 30 years to be executed for such behavior.

I conclude that the proportionality analysis and result in this case cannot be reconciled with the analyses and results of previous cases. On this ground alone, I would dissent. But the fact that this Court's death penalty jurisprudence can validate different results in analytically indistinguishable cases suggests that something more profoundly disturbing than faithlessness to precedent is at work in capital sentencing.

* * *

IV.
* * *

This case thus illustrates the enduring truth of Justice Harlan's observation that the tasks of identifying "those characteristics of criminal homicides and their perpetrators which call for the death penalty, and [of] express[ing] these characteristics in language which can be fairly understood and applied by the sentencing authority appear to be . . . beyond present human ability." *McGautha v. California*, 402 U.S. 183, 204 (1971). The persistence of doctrines (such as felony murder) that allow excessive discretion in apportioning criminal culpability and of decisions (such as today's) that do not even attempt "precisely [to] delineate the particular types of conduct and states of mind warranting imposition of the death penalty," demonstrates that this Court has still not articulated rules that will ensure that capital sentencing decisions conform to the substantive principles of the Eighth Amendment.

Arbitrariness continues so to infect both the procedure and substance of capital sentencing that any decision to impose the death penalty remains cruel and unusual. * * *

Note

For an argument that *Tison* should be reconsidered and overruled based upon the proportionality analysis later employed in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005) and *Kennedy v. Louisiana*, 554 U.S. 407 (2008); the low number of felony-murder accomplices who are on death row or who have been executed; and culpability principles as applied to felony-murder accomplices, see Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: a Categorical Approach to Proportional Sentencing*, 48 AM CRIM. L. REV. 1371 (2011).

The Death Penalty for a Crime in Which the Victim is not Killed

Ehrlich Anthony COKER, Petitioner,
v.
State of GEORGIA

United States Supreme Court
433 U.S. 584, 97 S.Ct. 2861 (1977).

White, J., announced the judgment of the Court and filed an opinion in which Stewart, Blackmun, and Stevens, JJ., joined. Brennan and Marshall, JJ., each filed opinions concurring in the judgment. Powell, J., filed an opinion concurring in the judgment in part and dissenting in part. Burger, C.J., filed a dissenting opinion, in which Rehnquist, J., joined.

Mr. Justice WHITE announced the judgment of the Court and filed an opinion in which Mr. Justice STEWART, Mr. Justice BLACKMUN, and Mr. Justice STEVENS, joined.

* * *

I

While serving various sentences for murder, rape, kidnaping, and aggravated assault, petitioner escaped from the Ware Correctional Institution near Waycross, Ga., on September 2, 1974. At approximately 11 o'clock that night, petitioner entered the house of Allen and Elnita Carver through an unlocked kitchen door. Threatening the couple with a "board," he tied up Mr. Carver in the bathroom, obtained a knife from the kitchen, and took Mr. Carver's money and the keys to the family car. * * * Coker then raped Mrs. Carver. Soon thereafter, petitioner drove away in the Carver car, taking Mrs. Carver with him. Mr. Carver, freeing himself, notified the police; and not long thereafter petitioner was apprehended. * * *

* * * [Coker was convicted and sentenced to death.]

* * *

III

* * * We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.⁴

A

As advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman. At no time in the last 50 years have a majority of the States authorized death as a punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. By 1971 just prior to the decision in *Furman v. Georgia*, that number had declined, but not substantially, to 16 States plus the Federal Government. *Furman* then invalidated most of the capital punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws.

* * * Thirty-five states immediately reinstated the death penalty for at least limited kinds of crime. This public judgment as to the acceptability of capital punishment, evidenced by the immediate, post-*Furman* legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in *Gregg v. Georgia*.

But if the "most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*," it should also be

4. Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so. We observe that in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system.

a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In reviving death penalty laws to satisfy *Furman*'s mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* [*v. North Carolina*] and *Roberts* [*v. Louisiana*]. When Louisiana and North Carolina, responding to those decisions, again revised their capital punishment laws, they reenacted the death penalty for murder but not for rape[.] * * *

It should be noted that Florida, Mississippi, and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult. The Tennessee statute has since been invalidated because the death sentence was mandatory. The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.

* * *

B

It was also observed in *Gregg* that “[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved” and that it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried. * * *

* * * [S]ince 1973 * * * 63 [rape] cases had been reviewed by the Georgia Supreme Court as of the time of oral argument; and of these, 6 involved a death sentence, 1 of which was set aside, leaving 5 convicted rapists now under

sentence of death in the State of Georgia. Georgia juries have thus sentenced rapists to death six times since 1973. This obviously is not a negligible number; and the State argues that as a practical matter juries simply reserve the extreme sanction for extreme cases of rape and that recent experience surely does not prove that jurors consider the death penalty to be a disproportionate punishment for every conceivable instance of rape, no matter how aggravated. Nevertheless, it is true that in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence.

IV

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the “ultimate violation of self.” It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. * * * We have the abiding conviction that the death

penalty, which “is unique in its severity and irrevocability,” is an excessive penalty for the rapist who, as such, does not take human life.

This does not end the matter; for under Georgia law, death may not be imposed for any capital offense, including rape, unless the jury or judge finds one of the statutory aggravating circumstances and then elects to impose that sentence. For the rapist to be executed in Georgia, it must therefore be found not only that he committed rape but also that one or more of the * * * aggravating circumstances were present[.] * * *

Neither of [the two aggravating] circumstances [found by the jury in this case], nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape. Coker had prior convictions for capital felonies rape, murder, and kidnaping but these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.

* * *

[Justices BRENNAN and MARSHALL concurred in the judgement based on their view that the death penalty in all circumstances is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.]

Mr. Justice POWELL, concurring in the judgment in part and dissenting in part.

I concur in the judgment of the Court on the facts of this case, and also in the plurality’s reasoning supporting the view that ordinarily death is disproportionate punishment for the crime of raping an adult woman. * * * The plurality, however, does not limit its holding to the case before us or to similar cases. Rather, in an opinion that ranges well beyond what is necessary, it holds that capital punishment always regardless of the circumstances is a disproportionate penalty for the crime of rape.

* * *

[I]t may be that the death penalty is not disproportionate punishment for the crime of aggravated rape. Final resolution of the question must await careful inquiry into objective indicators of society’s “evolving standards of decency,” particularly legislative enactments and the responses of juries in capital cases. * * * In a proper case a more discriminating inquiry than the plurality undertakes well might discover that both juries and legislatures have reserved the ultimate penalty for the case of an outrageous rape resulting in serious, lasting harm to the victim. I would not prejudge the issue. To this extent, I respectfully dissent.

Mr. Chief Justice BURGER, with whom Mr. Justice REHNQUIST joins, dissenting.

* * * Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a State to do under its reserved powers. In striking down the death penalty imposed upon the petitioner in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature. * * *

* * *

(2)

* * *

Unlike the plurality, I would narrow the inquiry in this case to the question actually presented: Does the Eighth Amendment’s ban against cruel and unusual punishment prohibit the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime and who has not hesitated to escape confinement at the first available opportunity? Whatever one’s view may be as to the State’s constitutional power to impose the death penalty upon a rapist who stands before a court convicted for the first time, this case reveals a chronic rapist whose continuing danger to the community is abundantly clear.

* * *

(3)

* * * A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The longrange effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians, and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack[;] it is destructive of the human personality. The remainder of the victim's life may be gravely affected, and this in turn may have a serious detrimental effect upon her husband and any children she may have. I therefore wholly agree with Mr. Justice WHITE's conclusion as far as it goes that '[s]hort of homicide, [rape] is the "ultimate violation of self." Victims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery. * * *

Despite its strong condemnation of rape, the Court reaches the inexplicable conclusion that "the death penalty . . . is an excessive penalty" for the perpetrator of this heinous offense. * * *

(a)

* * *

[I]t is myopic to base sweeping constitutional principles upon the narrow experience of the past five years. Considerable uncertainty was introduced into this area of the law by this Court's *Furman* decision. A large number of States found their death penalty statutes invalidated; legislatures were left in serious doubt by the expressions vacillating between discretionary and mandatory death penalties, as to whether this Court would sustain any statute imposing death as a criminal sanction. Failure of more States to enact statutes imposing death for rape of an adult woman may thus reflect hasty legislative compromise occasioned by time pressures following *Furman*, a desire to wait on the

experience of those States which did enact such statutes, or simply an accurate forecast of today's holding.

* * *

(b)

The subjective judgment that the death penalty is simply disproportionate to the crime of rape is even more disturbing than the "objective" analysis discussed *supra*. The plurality's conclusion on this point is based upon the bare fact that murder necessarily results in the physical death of the victim, while rape does not. However, no Member of the Court explains why this distinction has relevance, much less constitutional significance. It is, after all, not irrational nor constitutionally impermissible for a legislature to make the penalty more severe than the criminal act it punishes in the hope it would deter wrongdoing:

We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. *Gregg v. Georgia*, 428 U.S., at 175.

* * *

Eberheart v. Georgia and Kennedy v. Louisiana

The same day the Court decided *Coker*, it granted *certiorari* in a case in which a defendant was sentenced death for a kidnaping in which the victim was not killed, vacated the death sentence, and declared that it constituted "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments," citing *Coker*. *Eberheart v. Georgia*, 433 U.S. 917 (1977).

In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court in a 5-4 decision, written by Justice Kennedy, concluded that there was not a consensus that the death penalty was permissible for the rape of a child, finding that 44 states had not made such a crime punishable by death; that since 1964, only Louisiana had sentenced anyone to death for the offense; that no one had been

executed for a non-homicide crime since 1963; and that only two persons, both in Louisiana, were under death sentence for the crime.

In making a determination of whether the death penalty for the rape a child was justified under one or more of three principal rationales of rehabilitation, deterrence, and retribution, Justice Kennedy warned that retribution “most often can contradict the law’s own ends.” He explained:

This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.

Later in the opinion he added:

Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.

He concluded that the difference between murder and crimes in which the victim was not killed was critical to determining whether retribution justified the penalty: “In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape.”

Justice Kennedy also noted “[t]he problem of unreliable, induced, and even imagined child testimony means there is a ‘special risk of wrongful execution’ in some child rape cases” because “children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement.”

Finally, with regard to deterrence, Justice Kennedy found that the death penalty adds to the risk of non-reporting and may provide an incentive for the rapist to kill the victim.

Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, dissented, disagreeing with both the majority’s conclusions regarding a national consensus and independent judgement that the death penalty is unconstitutional. Justice Alito expressed the view that some states had misunderstood *Coker* to prohibit laws providing for the death penalty for the rape of a child. He also expressed the view that a person who is convicted of capital murder is not necessarily more morally depraved and deserving of death than every child rapist.

The Death Penalty for Intellectually Disabled Offenders

The American Association of Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2007. This was part of an ongoing effort to replace the problematic and degrading term “mental retardation” with more dignified terms such as “intellectual disability,” “cognitive disability” and “developmental disability.” The Supreme Court recognized this change and adopted “intellectual disability” in *Hall v. Florida*, 134 S.Ct. 1986, 1990 (1976).

However, when the Court first addressed the issue of whether the death penalty was appropriate for those with intellectual disabilities, the term “mental retardation” was used. It is in the Court’s pre-2014 opinions and in the statutes regarding the imposition of death on those with such disabilities. As a result, “mental retardation” continues to be used when courts are discussing intellectual disability.

The AAMR/AAIDD and the American Psychiatric Association use slightly different language to define intellectual disability, but both definitions share three elements: (1) a deficit in

intellectual functioning; (2) deficits in adaptive behavior such as social skills, communication abilities, self-care, self-direction, health and safety, and work; and (3) these deficits occurred before age 18.

“Mental retardation” is usually established by evidence of a defendant’s poor intellectual functioning and lack of adaptive skills in childhood (e.g., through school records showing that the defendant had low IQ scores and was in special education classes) and adulthood, and testing of intelligence level on a widely recognized instrument such as the Wechsler Adult Intelligence Scale (WAIS). A score of 70 to 75 or less is indicative of mental retardation, but not conclusive.

There are approximately 3 to 9.2 million people living with intellectual disability. However, while these individuals comprise two to three percent of the general population, they are overly represented in the prison population, comprising between four to ten percent of it.⁵

One such inmate is Doil Lane, who, when on death row at age 39, wrote the following to prison administrators:

I like to clore [color] in my clorel [coloring] book but you all tuck [took] away my clores when you can not hurt no one with a box 24 clores, just in my book.⁶

As the linked article about Earl Washington illustrates (“Missteps on the Road to Injustice”), people with limited intellectual functioning often have problems in the criminal justice system. Of course this depends upon the extent of their limitations, which cannot be measured with

precision. The limitations of some may result in them being passive and suggestible. They may have difficulty understanding their situation or the consequences of decisions they make or actions they take. They may have no understanding of legal terms like “waiver.” They may be more willing than other people to try to please authority figures and to respond affirmatively when asked questions.

