

1999

Making the Constitutional Cut: Evaluating New York's Death Penalty Statute in Light of the Supreme Court's Capital Punishment Mandates

Jason M. Schoenberg

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Jason M. Schoenberg, *Making the Constitutional Cut: Evaluating New York's Death Penalty Statute in Light of the Supreme Court's Capital Punishment Mandates*, 8 J. L. & Pol'y (1999).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol8/iss1/7>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

MAKING THE CONSTITUTIONAL CUT: EVALUATING NEW YORK'S DEATH PENALTY STATUTE IN LIGHT OF THE SUPREME COURT'S CAPITAL PUNISHMENT MANDATES

Jason M. Schoenberg*

INTRODUCTION

This country engages in a daily debate regarding the morality of the death penalty.¹ Barring any change in the United States Supreme Court's constitutional jurisprudence, capital punishment will remain a constitutionally acceptable form of punishment.² While the Supreme Court has deemed the death penalty constitutional, only certain states have chosen to implement capital punishment. Currently thirty-eight states