Some intellectually limited people, having realized that they are not as smart as everyone else, have found ways to mask their limitations by pretending to understand things said to them when they do not and by agreeing to things they do not understand. They may have difficulty understanding things told them by law enforcement officials, their lawyers and judges, but they may go along with something suggested to them to avoid looking stupid. Or they may reject advice because of their inability to comprehend the choices available to them.

Another illustrative case is that of Earl Washington, described in Brooke A. Masters, *Missteps on Road to Injustice: In Virginia, Innocent Man Was Nearly Executed*, WASHINGTON POST, Dec. 1, 2000, <http://www.deathpenaltyinfo.org/node/649>

Washington was almost executed but Virginia Governor Douglas Wilder commuted the sentence in 1994 to life imprisonment because of doubts about his guilt. However, DNA technology later improved to the point that Washington was ruled out entirely. The DNA from semen recovered at the scene matched the genetic fingerprint of a man already imprisoned for rape. In October, 2000, Gov. James S. Gilmore III pardoned Washington for the murder.

Washington was released from prison on February 12, 2001. The *Washington Post* reported a few days after his release that he had “settled into his new home in Virginia Beach, and fulfilled a longtime dream: to see the ocean.” That same week, he entered a program for intellectually limited adults to help him learn how to cook and care for himself.

5. Leigh Ann Davis, PEOPLE WITH INTELLECTUAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM: VICTIMS & SUSPECTS, available at www.thearc.org/page.aspx?pid=2458.

6. Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Law Begins to Shift*, N.Y. TIMES, Aug. 7, 2000 at A1.

In May, 2006, a federal jury found that state police investigator Curtis Reese Wilmore deliberately fabricated evidence that resulted in Washington's conviction and awarded Washington \$2.2 million in damages. Washington's experiences are recounted by Margaret Edds in the book, *AN EXPENDABLE MAN* (New York University Press, 2003)

Penry v. Lynaugh

The Supreme Court rejected the argument that execution of a person who is mentally retarded violates the Eighth Amendment in *Penry v. Lynaugh*, 492 U.S. 302 (1989). In a decision by Justice O'Connor, the Court stated:

Penry's [claims] that it would be cruel and unusual punishment, prohibited by the Eighth Amendment, to execute a mentally retarded person like himself with the reasoning capacity of a 7-year-old. He argues that because of their mental disabilities, mentally retarded people do not possess the level of moral culpability to justify imposing the death sentence. * * *

Such a case is not before us today. Penry was found competent to stand trial. In other words, he was found to have the ability to consult with his lawyer with a reasonable degree of rational understanding, and was found to have a rational as well as factual understanding of the proceedings against him. In addition, the jury rejected his insanity defense, which reflected their conclusion that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law.

Penry argues, however, that there is objective evidence today of an emerging national consensus against execution of the mentally retarded, reflecting the "evolving standards of decency that mark the progress of a maturing society." The federal Anti-Drug Abuse Act of 1988, prohibits execution of a person who is mentally retarded. Only one State, however, currently bans execution of

retarded persons who have been found guilty of a capital offense. *Ga. Code Ann.* §17-7-131(j) (Supp.1988). Maryland has enacted a similar statute which will take effect on July 1, 1989.

* * *

* * * In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.

The Court reconsidered the question in 2002 in *Atkins v. Virginia*, which follows.

Daryl Renard ATKINS, Petitioner v. VIRGINIA.

United States Supreme Court.
536 U.S. 304, 122 S.Ct. 2242 (2002)

Stevens, J., delivered the opinion of the Court, in which O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., dissented and filed an opinion in which Scalia and Thomas, JJ., joined. Scalia, J., dissented and filed opinion in which Rehnquist, C.J., and Thomas, J., joined.

JUSTICE STEVENS delivered the opinion of the Court.

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, the American public, legislators,

scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are “cruel and unusual punishments” prohibited by the Eighth Amendment to the Federal Constitution.

I

Petitioner, Daryl Renard Atkins, was convicted of abduction, armed robbery, and capital murder, and sentenced to death. At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

Jones and Atkins both testified in the guilt phase of Atkins’ trial.¹ Each confirmed most of the details in the other’s account of the incident, with the important exception that each stated that the other had actually shot and killed Nesbitt. Jones’ testimony, which was both more coherent and credible than Atkins’, was obviously credited by the jury and was sufficient to establish Atkins’ guilt.² At the penalty phase of the trial, the State introduced victim impact evidence and proved two aggravating circumstances: future dangerousness and “vileness of the offense.” To prove future dangerousness, the State relied on Atkins’ prior felony convictions as well as the testimony of four victims of earlier robberies and assaults. To prove

1. Initially, both Jones and Atkins were indicted for capital murder. The prosecution ultimately permitted Jones to plead guilty to first-degree murder in exchange for his testimony against Atkins. As a result of the plea, Jones became ineligible to receive the death penalty.

2. Highly damaging to the credibility of Atkins’ testimony was its substantial inconsistency with the statement he gave to the police upon his arrest. Jones, in contrast, had declined to make an initial statement to the authorities.

the second aggravator, the prosecution relied upon the trial record, including pictures of the deceased’s body and the autopsy report.

In the penalty phase, the defense relied on one witness, Dr. Evan Nelson, a forensic psychologist who had evaluated Atkins before trial and concluded that he was “mildly mentally retarded.”³ His conclusion was based on interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of 59.⁵

3. The American Association of Mental Retardation (AAMR) defines mental retardation as follows: “*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.”

The American Psychiatric Association’s definition is similar: “The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.” “Mild” mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.

5. Dr. Nelson administered the Wechsler Adult Intelligence Scales test (WAIS-III), the standard instrument in the United States for assessing intellectual functioning. The WAIS-III is scored by adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a scaled score. The test measures an intelligence range from 45 to 155. The mean score of the test is 100,

The jury sentenced Atkins to death, but the Virginia Supreme Court ordered a second sentencing hearing because the trial court had used a misleading verdict form. At the resentencing, Dr. Nelson again testified. The State presented an expert rebuttal witness, Dr. Stanton Samenow, who expressed the opinion that Atkins was not mentally retarded, but rather was of “average intelligence, at best,” and diagnosable as having antisocial personality disorder.⁶ The jury again sentenced Atkins to death.

The Supreme Court of Virginia affirmed * * *.

II

* * *

which means that a person receiving a score of 100 is considered to have an average level of cognitive functioning. It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.

At the sentencing phase, Dr. Nelson testified: “[Atkins’] full scale IQ is 59. Compared to the population at large, that means less than one percentile... . Mental retardation is a relatively rare thing. It’s about one percent of the population.” According to Dr. Nelson, Atkins’ IQ score “would automatically qualify for Social Security disability income.” Dr. Nelson also indicated that of the over 40 capital defendants that he had evaluated, Atkins was only the second individual who met the criteria for mental retardation. He testified that, in his opinion, Atkins’ limited intellect had been a consistent feature throughout his life, and that his IQ score of 59 is not an “aberration, malingered result, or invalid test score.”

6. Dr. Samenow’s testimony was based upon two interviews with Atkins, a review of his school records, and interviews with correctional staff. He did not administer an intelligence test, but did ask Atkins questions taken from the 1972 version of the Wechsler Memory Scale. Dr. Samenow attributed Atkins’ “academic performance [that was] by and large terrible” to the fact that he “is a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do.”

* * * [W]e shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.

III

The parties have not called our attention to any state legislative consideration of the suitability of imposing the death penalty on mentally retarded offenders prior to 1986. In that year, the public reaction to the execution of a mentally retarded murderer in Georgia⁷ apparently led to the enactment of the first state statute prohibiting such executions. In 1988, when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a “sentence of death shall not be carried out upon a person who is mentally retarded.” In 1989, Maryland enacted a similar prohibition. It was in that year that we decided *Penry*, and concluded that those two state enactments, “even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.”

Much has changed since then. Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue. In 1990 Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the

7. Jerome Bowden, who was identified as having mental retardation when he was 14-years-old, was scheduled for imminent execution in Georgia in June of 1986. The Georgia Board of Pardons and Paroles granted a stay following public protests over his execution. A psychologist selected by the State evaluated Bowden and determined that he had an IQ of 65, which is consistent with mental retardation. Nevertheless, the board lifted the stay and Bowden was executed the following day. The board concluded that Bowden understood the nature of his crime and his punishment and therefore that execution, despite his mental deficiencies, was permissible.

Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998. There appear to have been no similar enactments during the next two years, but in 2000 and 2001 six more States – South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina – joined the procession. The Texas Legislature unanimously adopted a similar bill,¹⁶ and bills have passed at least one house in other States, including Virginia and Nevada.

It is not so much the number of these States that is significant, but the consistency of the direction of change.¹⁸ Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have

16. * * * Governor Perry vetoed the legislation on June 17, 2001. In his veto statement, the Texas Governor did not express dissatisfaction with the principle of categorically excluding the mentally retarded from the death penalty. In fact, he stated: “We do not execute mentally retarded murderers today.” Instead, his motivation to veto the bill was based upon what he perceived as a procedural flaw: “My opposition to this legislation focuses on a serious legal flaw in the bill. House Bill No. 236 would create a system whereby the jury and judge are asked to make the same determination based on two different sets of facts... . Also of grave concern is the fact that the provision that sets up this legally flawed process never received a public hearing during the legislative process.”

18. A comparison to *Stanford v. Kentucky*, 492 U. S. 361 (1989), in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty.

voted overwhelmingly in favor of the prohibition. Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. * * * And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*.²⁰ The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.²¹

To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. * * * “[W]e leave to the State[s] the

20. Those States are Alabama, Texas, Louisiana, South Carolina, and Virginia. * * *

21. Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as Amici Curiae; Brief for AAMR et al. as Amici Curiae. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all “share a conviction that the execution of persons with mental retardation cannot be morally justified.” Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue. * * *

task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.”

IV

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution. First, there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders. *Gregg v. Georgia* identified “retribution and deterrence of capital crimes by prospective offenders” as the social purposes served by the death penalty. * * *

With respect to retribution – the interest in seeing that the offender gets his “just deserts” – the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey v. Georgia* [446 U.S. 420 (1980),] we set aside a death sentence because the petitioner’s crimes did not reflect “a consciousness materially more ‘depraved’ than that of any person guilty of murder.” If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

With respect to deterrence – the interest in preventing capital crimes by prospective offenders – “it seems likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.’” * * * The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. * * *

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk “that the death penalty will be imposed in spite of factors which

may call for a less severe penalty,” *Lockett v. Ohio*, [438 U.S. 586 (1978),] is enhanced, not only by the possibility of false confessions,²⁵ but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. * * *

Our independent evaluation of the issue reveals no reason to disagree with the judgment of “the legislatures that have recently addressed the matter” and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our “evolving standards of decency,” we therefore conclude that such punishment is excessive and that the Constitution “places a substantive restriction on the State’s power to take the life” of a mentally retarded offender. * * *

* * *

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

* * * The Court pronounces the punishment cruel and unusual primarily because 18 States recently have passed laws limiting the death eligibility of certain defendants based on mental retardation alone, despite the fact that the laws of

25. * * * Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. As two recent high-profile cases demonstrate, these exonerations include mentally retarded persons who unwittingly confessed to crimes that they did not commit. * * *

19 other States besides Virginia continue to leave the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime.

* * *

In my view, * * * two sources – the work product of legislatures and sentencing jury determinations – ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

* * * I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination. While it is true that some of our prior opinions have looked to “the climate of international opinion,” to reinforce a conclusion regarding evolving standards of decency, we have since explicitly rejected the idea that the sentencing practices of other countries could “serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.”

* * * For if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant. * * *

To further buttress its appraisal of contemporary societal values, the Court marshals public opinion poll results and evidence that several professional organizations and religious groups have adopted official positions opposing the imposition of the death penalty upon mentally

retarded offenders. * * * For the Court to rely on such data today serves only to illustrate its willingness to proscribe by judicial fiat – at the behest of private organizations speaking only for themselves – a punishment about which no across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the States.

Even if I were to accept the legitimacy of the Court’s decision to reach beyond the product of legislatures and practices of sentencing juries to discern a national standard of decency, I would take issue with the blind-faith credence it accords the opinion polls brought to our attention. An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.

* * *

JUSTICE SCALIA, with whom the CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Today’s decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.

I

* * *

II

* * * [Adkins’] mental retardation was a *central issue* at sentencing. The jury concluded, however,

that his alleged retardation was not a compelling reason to exempt him from the death penalty in light of the brutality of his crime and his long demonstrated propensity for violence. * * * [T]he Court concludes that no one who is even slightly mentally retarded can have sufficient “moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution.”

* * *

The Court miraculously extracts a “national consensus” forbidding execution of the mentally retarded from the fact that 18 States – less than *half* (47%) of the 38 States that permit capital punishment (for whom the issue exists) – have very recently enacted legislation barring execution of the mentally retarded. * * *

* * * How is it possible that agreement among 47% of the death penalty jurisdictions amounts to “consensus”? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual on “evolving standards” grounds. * * *

Moreover, a major factor that the Court entirely disregards is that the legislation of all 18 States it relies on is still in its infancy. * * * Few, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term. * * *

The Court attempts to bolster its embarrassingly feeble evidence of “consensus” with the following: “It is not so much the number of these States that is significant, but the *consistency* of the direction of change.” (emphasis added). But in what *other* direction *could we possibly* see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus. * * * In any event, reliance upon “trends,” even

those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication, as JUSTICE O'CONNOR eloquently explained * * *:

In 1846, Michigan became the first State to abolish the death penalty In succeeding decades, other American States continued the trend towards abolition Later, and particularly after World War II, there ensued a steady and dramatic decline in executions In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968. . . .

In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.

Her words demonstrate, of course, not merely the peril of riding a trend, but also the peril of discerning a consensus where there is none.

The Court's thrashing about for evidence of "consensus" includes reliance upon the *margins* by which state legislatures have enacted bans on execution of the retarded. Presumably, in applying our Eighth Amendment "evolving-standards-of-decency" jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed *by how much*. * * * (By the way, the population of the death penalty States that exclude the mentally retarded is only 44% of the population of all death penalty States.) * * *

* * * It is not at all clear that execution of the mentally retarded is "uncommon," * * *. *If*, however, execution of the mentally retarded *is* "uncommon"; and if it is not a sufficient explanation of this that the retarded comprise a tiny fraction of society (1% to 3%); then surely the explanation is that mental retardation is a constitutionally mandated mitigating factor at sentencing. For that reason, even if there were uniform national sentiment in *favor* of executing the retarded in appropriate cases, one would still expect execution of the mentally retarded to be "uncommon." * * *

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. I agree with the CHIEF JUSTICE that the views of professional and religious organizations and the results of opinion polls are irrelevant.⁶ Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. * * *

III

* * * "[T]he Constitution," the Court says, 'contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" (emphasis added). * * * The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. * * *

The genuinely operative portion of the opinion,

6. And in some cases positively counter-indicative. The Court cites, for example, the views of the United States Catholic Conference, whose members are the active Catholic Bishops of the United States. The attitudes of that body regarding crime and punishment are so far from being representative, even of the views of Catholics, that they are currently the object of intense national (and entirely ecumenical) criticism.

then, is the Court's statement of the reasons why it agrees with the contrived consensus it has found, that the "diminished capacities" of the mentally retarded render the death penalty excessive. * * *. The Eighth Amendment is addressed to always-and-everywhere "cruel" punishments, such as the rack and the thumbscrew. But where the punishment is in itself permissible, "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." * * *

* * *

* * * Retribution is not advanced, the argument goes, because the mentally retarded are *no more culpable* than the average murderer, whom we have already held lacks sufficient culpability to warrant the death penalty. Who says so? Is there an established correlation between mental acuity and the ability to conform one's conduct to the law in such a rudimentary matter as murder? Are the mentally retarded really more disposed (and hence more likely) to commit willfully cruel and serious crime than others? In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality.

* * * Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime – which is precisely why this sort of question has traditionally been thought answerable not by a categorical rule of the sort the Court today imposes upon all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case. The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. * * *

As for the other social purpose of the death

penalty that the Court discusses, deterrence: * * * this leads to the same conclusion discussed earlier – that the mentally retarded (because they are less deterred) are more likely to kill – which neither I nor the society at large believes. In any event, even the Court does not say that *all* mentally retarded individuals cannot "process the information of the possibility of execution as a penalty and . . . control their conduct based upon that information"; it merely asserts that they are "less likely" to be able to do so. But surely the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class. * * *

The Court throws one last factor into its grab bag of reasons why execution of the retarded is "excessive" in all cases: Mentally retarded offenders "face a special risk of wrongful execution" because they are less able "to make a persuasive showing of mitigation," "to give meaningful assistance to their counsel," and to be effective witnesses. "Special risk" is pretty flabby language (even flabbier than "less likely") – and I suppose a similar "special risk" could be said to exist for just plain stupid people, inarticulate people, even ugly people. If this unsupported claim has any substance to it (which I doubt) it might support a due process claim in all criminal prosecutions of the mentally retarded; but it is hard to see how it has anything to do with an *Eighth Amendment* claim that execution of the mentally retarded is cruel and unusual. * * *

* * *

* * * There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks

commitment to a mental institution until he can be cured (and then tried and executed), the capital defendant who feigns mental retardation risks nothing at all. * * *

* * *

Further Developments in Daryl Atkins' Case

As a result of the Supreme Court's decision, Daryl Atkins received a trial on whether he was mentally retarded in the Circuit Court of York County, Virginia, in August 2006. Expert witnesses testified that he had scores of 59, 67, 74 and 76 on IQ tests, but disagreed on whether he was mentally retarded. The prosecution attributed Atkins' poor performance in school on the use of drugs and alcohol and argued that the claim of mental retardation was a ploy to avoid execution. After deliberating for 13 hours over two days, the jury returned a verdict finding that Atkins was not retarded. As a result, he remained under death sentence.

On appeal, the Virginia Supreme Court reversed and remanded for another trial on mental retardation. It found that the trial court erred in allowing the testimony of a clinical psychologist who was not qualified to express an expert opinion as to whether Atkins was mentally retarded because was not skilled in the administration of measures of adaptive behavior. The psychologist also disclosed to the jury that another jury had already decided that Atkins should receive the death penalty. *See Atkins v. Commonwealth*, 631 S.E.2d 93 (Va. 2006). The case was remanded to the trial court for another trial on the issue of mental retardation.

However, before the trial could be held, Atkins' lawyers discovered that prosecutors has failed to disclose before Atkins' trial in 1998 that they had coaxed and coached Atkins co-defendant, William Jones, whose testimony was a central part of the case against Atkins, when Jones statement was not in line with forensic evidence in the case. The prosecution's first and only interview with Jones was in 1997. Both

Atkins and Jones admitted participation in the crime, but each claimed that the other did the shooting.

Lawyer Leslie P. Smith, who represented Jones, testified that the tape recorder was turned off at a point during the interview when Jones's statements were inconsistent with forensic evidence. Prosecutors let Smith know of the inconsistency and said it was a problem, he testified. Smith had not been able to make the disclosure earlier because of his responsibly to keep confidential what he had learned as Jones' lawyer.

The interview was tape recorded, and an expert in audio analysis testified that 16 minutes could not be accounted for.

Judge Prentis Smiley Jr. of York County-Poquoson Circuit Court, who presided over Atkins' trial, found "there was favorable, potential impeachable evidence possessed by the commonwealth." Judge Smiley also found that "had [Atkins's attorney] been given the evidence, the outcome might have been different."

Judge Smiley said he would not order a new trial, which he said would be "a waste of everybody's time" because innocence was not an issue. Instead, he sentenced Atkins to life in prison.

Issues Remaining after *Atkins*

The Court's decision in *Atkins* left many questions to be answered by the states, such as: the definition of mental retardation; whether mental retardation should be adjudicated pretrial, during the guilt phase or during sentencing; whether the issue should be decided by a judge or a jury; how the burden of proof is to be allocated and the standard of proof. *See James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2003).

If the Eighth Amendment prohibits execution of the retarded, can the definition of retardation

vary from one state to another? Professor Jim Ellis, who argued *Atkins*, has said, “The Court’s decision in *Atkins* makes clear that its holding extends to all defendants who ‘fall within the range of mentally retarded offenders about whom there is a national consensus.’ This means that while States are free to adopt variations in the wording of the definition, they cannot adopt a definition that encompasses a smaller group of defendants, nor may they fail to protect any individuals who have mental retardation under the definition embodied in the national consensus.”

However, the Texas Court of Criminal Appeals saw its role as defining “that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.” It observed:

Most Texas citizens might agree that Steinbeck's Lennie [from *OF MICE AND MEN* (1973)] should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. But, does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? Put another way, is there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria?

Ex parte Briseno, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004). While adopting the definition of what was then called the American Association on Mental Retardation, the Court went on to describe how the adoptive functions were to be evaluated:

- Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried

them through or is his conduct impulsive?

- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Id. at 8-9.

In *Hall v. Florida*, 134 S.Ct. 1986 (1976), the Supreme Court rejected a Florida rule that prohibited any consideration of intellectual disability of a person who had an IQ score above 70.

There is agreement that the defendant has the burden of coming forward with some evidence to put mental retardation in issue. However, there is disagreement among the states with regard to the burden of proof. Some states require defendants to provide clear and convincing evidence. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-703.02(G) (2004) and Fla. Stat. Ann. § 921.137(4) (2005). However, the Louisiana Supreme Court held that, “[r]equiring a defendant to prove by clear and convincing evidence he is exempt from capital punishment by reason of mental retardation would significantly increase the risk of an erroneous determination that he is not mentally retarded.” *State v. Williams*, 831 So. 2d 835, 860 (La. 2002). Louisiana and other states require that mental retardation be proven by a preponderance of the evidence.

One state, Georgia, has set the highest burden possible – defendants must prove mental retardation beyond a reasonable doubt. Ga. Code Ann. § 17-1-131(c)(3) (2004). *See Stripling v. State*, 711 S.E.2d 665, 668 (Ga. 2011) (upholding standard based on its earlier decision in *Head v. Hill*, 587 S.E.2d 613, 621–22 (Ga. 2003). A panel of the Court of Appeals for the Eleventh Circuit held that setting such a high burden on defendants created an unconstitutional risk of erroneous determination and eviscerated the Eighth Amendment’s protection of mentally retarded offenders. *Hill v. Schofield*, 608 F.3d 1272 (11th Cir. 2010). However, the full Court vacated the panel opinion and held that the Georgia Supreme Court’s decision upholding the beyond a reasonable doubt standard was not contrary to law clearly established by the Supreme Court, which is necessary to grant habeas corpus review. *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011). *See* 28 U.S.C. § 2254 (d) (1) (prohibiting federal courts from granting habeas corpus relief unless the state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”).

For a discussion of how *Atkins* has been applied in different states, *see* John Blume, Sheri Lynn Johnson & Christopher Seeds, *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 Tenn. L. Rev. 625 (2009).

For readings on intellectual disabilities and limitations and the criminal justice system generally, *see* Ronald W. Conley, Ruth Luckasson & George N. Bouthilet, *THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION* (Paul H. Brookes Pub. Co, 1992); James Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985).

STATE ex rel. Andrew LYONS, Petitioner,
v.
George LOMBARDI and Chris Koster,
Respondents.

Supreme Court of Missouri, En Banc
303 S.W.3d 523 (Mo. 2010).

PER CURIAM.

Overview

Andrew Lyons was convicted of first degree murder and sentenced to death for the killing of his estranged girlfriend. The sentence was affirmed by this Court. Claiming he is mentally retarded, Lyons files this petition in mandamus as provided in *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. en banc 2007). The Court appointed a master, who reports that the evidence supports Lyons’ claim. This Court finds that the master’s findings and conclusions are supported by substantial evidence.

The Supreme Court of the United States has determined that the United States Constitution prohibits the execution of a mentally retarded person such as Lyons. *Atkins v. Virginia*, 536 U.S. 304 (2002). * * *

Standard of review

The habeas corpus petitioner has the burden of proof to show that he is entitled to habeas corpus relief. Where the master has the opportunity to view and judge the credibility of witnesses, the findings and conclusions of the master are accorded the weight and deference given to trial courts in court-tried cases. In such cases, the master’s findings and conclusions will be sustained by this Court unless there is no substantial evidence to support them, they are against the weight of the evidence, or they erroneously declare or apply the law. This Court should exercise the power to set aside the findings and conclusions on the ground that they are against the weight of the evidence with caution and with a firm belief that the conclusions are wrong.

Facts

Lyons seeks to prove that he is mentally retarded. The master received testimony from four of his witnesses and a witness presented by the state. In addition, the master received numerous exhibits, including, in part, on Lyons' behalf, reports of other experts, limited school records, and other materials from Lyons' relatives describing his experiences growing up. The state presented other exhibits.

Having received all the evidence, the master concluded that Lyons had met the definition of "mental retardation" contained in [the statute quoted below]. He concluded Lyons' IQ was in a range of 61 to 70; that Lyons' had continual extensive related deficits in two adaptive behaviors-communications and functional academics; and that these conditions were manifested and documented before Lyons was 18 years of age.

Discussion

Section 565.030.6 provides:

As used in [section 565.030], the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

The master carefully considered each element of the definition.

Significantly Subaverage Intellectual Functioning

First, he sought to determine whether Lyons had significantly subaverage intellectual functioning. Although the statute does not specify any particular method for proving this element, the parties presented evidence of Lyons' IQ

scores. There were four IQ tests. The results ranged from 61 to 84.

Lyons' expert presented evidence that reconciled the variance. The master concluded that this expert's testimony was the most credible and concluded that Lyons' IQ fell within the range of 61 to 70. There is substantial evidence to support the master's conclusion and finding of significantly subaverage intellectual functioning.

Adaptive Behaviors

Next, the master reviewed the evidence as to Lyons' adaptive behaviors. He found evidence to support the behaviors of communication and functional academics.

With respect to communication, the master noted the evidence of the difficulty Lyons' attorneys and some of Lyons' experts had communicating with him.⁶ The family testimony also characterized Lyons as a loner, someone who kept to himself, was quiet, withdrawn, and unwilling to engage in conversations except to smile, and who became nauseated by having to get ready for school. The evidence also noted Lyons' inability to read, write, or spell.

With respect to functional academics, the master noted the limited school records. They indicated only failing or incomplete grades and that Lyons was in the 10th grade for three consecutive years. His Iowa Basic Skills Test placed Lyons in the bottom two percent. The family evidence indicated Lyons was in special education classes and was "slow" in reading and mathematics.

The foregoing evidence supports the master's conclusion and finding of continual extensive related deficits and limitations in two or more adaptive behaviors related to his significantly subaverage intellectual functioning.

6. Lyons' trial was delayed for more than two years because of a finding he was not competent to stand trial.

Conditions Being Manifested And Documented Before Age 18

Finally, the master concluded that these conditions were manifested and documented before 18 years of age. Although there is evidence, as noted earlier, that Lyons manifested these conditions before age 18, the state contends there was insufficient documentation of these conditions. The state vigorously notes the lack of an IQ test result from prior to age 18 and the scant school records and other evidence with respect to the adaptive behaviors.

Documentation, as with any other fact, is a matter of proof. In reaching his conclusion, the master was entitled to make reasonable inferences from the evidence. A purpose of requiring documentation is to diminish the possibility a defendant will fabricate or exaggerate the symptoms of mental retardation to avoid punishment. The records that Lyons presented and the testimony received are sufficient for the master to conclude that Lyons' conditions were not a recent fabrication and that they were documented prior to Lyons attaining 18 years of age.

Conclusion

This Court issues its permanent writ of mandamus to prohibit Lyons' execution. In addition, the Court will recall its last mandate in *Lyons* [its direct appeal decision], set aside Lyons' sentence of death as to his estranged girlfriend, and resentence Lyons for that offense to life imprisonment without eligibility for probation, parole, or release except by act of the governor.

The Death Penalty for Children

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), four members of the Court concluded that the imposition of the death penalty upon those 15 years old at the of the crime violated the Eighth Amendment, and four members concluded that it did not. Justice O'Connor cast the critical vote, holding that because Oklahoma had not specified in its statute that the death penalty could be

imposed upon those 15 at the time of the crime, it could not execute Thompson.

The Court held by a vote of 5-4 that imposition of the death penalty upon those 16 and 17 years old at the time of their crimes did not violate the Eighth Amendment in *Stanford v. Kentucky*, 492 U.S. 361 (1989). The Court reconsidered *Stanford* in the opinion which follows.

**Donald P. ROPER, Superintendent,
Potosi Correctional Center, Petitioner,**

v.

Christopher SIMMONS.

Supreme Court of the United States
543 U.S. 551(2005).

Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. Stevens, J., filed a concurring opinion, in which Ginsburg, J., joined. O'Connor, J., filed a dissenting opinion. Scalia, J., filed a dissenting opinion, in which Rehnquist, C.J., and Thomas, J., joined.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined.

* * *

I

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. * * * Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could "get away with it" because they were minors.

* * * Simmons and [Charles] Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking

the back door. * * *

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

* * *

The next day, * * * police arrested [Simmons] at his high school * * *. * * * Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

* * *

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty.

* * *

* * * [After the Court's decision in *Atkins v. Virginia*,] Simmons filed a new petition for state

postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.

The Missouri Supreme Court agreed. * * *

* * *

We granted certiorari, and now affirm.

II

* * * By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

* * *

* * * [I]n *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18. The Court noted that 22 of the 37 death penalty States permitted the death penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year-old offenders. These numbers, in the Court's view, indicated there was no national consensus "sufficient to label a particular punishment cruel and unusual." A plurality of the Court also "emphatically reject[ed]" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. (opinion of SCALIA, J., joined by REHNQUIST, C.J., and White and KENNEDY, JJ.); * * *.

The same day the Court decided *Stanford*, it held that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302 (1989). * * *

Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the

execution of the mentally retarded is cruel and unusual punishment. * * *

* * *

Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*. * * *

III

A

* * * When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. * * * In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. * * * In December 2003 the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that “[w]e ought not be executing people who, legally, were children.” By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford v. Kentucky*.

* * *

* * * The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no

State that previously prohibited capital punishment for juveniles has reinstated it. * * *

The slower pace of abolition of the juvenile death penalty over the past 15 years, moreover, may have a simple explanation. When we heard *Penry*, only two death penalty States had already prohibited the execution of the mentally retarded. When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier than the impropriety of executing the mentally retarded. * * *

* * *

As in *Atkins*, the objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal.”

B

* * *

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.” * * *

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an

underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. * * * This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. * * *

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. * * *

* * * The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed. * * *

* * *

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. * * * Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a

substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles * * *. [T]he same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. * * * To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

* * * Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. * * *

* * * The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant’s youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons’ youth was aggravating rather than mitigating. * * *

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is

characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation – that a juvenile offender merits the death penalty.
* * *

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. * * * The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

These considerations mean *Stanford v. Kentucky* should be deemed no longer controlling on this issue. To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, it suffices to note that those indicia have changed. It should be observed, furthermore, that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles. Last, to the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions, It is also inconsistent with the premises of our recent decision in *Atkins*.

* * *

IV

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that

continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop [v. Dulles]*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." * * *

As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. * * * Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U.N.T.S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5)); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990) (entered into force Nov. 29, 1999) (same).

Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

* * *

* * * The opinion of the world community, while not controlling our outcome, does provide

respected and significant confirmation for our own conclusions.

* * *

* * * It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

* * *

Justice STEVENS, with whom Justice GINSBURG joins, concurring.

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. * * * In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day – Alexander Hamilton, for example – were sitting with us today, I would expect them to join Justice KENNEDY's opinion for the Court. In all events, I do so without hesitation.

Justice O'CONNOR, dissenting.

* * * Adolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

* * * In contrast to the trend in *Atkins*, the States have not moved uniformly towards abolishing the juvenile death penalty. * * * [T]he extraordinary wave of legislative action leading up to our decision in *Atkins* provided strong evidence that the country truly had set itself against capital punishment of the mentally retarded. Here, by contrast, the halting pace of change gives reason for pause.

* * *

* * * The fact that juveniles are generally *less* culpable for their misconduct than adults does not necessarily mean that a 17-year-old murderer cannot be *sufficiently* culpable to merit the death penalty. At most, the Court's argument suggests that the average 17-year-old murderer is not as culpable as the average adult murderer. But an especially depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty. Similarly, the fact that the availability of the death penalty may be *less* likely to deter a juvenile from committing a capital crime does not imply that this threat cannot *effectively* deter some 17-year-olds from such an act. * * * [A] legislature may reasonably conclude that at least *some* 17-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted in an appropriate case.

Indeed, this appears to be just such a case. Christopher Simmons' murder of Shirley Crook was premeditated, wanton, and cruel in the extreme. * * * And Simmons' prediction that he could murder with impunity because he had not yet turned 18 – though inaccurate – suggests that he *did* take into account the perceived risk of punishment in deciding whether to commit the crime. * * *

* * *

For purposes of proportionality analysis,

17-year-olds as a class are qualitatively and materially different from the mentally retarded. “Mentally retarded” offenders, as we understood that category in *Atkins*, are *defined* by precisely the characteristics which render death an excessive punishment. A mentally retarded person is, “by definition,” one whose cognitive and behavioral capacities have been proven to fall below a certain minimum. Accordingly, for purposes of our decision in *Atkins*, the mentally retarded are not merely *less* blameworthy for their misconduct or *less* likely to be deterred by the death penalty than others. Rather, a mentally retarded offender is one whose demonstrated impairments make it so highly unlikely that he is culpable enough to deserve the death penalty or that he could have been deterred by the threat of death, that execution is not a defensible punishment. There is no such inherent or accurate fit between an offender’s chronological age and the personal limitations which the Court believes make capital punishment excessive for 17-year-old murderers. * * *

* * *

* * * I disagree with Justice SCALIA’s contention that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. * * * [W]e should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement – expressed in international law or in the domestic laws of individual countries – that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.

* * *

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people’s representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since “[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment.” But Hamilton had in mind a traditional judiciary, “bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.” Bound down, indeed. What a mockery today’s opinion makes of Hamilton’s expectation, announcing the Court’s conclusion that the meaning of our Constitution has changed over the past 15 years – not, mind you, that this Court’s decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to “the evolving standards of decency” of our national society. * * * Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

I

* * *

Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus. Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time. In *Coker v. Georgia*, a plurality concluded the Eighth Amendment prohibited capital punishment for rape of an adult woman where only one jurisdiction authorized such punishment. * * * In *Ford v. Wainwright*, we held execution of the insane unconstitutional, tracing the roots of this prohibition to the common law and noting that “no State in the union permits the execution of the insane.” In *Enmund v. Florida*, we invalidated capital punishment imposed for participation in a

robbery in which an accomplice committed murder, because 78% of all death penalty States prohibited this punishment. * * *

* * * *None* of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely. And with good reason. Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don't like it, but that sheds no light whatever on the point at issue. * * *

* * * Now, the Court says a legislative change in four States is "significant" enough to trigger a constitutional prohibition.⁴ It is amazing to think that this subtle shift in numbers can take the issue entirely off the table for legislative debate.

* * *

The Court's reliance on the infrequency of executions, for under-18 murderers, credits an argument that this Court considered and explicitly rejected in *Stanford*. That infrequency is explained, we accurately said, both by "the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18," and by the fact that juries are required at sentencing to consider the offender's youth as a mitigating factor. Thus, "it is not only possible, but overwhelmingly probable, that the very considerations which induce [respondent] and [his] supporters to believe that death should

4. As the Court notes, Washington State's decision to prohibit executions of offenders under 18 was made by a judicial, not legislative, decision. *State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993), construed the State's death penalty statute – which did not set any age limit – to apply only to persons over 18. The opinion found that construction necessary to avoid what it considered constitutional difficulties, and did not purport to reflect popular sentiment. It is irrelevant to the question of changed national consensus.

never be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed." *Stanford*, at 374.

* * *

II

Of course, the real force driving today's decision is not the actions of four state legislatures, but the Court's "own judgment" "that murderers younger than 18 can never be as morally culpable as older counterparts." * * * If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of "the evolving standards of decency" of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?

* * *

Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding. * * * In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends.

We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that

scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), the APA found a “rich body of research” showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. The APA brief, citing psychology treatises and studies too numerous to list here, asserted: “[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems. * * *”

* * *

The criminal justice system * * * provides for individualized consideration of each defendant. * * * In other contexts where individualized consideration is provided, we have recognized that at least some minors will be mature enough to make difficult decisions that involve moral considerations. For instance, we have struck down abortion statutes that do not allow minors deemed mature by courts to bypass parental notification provisions. It is hard to see why this context should be any different. Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood.

* * *

III

Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.

The Court begins by noting that “Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified *save for the United States* and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles

under 18.” (emphasis added). The Court also discusses the International Covenant on Civil and Political Rights (ICCPR), which the Senate ratified only subject to a reservation [that allows capital punishment]. * * *

* * * That the Senate and the President * * * have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. * * *

* * * [T]he Court is quite willing to believe that every foreign nation – of whatever tyrannical political makeup and with however subservient or incompetent a court system – in fact *adheres* to a rule of no death penalty for offenders under 18. Nor does the Court inquire into how many of the countries that have the death penalty, but have forsworn (on paper at least) imposing that penalty on offenders under 18, have what no State of this country can constitutionally have: a *mandatory* death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason. I suspect it is most of them. To forbid the death penalty for juveniles under such a system may be a good idea, but it says nothing about our system, in which the sentencing authority, typically a jury, always can, and almost always does, withhold the death penalty from an under-18 offender except, after considering all the circumstances, in the rare cases where it is warranted. The foreign authorities, in other words, do not even speak to the issue before us here.

More fundamentally, however, the basic premise of the Court’s argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law – including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-

pronounced exclusionary rule, for example, is distinctively American. * * * Since then a categorical exclusionary rule has been “universally rejected” by other countries, including those with rules prohibiting illegal searches and police misconduct, despite the fact that none of these countries “appears to have any alternative form of discipline for police that is effective in preventing search violations.” * * *

* * * Most other countries – including those committed to religious neutrality – do not insist on the degree of separation between church and state that this Court requires. For example, * * * countries such as the Netherlands, Germany, and Australia allow direct government funding of religious schools[.] * * *

And let us not forget the Court’s abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. Though the Government and *amici* in cases following *Roe v. Wade*, urged the Court to follow the international community’s lead, these arguments fell on deaf ears. * * *

* * *

* * * To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.

* * *

***Graham v. Florida
and Miller v. Alabama***

Relying on much of its reasoning in *Roper*, the Court held in *Graham v. Florida*, 130 S.Ct. 2011 (2010), that the sentence to life in prison without the possibility of parole is excessive and disproportionate for children under age 18 who commit crimes in which no one is killed. The decision is the first in which the Court has held outside of capital punishment that an entire class of offenders is immune from a certain punishment.

Justice Kennedy wrote the Court’s opinion in *Graham*. He was joined by Justices Stevens,

Ginsburg, Breyer and Sotomayor. Chief Justice Roberts concurred, but endorsed a case-by-case approach of assessing proportionality. Justice Thomas, joined by Justices Scalia and Alito, dissented, expressing the view that the sentence did not violate the Eighth Amendment. Justice Alito also issued a brief dissenting opinion.

The Court extended its holding, deciding that a mandatory sentence of life imprisonment without parole violates the Eighth Amendment even for children under 18 who commit homicide offenses. *Miller v. Alabama* 132 S.Ct. 2455 (2012). In that case, 14-year-old children had been sentenced to life in prison without parole for homicide under the mandatory sentencing guidelines of Alabama and Arkansas. At the time, 29 states permitted mandatory life imprisonment without parole for children.

Miller requires courts to hold “individualized” sentencing hearings for children under 17 convicted of homicide, where judges are to take the child’s age, circumstances of the crime, and other mitigating factors into account. Life imprisonment without parole can still be imposed, but only if deemed proportional to the child’s guilt. In so doing, the Court held to the foundational principles of *Roper* and *Graham* that courts must take child status into account when imposing severe penalties for juvenile offenders.

The 5-4 decision was written by Justice Kagan, joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Justices Breyer and Sotomayor concurred in a separate decision, arguing that under *Graham*, even a discretionary life imprisonment with the possibility of parole could be justified only if it could be shown that the convicted child personally killed or intended to kill the victim. Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito, arguing that such mandatory sentences are not cruel and unusual under the Eighth Amendment.

For further reading: See, e.g., John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA.

L. REV. 899, 904 (2011).

Individual Proportionality Review

For consideration: What kind of proportionality review is being sought by Robert Alton Harris in the following case? Why is he not entitled to it? Are “guided discretion” statutes sufficient to avoid arbitrariness and limit imposition of the death penalty to the most incorrigible offenders who commit the most heinous crimes, *i.e.*, the “worst of the worst?”

R. PULLEY, Warden, Petitioner

v.

Robert Alton HARRIS.

United States Supreme Court
465 U.S. 37, 104 S.Ct. 871(1984).

White, J., delivered the opinion of the Court, which was joined by Burger, C.J. and Blackmun, Powell, Rehnquist, and O’Connor, JJ. Stevens, J., filed an opinion concurring in part and concurring in the judgment. Brennan, J., dissented and filed an opinion in which Marshall, J., joined.

Justice WHITE delivered the opinion of the Court.

Respondent Harris was convicted of a capital crime in a California court and was sentenced to death. Along with many other challenges to the conviction and sentence, Harris claimed on appeal that the California capital punishment statute was invalid under the United States Constitution because it failed to require the California Supreme Court to compare Harris’s sentence with the sentences imposed in similar capital cases and thereby to determine whether they were proportionate. Rejecting the constitutional claims by citation to earlier cases, the California Supreme Court affirmed.

* * *

* * * Traditionally, “proportionality” has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular

crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime. *See, e.g., Solem v. Helm*, 103 S.Ct. 3001 (1983); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977). The death penalty is not in all cases a disproportionate penalty in this sense.

The proportionality review sought by Harris * * * and provided for in numerous state statutes is of a different sort. This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime. The issue in this case, therefore, is whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. Harris insists that it does and that this is the invariable rule in every case. * * * We do not agree.

* * *

That *Gregg [v. Georgia]* and *Proffitt [v. Florida]* did not establish a constitutional requirement of proportionality review is made clearer by *Jurek v. Texas*, decided the same day. In *Jurek* we upheld a death sentence even though neither the statute, as in Georgia, nor state case-law, as in Florida, provided for comparative proportionality review.

There is * * * no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. * * *

* * *

By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small sub-class of capital-eligible cases. * * *

Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in *Furman*. As we have acknowledged in the past, “there can be ‘no perfect procedure for deciding in which cases governmental authority should be used to impose death.’” As we are presently informed, we cannot say that the California procedures provided Harris inadequate protection against the evil identified in *Furman*. * * *

Justice STEVENS, concurring in part and concurring in the judgment.

* * *

While the cases relied upon by respondent do not establish that comparative proportionality review is a constitutionally required element of a capital sentencing system, I believe the case law does establish that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, and hence that some form of meaningful appellate review is constitutionally required.

* * *

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting. * * *

* * *

* * * The results obtained by many states that undertake such proportionality review, pursuant to either state statute or judicial decision, convince me that this form of appellate review serves to eliminate some, if only a small part, of the irrationality that infects the current imposition of death sentences throughout the various States. To

this extent, I believe that comparative proportionality review is mandated by the Constitution.

A

Some forms of irrationality that infect the administration of the death penalty – unlike discrimination by race, gender, socioeconomic status, or geographic location within a State – cannot be measured in any comprehensive way. That does not mean, however, that the process under which death sentences are currently being imposed is otherwise rational or acceptable. Rather, for any individual defendant the process is filled with so much unpredictability that “it smacks of little more than a lottery system,” under which being chosen for a death sentence remains as random as “being struck by lightning.”

Chief among the reasons for this unpredictability is the fact that similarly situated defendants, charged and convicted for similar crimes within the same State, often receive vastly different sentences. * * * [One] type of error in capital punishment occurs when we execute someone whose crime does not seem so aggravated when compared to those of many who escaped the death penalty. It is in this kind of case – which is extremely common – that we must worry whether, first, we have designed procedures which are appropriate to the decision between life and death and, second, whether we have followed those procedures.” * * * Comparative proportionality review is aimed at eliminating this second type of error. * * *

B

Disproportionality among sentences given different defendants can only be eliminated after sentencing disparities are identified. And the most logical way to identify such sentencing disparities is for a court of statewide jurisdiction to conduct comparisons between death sentences imposed by different judges or juries within the State. * * * Although clearly no panacea, such review often serves to identify the most extreme examples of disproportionality among similarly situated defendants. * * *

* * *

Perhaps the best evidence of the value of proportionality review can be gathered by examining the actual results obtained in those States which now require such review. For example, since 1973, * * * the Georgia Supreme Court has vacated at least seven death sentences because it was convinced that they were comparatively disproportionate. * * *

What these cases clearly demonstrate, in my view, is that comparative proportionality review serves to eliminate some, if only a small part, of the irrationality that currently infects imposition of the death penalty by the various States. * * *

* * *

Proportionality Review after *Pulley*

Pulley provided legislatures and courts an opportunity to abandon individualized proportionality review, which some had adopted only because they understood it to be constitutionally required. After *Pulley*, nine state legislatures repealed their statutory provisions for proportionality review.¹ (One state, Tennessee, later reinstated it.) One commentator found that many other state supreme courts “reduced proportionality review to a perfunctory exercise.”² The Georgia Supreme Court, which had found seven sentences disproportionate prior to *Pulley*, has not found any death sentence disproportionate since *Pulley*.

Some judges and scholars have considered proportionality review misguided, unnecessary

1. See, e.g., Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1168 n.31 (2001).

2. Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only “The Appearance of Justice”?* 87 J. CRIM. L. & CRIMINOLOGY 130, 133 (1996).

and ineffective.³ One Arizona judge wrote, “Our cases reveal that proportionality reviews are judicial afterthoughts, mere appendages to already lengthy opinions. They are performed in a non-adversarial setting, without any pretense at real science. They require a court to engage in the alchemy of measuring degrees of depravity among a handful of selected cases. The pursuit of justice does not require us to engage in unauthorized false science.” *Arizona v. Salazar*, 844 P.2d 566, 584 (Ariz. 1992) (Martone, J., concurring).

Others argue that proportionality review is necessary to prevent arbitrary and excessive death sentences due to variances in prosecutorial practices within a state and the failure of aggravating circumstances to narrow sufficiently the class of those eligible for the death penalty to the “worst of the worst.”⁴ Florida has no statute requiring proportionality review, but the state’s Supreme Court decided in an early decision,⁵ that it was required to engage in it despite pressure from the state legislature to abandon it.⁶ Today, 19 of the 34 states that have capital

3. Latzer, *supra* note 1; Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by The Supreme Court of Florida*, 17 ST. THOMAS L. REV. 299 (2004).

4. See, e.g., William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687 (2012); David S. Baime, J., *Comparative Proportionality Review: The New Jersey Experience*, 41 NO. 2 CRIM. L. BULLETIN 7 (2005); Alex Lessman, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and the New Jersey Supreme Court’s Proportionality Review Project*, 13 J.L. & POL’Y 359 (2005); Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L. REV. 883 (2002)

5. See *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973).

6. See Dan Weisman, *Cruel and Unusual Punishment, “Conformity” Amendments, and The Florida Supreme Court’s Review of Death Sentences: A Call For The Abolishment of Comparative Proportionality Review in Florida*, 25 T.M. COOLEY L. REV. 177 (2008).

punishment have some form of a proportionality review,⁷ although, as previously noted, the practice is perfunctory in many of the states.

One of the fundamental issues with regard to proportionality review where it is carried out is the universe of cases that should be considered in conducting it. The different universes can be divided into three categories to which an individual death sentence ought be compared (a) other individuals sentenced to death,⁸ (b) all others found guilty of a capital offense and then sentenced to either life or death⁹ or, most extensively, (c) all individuals whose crimes would render them death eligible regardless of whether they are prosecuted for a capital offense and however their cases are resolved, including plea dispositions.¹⁰

The Nebraska Supreme Court concluded that its proportionality review pursuant to statute would include only cases in which death was imposed. *State v. Palmer*, 399 N.W.2d 706, 733-38 (Neb. 1986). It concluded that the death sentence was proportionate in that case. Chief Justice Krivosha disagreed, saying:

If one wants to determine whether individuals are being discriminated against in public transportation, one does not merely look at those who are required to sit in the back of the bus and conclude that since everyone in the back of the bus looks alike, there is no

7. Those states are Alabama, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Washington.

8. This is how Georgia conducts its review and is at the heart of the controversy in *Walker v. Georgia* to be considered next in these readings.

9. This is how Florida conducts its review. Durham, *supra* note 3, at 312-13.

10. This was the method New Jersey employed when it had the death penalty and performed proportionality review. See Latzer, *supra* note 1, at 1214-38.

discrimination. One, of necessity, must look at who is riding in the front of the bus as well in order to determine whether the persons in the back are being discriminated against. So, too, there is no way that we can determine whether those who are sentenced to death are being discriminated against if we do not examine those cases having the same or similar circumstances which, for whatever reason, did not result in the imposition of a death sentence.

Id. at 752 (Krivosha, C.J., concurring in part and dissenting in part).

The Missouri Supreme Court divided sharply on whether non-capital cases should be included in *State v. Deck*, 303 S.W.3d 527 (Mo. 2010), with three justices arguing in favor of considering non-capital cases, three arguing against and one concurring in the result in that case that the death sentence imposed on Deck was not disproportionate.

Artemus Rick WALKER, Petitioner,
v.
GEORGIA

Supreme Court of the United States
129 S.Ct. 453 (2008).

The petition for a writ of *certiorari* is denied.

Statement of **Justice STEVENS** respecting the denial of the petition for writ of certiorari.

* * *

* * * I find this case, which involves a black defendant and a white victim, particularly troubling. The State's evidence showed that, on the night of the murder, petitioner and an accomplice drove to the victim's home. After petitioner drew the victim outside, the two engaged in a struggle and petitioner stabbed the victim 12 times. While his accomplice collected the victim's wallet, petitioner used the victim's keys to try to gain access to his house, stating that he "had 'one more to kill.'" When a woman inside

the house yelled that she had a gun, petitioner and his accomplice fled. The jury found petitioner guilty of murder, felony murder, armed robbery, aggravated assault, attempted burglary, and possession of a firearm during the commission of a crime. After the penalty phase proceeding, the jury concluded that the State had proved five statutory aggravating factors (two of which the Georgia Supreme Court later found invalid), and it sentenced petitioner to death.

Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review. * * * [T]he court stated its review in the most conclusory terms: “The cases cited in the Appendix support our conclusion that [petitioner’s] punishment is not disproportionate in that each involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value.” The appendix consists of a string citation of 21 cases in which the jury imposed a death sentence; it makes no reference to the facts of those cases or to the aggravating circumstances found by the jury.

Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner’s in which the jury imposed a sentence of life imprisonment. [Citations omitted.] If the Georgia Supreme Court had expanded its inquiry still further, it would have discovered many similar cases in which the State did not even seek death. [Citations omitted.] Cases in both of these categories are eminently relevant to the question whether a death sentence in a given case is proportionate to the offense.¹¹ The Georgia

11. Justice THOMAS states that the Georgia Supreme Court in fact “considered a life sentence in its proportionality review” by examining the sentence of petitioner’s accomplice. As the concurring opinion elsewhere notes, however, the accomplice “was ineligible for the death penalty because he was adjudged mentally retarded.” Because petitioner’s accomplice is not a “similarly situated defendant,” his life sentence does not provide a meaningful point of

Supreme Court’s failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations.

* * * In the years immediately following *Gregg*, it was that court’s regular practice to include in its review cases that did not result in a death sentence. That practice began to change around the time this Court decided *Pulley v. Harris*, 465 U.S. 37 (1984). * * *

Since *Pulley*, the Georgia Supreme Court has significantly narrowed the universe of cases from which it culls comparators. It now appears to be the court’s practice never to consider cases in which the jury sentenced the defendant to life imprisonment. This is not the review that the Georgia Supreme Court represented to us in *Zant*. And the likely result of such a truncated review – particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury’s discretion in weighing aggravating and mitigating factors – is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.

Justice THOMAS, concurring in the denial of the petition of certiorari.

* * *

There is nothing constitutionally defective about the Georgia Supreme Court’s determination. Proportionality review is not constitutionally required in any form. Georgia simply has elected, as a matter of state law, to provide an additional protection for capital defendants. In *Pulley*, the Court considered the history of Georgia’s capital sentencing scheme and dismissed Justice STEVENS’ assertion that the constitutionality of Georgia’s scheme had rested on its willingness to conduct proportionality review. The Court explained that, although it may have emphasized

comparison.

the role of proportionality review as “an additional safeguard against arbitrarily imposed death sentences” in *Gregg* and *Zant*, it had never held that “without comparative proportionality review the [Georgia] statute would be unconstitutional.” * * * [U]nder this Court’s precedents, Georgia is not required to provide any proportionality review at all.

* * *

Justice STEVENS nevertheless asserts that there is a “special risk of arbitrariness in cases that involve black defendants and white victims,” and that the Georgia Supreme Court should have “looked outside the universe of cases in which the jury imposed a death sentence.” But he once again fails to acknowledge that the Court considered and rejected similar arguments in *McCleskey v. Kemp*, [481 U.S. 279 (1987)]. The *McCleskey* Court considered whether a study based on Georgia’s application of the death penalty in the 1970’s showed a “major systemic defec[t]” in sentencing that correlates with race. And although that study found that the death penalty was imposed more often when a black defendant murdered a white victim than when a white defendant murdered a black victim, the Court concluded that the study “[a]t most ... indicate[d] a discrepancy that appears to correlate with race,” According to the Court, “[a]pparent discrepancies are an inevitable part of our criminal justice system,” and there are other aspects of Georgia’s discretionary scheme that could explain the apparent discrepancy. The study did not “demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”

* * *

Charles William PROFFITT, Appellant,
v.
STATE of Florida, Appellee.

Supreme Court of Florida.
510 So.2d 896 (Fla. 1987).

PER CURIAM.

This is an appeal by Charles William Proffitt from a resentencing proceeding directed by the federal courts. In resentencing, the trial court imposed the death penalty. * * * We conclude that, under the record presented in the new sentencing proceeding, our present capital sentencing law mandates that we reduce Proffitt’s sentence to life imprisonment without the possibility of parole for twenty-five years. We deny the state’s appeal.

Proffitt was initially tried and convicted for first-degree murder and originally sentenced to death in March, 1974. The evidence at trial revealed that Proffitt, while burglarizing a house, killed an occupant with one stab wound to the chest while the victim was lying in bed. Proffitt’s conviction and sentence were first affirmed by this Court in [1975]. The United States Supreme Court thereafter granted certiorari and expressly upheld the facial validity of Florida’s death penalty statute against an eighth amendment challenge. *Proffitt v. Florida*, 428 U.S. 242 (1976). * * * Thereafter, Proffitt obtained federal habeas corpus relief by a decision of the United States Circuit Court of Appeals for the Eleventh Circuit, which remanded the case to the state courts for resentencing in light of errors which that court found had occurred in the 1974 sentencing proceeding. *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified* 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1002 (1983). * * *

The trial court resentenced Proffitt to death, finding the following aggravating circumstances: (1) the murder occurred during the commission of a felony (burglary), and (2) the murder was committed in a cold, calculated, and premeditated manner. In mitigation, the trial court found that

Proffitt had no significant history of criminal activity, and recognized nonstatutory mitigating evidence from Proffitt's family, former co-workers, religious advisers, and others.

We recognize that *Proffitt* is a case of considerable notoriety because it resulted in the United States Supreme Court's upholding the facial validity of Florida's death penalty statute. The death sentence law as it now exists, however, controls our review of this resentencing. * * *

This case presents a somewhat different record from Proffitt's earlier sentencing appeal and includes more mitigating evidence.

* * *

[A]ppellant contends that the death sentence in this case is disproportionate. Appellant claims that this Court has never affirmed the death penalty for a homicide during a burglary unaccompanied by any additional acts of abuse or torture to the victim, where the defendant has no prior record of criminal or violent behavior. Appellant argues that we have consistently reversed death sentences in these types of felony murder cases with or without jury recommendations of life.

The state concedes a murder committed during a residential burglary, without more, does not justify a finding of cold, calculated, and premeditated murder. The state contends, however, that this case is practically identical to, and should be controlled by, *Mason v. State*, 438 So.2d 374 (Fla. 1983). We disagree and find *Mason* to be clearly distinguishable. In *Mason*, the defendant also broke into the home of the victim and stabbed her while she lay sleeping. In *Mason*, however, the state introduced testimony and evidence that Mason was convicted previously of attempted murder and arson. The state also presented evidence that Mason was convicted of raping and robbing a woman, after threatening her with a knife, just two days after the incident for which he was tried, convicted, and sentenced to death. We think that Mason's prior convictions for attempted murder and rape distinguish *Mason* from the instant case. Here, not only is there no

aggravating factor of prior convictions, but the trial judge expressly found that Proffitt's lack of any significant history of prior criminal activity or violent behavior were mitigating circumstances. Co-workers described Proffitt as nonviolent and happily married. He was employed at the time of the offense and was described as a good worker and responsible employee. This testimony was unrefuted. The record also reflects that Proffitt had been drinking; he made no statements on the night of the crime regarding any criminal intentions; there is no record that he possessed a weapon when he entered the premises; and the victim was stabbed only once. Additionally, following the crime, Proffitt made no attempt to inflict mortal injuries on the victim's wife, but immediately fled the apartment, returned home, confessed to his wife, and voluntarily surrendered to authorities. To hold, as argued by the state, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty. We hold that our decisions in [two previous cases] require this Court to reduce the sentence to life imprisonment without the opportunity for parole for twenty-five years.

Accordingly, we vacate Proffitt's death sentence and reduce his sentence to life imprisonment without eligibility for parole for twenty-five years.

[Concurring opinion of Ehrlich, J., omitted.]

ADKINS, J. (Ret.), dissents [without opinion].

Ryan Thomas GREEN, Appellant,
v.
STATE of Florida, Appellee.

Supreme Court of Florida
975 So.2d 1081 (Fla. 2008).

The opinion was issued Per Curiam. Lewis, C.J., Wells, Anstead, Pariente, Quince, Cantero, and Bell, JJ., concur.

PER CURIAM.

Appellant, Ryan Thomas Green [was sentenced to death for first-degree murder and life in prison for attempted murder and robbery]. Based on the substantial mental health mitigation presented – including evidence that for years Green has suffered from schizophrenic disorders, we vacate the death sentence and remand the case for the imposition of a sentence of life imprisonment without the possibility of parole.

**I. THE FACTS AND
PROCEDURAL HISTORY**

As always, we review the facts in the light most favorable to upholding the jury’s verdict and the trial court’s findings. We note, however, that in determining Green’s sentence the trial court found all three statutory mitigating factors related to mental health: that Green was under the influence of extreme mental and emotional disturbance; that his capacity to conform to the requirements of the law was substantially impaired; and that he acted under extreme duress or under the substantial domination of another person. We therefore review the facts with those findings in mind.

The Shootings

* * *

On the morning of the murder, Green walked out of his mother’s apartment, where he was living at the time, and walked to [Henry] Cecil’s home. He knocked on the door and [Cecil’s nephew Christopher] Phipps invited him in. * * * Green walked to Cecil’s bedroom. In the bedroom, Green noticed Cecil’s handgun and

briefcase and grabbed them. He returned to the living room, where he encountered Phipps. Green pointed the gun at Phipps’s head and demanded the keys to his car – a white Ford Thunderbird. After Phipps gave him the keys, Green shot him in the head. He fled in Phipps’s car.

A short time later, Cecil * * * returned home, where he found Phipps lying on the living room floor with a severe head wound (he miraculously survived). * * *

Meanwhile, having eluded Cecil, Green continued driving and eventually reached Kingsfield Road. Along the road he encountered James Hallman, a retired police officer who was taking his daily walk. He was dressed in a maroon shirt, blue jeans, and a University of Alabama baseball cap. Green saw Hallman walking and drove past him to the end of the road. With Cecil’s handgun, Green shot a bull grazing in a nearby pasture.

After shooting the bull, Green turned around and drove back down Kingsfield Road. He approached Hallman and asked him for directions. As Hallman leaned forward toward the car window, Green shot Hallman in the head and drove off. Hallman was discovered shortly thereafter by a family on their way to church. He was airlifted to a hospital and remained in a coma for a week before dying.

* * *

At about 7 p.m. that evening, Green was arrested. Police found Cecil’s pistol in his apartment.

Before trial, the circuit judge determined that Green was incompetent to stand trial and committed him to a mental health facility where he received treatment until October 26, 2004, when the court found him competent to proceed.

The Evidence at Trial

At trial, Green claimed insanity as a defense. He presented the testimony of his mother, his brother, and two mental health experts. Green’s

mother testified that at the age of thirteen Green had been diagnosed with clinical depression and that he had threatened suicide several times. Green's school helped his mother seek treatment from a child psychologist, but Green refused to cooperate. He was prescribed Prozac for his depression, but after several months he stopped taking it. At around age 15 or 16, Green began experimenting with illegal drugs. Between the ages of 15 and 17, Green's mother noticed that he suffered from personality issues. He was later diagnosed with impulse control disorder.

When Green was 16, he was sent to live with his father in Mississippi. At first, he was happy. The situation eventually deteriorated, however, and Green moved back in with his mother. In the following weeks, he exhibited angry and unusual behavior. He heard voices, locked himself in his room, and planted his mother's jewelry in potting soil to grow crystals. During this time, Green was not being treated for mental illness and was not taking any medication.

At one point, Green disappeared for three days. He was found by police in another county without identification. About four months before the shootings, Green was involuntarily committed to the Crisis Stabilization Unit at the Lakeview Center, where he remained for a few weeks. While there, he was prescribed medication to treat his mental illness. After he left, he had a follow-up appointment scheduled but refused to see the doctor.

Shortly after leaving the facility, Green turned violent. His mother testified that Green threw glass at her and destroyed her dining room set. He also carved a picture of a brain onto the seat of a chair. The carving included strange labeling and nonsensical equations. Green's mother and brother were fearful of him. Green would stay up for days locked in his room praying and speaking to entities no one else could see. Green also told his mother that God had given him a secret name no one knew about.

A few days before the murder, Green asked his uncle to cosign a loan for the purchase of a car,

but his uncle refused. The family did not want Green having access to a car because he had driven off many times from a local gas station without paying for the fuel. Green had told his mother that he was the son of God and the station attendant knew he did not have to pay for the gas.

Green responded angrily to his uncle's denial. According to Green's mother, "he just absolutely snapped." He sat in the kitchen and banged his head against the wall. He was "ranting and raving, screaming and crying, slinging and breaking things, crying, and crying."

Green's brother Aaron also testified about Green's behavior during the months before the shootings. Aaron testified that in the spring of 2002 Green told him he could read minds. Green also said his hand was the devil's hand. Aaron testified that Green routinely smoked marijuana and took ecstasy.

Green testified in his own defense. He stated that he began taking ecstasy in December 2001 and that was when he first started hearing voices. He stated that his drug use increased once he returned to live with his mother. He would self-medicate with marijuana and ecstasy to quiet the voices in his head and cope with his depression. He believed he could read minds and body language. On the Wednesday before the shootings, Green was fired from his job. He testified that this partially motivated his breakdown two days later, when his uncle refused to cosign the loan for a car. Green said that at this point he felt suicidal and wanted to die so he could go to heaven.

Green admitted walking to Cecil's house on February 23, 2003, retrieving the gun from Cecil's bedroom, and shooting Phipps in the head. He testified that he was hearing voices during this time. He also admitted driving off in Phipps's car, encountering Hallman, and shooting the bull. Green testified that after he shot the bull, it turned around and said, "I love you," and he responded by saying, "I love you too." During this time Green stated that he wanted to kill himself and that he felt he was the devil.

Green testified that he then drove back up the road and asked Hallman for directions. Green said he believed the “A” on the front of Hallman’s University of Alabama hat stood for the “Antichrist.” Green also said he interpreted Hallman’s body language as indicating that he wanted to die and that he heard a voice that told him Hallman wanted to be killed. Green admitted that as soon as Hallman leaned his head forward, Green shot him.

Three psychological experts testified during the guilt and penalty phases – Drs. James Larson and Brett Turner for the defense, and Dr. Lawrence Gilgun for the State. They testified that Green had a history of intermittently treated mental illness and that he was psychotic on the day of the shootings. All the doctors agreed that Green was suffering from an untreated schizoaffective disorder. Dr. Larson testified that he was unable to determine whether Green was legally sane when he committed the shootings. Dr. Turner said he believed Green was sane when he shot Phipps, but could not be certain whether he was sane at the time he shot Hallman. Dr. Gilgun testified that he believed Green was sane during both shootings. The jury rejected Green’s insanity defense and found him guilty on all counts.

During the penalty phase, the defense presented extensive mental health mitigation through several witnesses: Green’s guidance counselor, two expert witnesses (Drs. Larson and Turner) and most notably the State’s expert psychologist, Dr. Gilgun. Dr. Gilgun agreed that both statutory mental health mitigators applied: that at the time of the killing, Green was under the influence of extreme mental and emotional disturbance; and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. Nevertheless, the jury recommended death by a vote of ten to two.

* * * [T]he court followed the jury’s recommendation. The court found two aggravating circumstances: (1) Green had been contemporaneously convicted of another violent felony; and (2) Hallman’s murder was committed

for the purpose of avoiding or preventing a lawful arrest. The trial court also found four statutory mitigators: (1) Green had no significant history of prior criminal activity; (2) the murder was committed while Green was under the influence of extreme mental and emotional disturbance; (3) Green’s capacity to conform to the requirements of the law was substantially impaired; and (4) the defendant acted under extreme duress or under the substantial domination of another person. In addition, the court found three nonstatutory mitigators: (1) the defendant’s mental illness was brought to the attention of the family and school authorities years before this incident and yet he received no significant assistance (substantial weight); (2) during the time that the circumstances giving rise to this prosecution were committed, the defendant had significant problems with drug abuse, and these problems were the result of his mental illness (substantial weight); and (3) since his arrest, the defendant has not been a disciplinary problem and has not engaged in any violent acts (moderate weight).

The trial court sentenced Green to life in prison for the attempted murder and robbery convictions, and imposed the death penalty for the murder of Hallman. This appeal followed.

II. ISSUES ON APPEAL

* * * Because we reverse Green’s sentence, we only address the following two claims: (1) that the trial court erred in finding the avoid arrest aggravator; and (2) that the death sentence is disproportionate.

1. Avoid Arrest Aggravator

Green challenges the trial court’s finding of the statutory “avoid arrest” aggravator. He contends that the avoid arrest aggravator is not supported by competent substantial evidence. We agree.

* * *

To support the avoid arrest aggravator, the State argued that Green’s dominant, if not sole, motive for killing Hallman was to eliminate him as a witness to the discharge of the firearm and the shooting of the bull. While the State’s theory is

possible, it is equally plausible that Hallman's murder had nothing to do with witness elimination, but rather was the product of Green's mental illness, which included psychotic episodes, delusions, and hallucinations.

The trial court found that when Green killed Hallman, he was under the influence of extreme mental and emotional disturbance. * * *

* * *

2. Proportionality

* * *

Without the avoid arrest aggravator, Green's death sentence rests on a single aggravating circumstance: that Green had been contemporaneously convicted of another violent felony – the attempted murder of Phipps. The trial court also found substantial mitigation, however. * * * The trial court also found three nonstatutory mitigators.

* * * [A]bsent unusual circumstances, “ ‘death is not indicated in a single-aggravator case where there is substantial mitigation.’ ” The vast majority of cases where we have upheld a death sentence based on a single aggravator have involved a prior murder or manslaughter. Although the shooting of Phipps was a very serious crime, it (fortunately) did not result in Phipps's death. Thus, in light of the substantial mitigation, Green's single-aggravator murder does not warrant a death sentence.

Even if we upheld the avoid arrest aggravator, however, we would reach the same conclusion based on the substantial and uncontroverted evidence of the defendant's mental illness. We have consistently recognized such mitigation as among the most compelling. *See, e.g., Morgan v. State* (reducing a death sentence to life despite the trial court's finding that rage and mental infirmity did not play a major role in the crime); *Knowles v. State* (reversing the trial court's rejection of this factor and reducing the sentence to life given evidence of the defendant's organic brain damage, psychotic state, and neurological deficiencies);

Carter v. State (reducing the death sentence to life based on the defendant's organic brain damage, increased impulsiveness, diminished ability to plan events, and a psychologist's testimony that the defendant “probably” was unable to appreciate the criminality of his conduct).

Green has a history of intermittently treated mental illness dating back to at least age 13. The trial court accurately described Green's life after age 13 as “a psychological, emotional, and antisocial free fall into an abyss of aberrational, delusional and psychotic behavior.” Green was diagnosed as suffering from depression, impulse control disorder, and schizoaffective disorder. * * * [A]ll three mental health experts agreed, and the trial court found, that during the shootings “he was fully immersed in a drowning pool of mental illness.” Therefore, we find that without question Green's mental health significantly contributed to the murder.

In comparable cases involving extensive mental health mitigation, we have found the death sentence disproportionate. Similarly, we find imposition of the death penalty disproportionate here. * * *

* * *

Due Process – *Honda v. Oberg*

In *Honda Motor Company, Ltd. v. Oberg*, 512 U.S. 415 (1994), the Supreme Court, in an opinion by Justice Stevens, joined by Justices Blackmun, O'Connor, Scalia, Kennedy, Souter, and Thomas, held that the due process clause of the Fourteenth Amendment requires appellate review of awards of punitive damages in civil cases because excessive awards of punitive damages pose a danger of arbitrary deprivation of property as a result of the wide discretion that juries have in determining the amounts and the potential that juries will use their verdicts to express biases against big businesses upon consideration of evidence of a defendant's net worth.

Justice Scalia filed a brief concurring opinion.

Justice Ginsburg, joined by Chief Justice Rehnquist, dissented, arguing that Oregon's procedures adequately guide the jury charged with the responsibility of determining punitive damages, and thus appellate review for excessiveness is not required by the due process clause.

* * *

Walter BELL, Appellant,
v.
The STATE of Texas, Appellee.

Court of Criminal Appeals of Texas,
938 S.W.2d 35 (Tex. Crim. App. 1996).

PER CURIAM.

* * *

* * * [A]ppellant contends that the Fourteenth Amendment's Due Process clause requires a comparative proportionality review of death penalty verdicts to determine whether a particular death sentence is excessive or disproportionate as compared to other death sentences in other capital murder cases. Appellant bases his claims exclusively on the United States Supreme Court's holding in *Honda Motor Company, Ltd. v. Oberg*, 512 U.S. 415 (1994), that an amendment to the Oregon constitution, which effectively prohibited any judicial review of the size of punitive damage awards in civil cases, violated due process. The Court grounded its holding in common law existing at the time the Fourteenth Amendment's enactment which contemplated appellate review of the amount of punitive damages. The common law requirement raised a presumption that a lack of appellate review of punitive damages for excessiveness violates due process, and that the presumption could only be overcome by some alternative state law mechanism adequate to protect against the danger of jury overreaching. Because Oregon had no alternative safeguards, the Court held that due process required some form of appellate review. * * * Contrary to appellant's contention, we cannot interpret *Honda* to support the argument that due process specifically requires

a comparative proportionality review of jury verdicts in capital murder cases when the death penalty is imposed.²⁸

Moreover, appellant's analogy between *Honda's* holding regarding jury awarded punitive damages and a jury's capital sentencing decisions is unsupported. Because appellant relies solely on *Honda*, he necessarily must follow the Court's reliance on the common law existing at the time the Due Process clause was enacted. However, appellant presents no caselaw or argument to support the proposition that when the Fourteenth Amendment was promulgated, the common law required every capital sentence to be measured on appeal against all other death sentences. Appellant fails to raise a presumption that without a comparative proportionality analysis, appellate review of capital sentences in Texas violates due process. * * *

* * *

Finding no reversible error, we affirm the judgment of the trial court.

[Baird, J., concurred with a brief statement regarding other issues. Overstreet, JJ., concurred. No members of the Court dissented.]

28. We note that our capital sentencing scheme in Texas currently includes appellate review for rationality of the jury's verdicts regarding guilt-innocence and the "future dangerousness" special issue at punishment.

PROCEDURAL PROTECTIONS – DEATH IS DIFFERENT

Daniel Wilbur GARDNER, Petitioner,

v.

State of FLORIDA.

Supreme Court of the United States
430 U.S. 349, 97 S.Ct. 1197 (1977).

Justice Stevens announced the judgment of the Court and delivered an opinion, in which Justices Stewart and Powell joined. Chief Justice Burger concurred in the judgment. Justices White and Blackmun each filed opinions concurring in judgment. Justice Brennan filed a separate opinion. Justices Marshall and Rehnquist each filed dissenting opinions.

Mr. Justice STEVENS announced the judgment of the Court and delivered an opinion, in which Mr. Justice STEWART and Mr. Justice POWELL joined.

Petitioner was convicted of first-degree murder and sentenced to death. When the trial judge imposed the death sentence he stated that he was relying in part on information in a presentence investigation report. Portions of the report were not disclosed to counsel for the parties. Without reviewing the confidential portion of the presentence report, the Supreme Court of Florida, over the dissent of two justices, affirmed the death sentence. We conclude that this procedure does not satisfy the constitutional command that no person shall be deprived of life without due process of law.

I

On June 30, 1973, the petitioner assaulted his wife with a blunt instrument, causing her death. On January 10, 1974, after a trial in the Circuit Court of Citrus County, Fla., a jury found him guilty of first-degree murder.

The separate sentencing hearing required by Florida law in capital cases was held later on the same day. The State merely introduced two photographs of the decedent, otherwise relying on

the trial testimony. That testimony, if credited, was sufficient to support a finding of one of the statutory aggravating circumstances, that the felony committed by petitioner “was especially heinous, atrocious, or cruel.”

In mitigation petitioner testified that he had consumed a vast quantity of alcohol during a day-long drinking spree which preceded the crime, and professed to have almost no recollection of the assault itself. * * *

* * *

After the jury retired to deliberate, the judge announced that he was going to order a presentence investigation of petitioner. Twenty-five minutes later the jury returned its advisory verdict. It expressly found that the mitigating circumstances outweighed the aggravating circumstances and advised the court to impose a life sentence.

The presentence investigation report was completed by the Florida Parole and Probation Commission on January 28, 1974. On January 30, 1974, the trial judge entered findings of fact and judgment sentencing petitioner to death. His ultimate finding was that the felony “was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstance, to-wit: none.” As a preface to that ultimate finding, he recited that his conclusion was based on the evidence presented at both stages of the bifurcated proceeding, the arguments of counsel, and his review of “the factual information contained in said pre-sentence investigation.”

There is no dispute about the fact that the presentence investigation report contained a confidential portion which was not disclosed to defense counsel. * * * The trial judge did not comment on the contents of the confidential portion. His findings do not indicate that there was anything of special importance in the undisclosed portion, or that there was any reason other than customary practice for not disclosing the entire report to the parties.

On appeal to the Florida Supreme Court, petitioner argued that the sentencing court had erred in considering the presentence investigation report, including the confidential portion, in making the decision to impose the death penalty. [The Florida Supreme Court affirmed in a per curiam opinion.] * * * The record on appeal, however, did not include the confidential portion of the presentence report.

* * *

II

The State places its primary reliance on this Court's landmark decision in *Williams v. New York*, 337 U.S. 241. In that case, as in this, the trial judge rejected the jury's commendation of mercy and imposed the death sentence in reliance, at least in part, on material contained in a report prepared by the court's probation department. * * *

* * *

It is first significant that in *Williams* the material facts concerning the defendant's background which were contained in the presentence report were described in detail by the trial judge in open court. * * *

* * *

In contrast, in the case before us, the trial judge did not state on the record the substance of any information in the confidential portion of the presentence report that he might have considered material. There was, accordingly, no * * * opportunity for petitioner's counsel to challenge the accuracy or materiality of any such information.

* * *

III

In 1949, when the *Williams* case was decided, no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court. * * * In the intervening years there have

been two constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.

First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. * * * The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.⁹

* * *

The State first argues that an assurance of confidentiality to potential sources of information is essential to enable investigators to obtain relevant but sensitive disclosures from persons unwilling to comment publicly about a defendant's background or character. * * * But

9. The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights.

Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure. *Morrissey v. Brewer*, 408 U.S. 471, 481.

consideration must be given to the quality, as well as the quantity, of the information on which the sentencing judge may rely. Assurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip, and may imply a pledge not to attempt independent verification of the information received. The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest.

If, as the State argues, it is important to use such information in the sentencing process, we must assume that in some cases it will be decisive in the judge's choice between a life sentence and a death sentence. * * * [I]f it is the basis for a death sentence, the interest in reliability plainly outweighs the State's interest in preserving the availability of comparable information in other cases.

The State also suggests that full disclosure of the presentence report will unnecessarily delay the proceeding. * * * In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material. Or if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death.

The State further urges that full disclosure of presentence reports, which often include psychiatric and psychological evaluations, will occasionally disrupt the process of rehabilitation. * * * [W]hatever force that argument may have in noncapital cases, it has absolutely no merit in a case in which the judge has decided to sentence the defendant to death. * * *

Finally, Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information. However acceptable that argument might have been before *Furman v. Georgia*, it is now clearly foreclosed. Moreover, the argument rests on the erroneous

premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Even if it were permissible to withhold a portion of the report from a defendant, and even from defense counsel, pursuant to an express finding of good cause for nondisclosure, it would nevertheless be necessary to make the full report a part of the record to be reviewed on appeal. Since the State must administer its capital-sentencing procedures with an even hand, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which would result in the holding of unconstitutionality in *Furman v. Georgia*. * * *

* * *

We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

* * *

THE CHIEF JUSTICE concurs in the judgment.

Mr. Justice WHITE, concurring in the judgment.

* * * A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the "character and record of the individual offender," fails to meet the "need for reliability in the determination that death is the appropriate punishment" which the

Court indicated was required in *Woodson*. * * *

[Brief concurring opinions of **Mr. Justice BRENNAN** and **Mr. Justice BLACKMUN** omitted.]

Mr. Justice MARSHALL, dissenting.

Last Term, this Court carefully scrutinized the Florida procedures for imposing the death penalty and concluded that there were sufficient safeguards to insure that the death sentence would not be “wantonly” and “freakishly” imposed. *Proffitt v. Florida*, 428 U.S. 242 (1976). This case, however, belies that hope. * * * I am appalled at the extent to which Florida has deviated from the procedures upon which this Court expressly relied. * * *

* * *

[T]he Florida Supreme Court engaged in precisely the “cursory or rubber-stamp review” that the joint opinion in *Proffitt* trusted would not occur. * * *

* * *

[T]he State Supreme Court undertook none of the analysis it had previously proclaimed to be its duty. The opinion does not say that the Supreme Court evaluated the propriety of the death sentence. It merely says the trial judge did so. Despite its professed obligation to do so, the Supreme Court thus failed “to determine independently” whether death was the appropriate penalty. The Supreme Court also appears to have done nothing “to guarantee” consistency with other death sentences. Its opinion makes no comparison with the facts in other similar cases. Nor did it consider whether the trial judge was correct in overriding the jury’s recommendation. * * *

* * *

Mr. Justice REHNQUIST, dissenting.

* * * [T]he use of particular sentencing

procedures, never previously held unfair under the Due Process Clause, in a case where the death sentence is imposed cannot convert that sentence into a cruel and unusual punishment. The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed. I would therefore affirm the judgment of the Supreme Court of Florida.

Roosevelt GREEN, Jr.

v.

State of GEORGIA.

Supreme Court of the United States
442 U.S. 95, 99 S.Ct. 2150 (1979).

PER CURIAM.

Petitioner and Carzell Moore were indicted together for the rape and murder of Teresa Carol Allen. Moore was tried separately, was convicted of both crimes, and has been sentenced to death. Petitioner subsequently was convicted of murder, and also received a capital sentence. The Supreme Court of Georgia upheld the conviction and sentence[.] * * *

The evidence at trial tended to show that petitioner and Moore abducted Allen from the store where she was working alone and, acting either in concert or separately, raped and murdered her. After the jury determined that petitioner was guilty of murder, a second trial was held to decide whether capital punishment would be imposed. At this second proceeding, petitioner sought to prove he was not present when Allen was killed and had not participated in her death. He attempted to introduce the testimony of Thomas Pasby, who had testified for the State at Moore’s trial. According to Pasby, Moore had confided to him that he had killed Allen, shooting her twice after ordering petitioner to run an errand. The trial court refused to allow introduction of this evidence, ruling that Pasby’s testimony constituted hearsay that was inadmissible under [the applicable Georgia

statute].¹⁰ The State then argued to the jury that in the absence of direct evidence as to the circumstances of the crime, it could infer that petitioner participated directly in Allen's murder from the fact that more than one bullet was fired into her body.¹¹

Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.¹² In these unique circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Because the exclusion of Pasby's

10. Georgia recognizes an exception to the hearsay rule for declarations against pecuniary interest, but not for declarations against penal interest.

11. The District Attorney stated to the jury:

*** I don't know whether Carzell Moore fired the first shot and handed the gun to Roosevelt Green and he fired the second shot or whether it was vice versa or whether Roosevelt Green had the gun and fired the shot or Carzell Moore had the gun and fired the first shot or the second, but I think it can be reasonably stated that you Ladies and Gentlemen can believe that each one of them fired the shots so that they would be as equally involved and one did not exceed the other's part in the commission of this crime.

12. A confession to a crime is not considered hearsay under Georgia law when admitted against a declarant.

testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

[Justices BRENNAN and MARSHALL concurred, adhering to their view that the death penalty is in all circumstances cruel and unusual punishment.]

Mr. Justice REHNQUIST, dissenting.

Nothing in the United States Constitution gives this Court any authority to supersede a State's code of evidence because its application in a particular situation would defeat what this Court conceives to be "the ends of justice." *** The Court obviously is troubled by the fact that the same testimony was admissible at the separate trial of petitioner's codefendant at the behest of the State. But this fact by no means demonstrates that the Georgia courts have not evenhandedly applied their code of evidence, with its various hearsay exceptions, so as to deny petitioner a fair trial. No practicing lawyer can have failed to note that Georgia's evidentiary rules, like those of every other State and of the United States, are such that certain items of evidence may be introduced by one party, but not by another. This is a fact of trial life, embodied throughout the hearsay rule and its exceptions. This being the case, the United States Constitution must be strained to or beyond the breaking point to conclude that all capital defendants who are unable to introduce all of the evidence which they seek to admit are denied a fair trial. ***

Gilbert Franklin BECK, Petitioner,
v.
State of ALABAMA.

Supreme Court of the United States
447 U.S. 625, 100 S.Ct. 2382 (1980).

Justice Stevens delivered the opinion of the Court which was joined by the Burger, C.J., and Stewart, Blackmon and Powell, JJ. Justice Brennan concurred and filed opinion. Justice Marshall concurred in judgment and filed opinion. Justice Rehnquist dissented and filed opinion in which Justice White joined.

Mr. Justice STEVENS delivered the opinion of the Court.

* * *

Petitioner was tried for the capital offense of “[r]obbery or attempts thereof when the victim is intentionally killed by the defendant.” Under the Alabama death penalty statute the requisite intent to kill may not be supplied by the felony-murder doctrine. Felony murder is thus a lesser included offense of the capital crime of robbery-intentional killing. However, under the statute the judge is specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense. Instead, the jury is given the choice of either convicting the defendant of the capital crime, in which case it is required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime. If the defendant is convicted and the death penalty imposed, the trial judge must then hold a hearing with respect to aggravating and mitigating circumstances; after hearing the evidence, the judge may refuse to impose the death penalty, sentencing the defendant to life imprisonment without possibility of parole.

In this case petitioner’s own testimony established his participation in the robbery of an 80-year-old man named Roy Malone. Petitioner consistently denied, however, that he killed the man or that he intended his death. Under

petitioner’s version of the events, he and an accomplice entered their victim’s home in the afternoon, and, after petitioner had seized the man intending to bind him with a rope, his accomplice unexpectedly struck and killed him. As the State has conceded, absent the statutory prohibition on such instructions, this testimony would have entitled petitioner to a lesser included offense instruction on felony murder as a matter of state law.⁵

Because of the statutory prohibition, the court did not instruct the jury as to the lesser included offense of felony murder. Instead, the jury was told that if petitioner was acquitted of the capital crime of intentional killing in the course of a robbery, he “must be discharged” and “he can never be tried for anything that he ever did to Roy Malone.” The jury subsequently convicted petitioner and imposed the death penalty; after holding a hearing with respect to aggravating and mitigating factors, the trial court refused to overturn that penalty.

* * *

I

At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. But it has long been recognized that it can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. As Mr. Justice BRENNAN explained in

5. The Alabama rule in cases other than capital cases is that the defendant is entitled to a lesser included offense instruction if “there is any reasonable theory from the evidence which would support the position.” The State concedes that under this standard petitioner would have been entitled to instructions on first-degree (felony) murder and robbery. The parties disagree as to whether petitioner also would have been entitled to an instruction on second-degree murder under state law. We, of course, have no occasion to pass on this issue.

his opinion for the Court in *Keeble v. United States*, 412 U.S. 205, 208, providing the jury with the “third option” of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard[.]

* * *

Alabama’s failure to afford capital defendants the protection provided by lesser included offense instructions is unique in American criminal law. In the federal courts, it has long been “beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” Similarly, the state courts that have addressed the issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it. Indeed, for all noncapital crimes Alabama itself gives the defendant a right to such instructions under appropriate circumstances. * * *

While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, * * * when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the “third option” of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant’s life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments[.]

* * * The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

II * * *

The Alabama statute, which was enacted after *Furman* but before *Woodson [v. North Carolina]*, has many of the same flaws that made the North Carolina statute unconstitutional. Thus, the Alabama statute makes the guilt determination depend, at least in part, on the jury’s feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue.

* * *

III

* * * [A]lthough the jury may not convict the defendant of a lesser included offense, the State argues that it may refuse to return any verdict at all in a doubtful case, thus creating a mistrial. * * *

We are not persuaded by the State’s argument that the mistrial “option” is an adequate substitute for proper instructions on lesser included offenses. It is extremely doubtful that juries will understand the full implications of a mistrial or will have any confidence that their choice of the mistrial option will ultimately lead to the right result. Thus, they could have no assurance that a second trial would end in the conviction of the defendant on a lesser included offense. * * *

The State’s second argument is that, even if a defendant is erroneously convicted, the fact that the judge has the ultimate sentencing power will ensure that he is not improperly sentenced to death. Again, we are not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a “third option.”

If a fully instructed jury would find the defendant guilty only of a lesser, noncapital offense, the judge would not have the opportunity to impose the death sentence. Moreover, it is manifest that the jury’s verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. * * *

[Justices Brennan and Marshall concurred, but expressed their views that the death penalty in all circumstances violates the Eighth and Fourteenth Amendments.]

Mr. Justice REHNQUIST, with whom Mr. Justice WHITE joins, dissenting.

* * * I find the Court's treatment of this issue highly unusual, since although this question was raised in the Alabama trial court and the Alabama intermediate Court of Appeals, it was not preserved in the Supreme Court of Alabama. * * *

* * *

This is not a matter that may be stipulated or waived by any of the parties to a case decided on its merits here. * * *

* * *

Believing, therefore, because of the proceedings in the Supreme Court of Alabama, that we do not have jurisdiction under 28 U.S.C. § 1257 to decide the question which the Court purports to decide, I dissent.

***Beck* and other statutes**

Courts have rejected the argument that *Beck* applies only under the Alabama procedure in which the jury was forced to choose between death and acquittal. For example, the Court of Appeals for the Tenth Circuit rejected Oklahoma's argument that *Beck* did not apply because its capital trial procedure allows a jury to know from the outset that there are three sentencing options for first degree murder: life imprisonment, life imprisonment without parole, and death.

The Court held that "a defendant in a capital case [is entitled] to a lesser included instruction when the evidence warrants it, notwithstanding the fact that the jury may retain discretion to issue a penalty less than death," and held that the rule in *Beck* applies to Oklahoma. *Hogan v. Gibson*, 197 F.3d 1297, 1304 (10th Cir. 1999) (quoting *Hooks v. Ward*, 184 F.3d 1206, 1227 (10th Cir. 1999)).

The Court found a *Beck* violation and granted relief in *Hogan*. See also *Phillips v. Workman*, 604 F.3d 1202, 1212 (10th Cir. 2010) (holding that rejection of a *Beck* claim by the Oklahoma Court of Criminal Appeals because it found the evidence was sufficient to support the greater offense "turns *Beck* on its head, and 'is in gross deviation from, and disregard for, the Court's rule in *Beck*'" (quoting *Hogan*) and was thus contrary to *Beck* and requiring that relief be granted under Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"); *Taylor v. Workman*, 554 F.3d 879 (10th Cir. 2009) (finding *Beck* error and granting habeas relief).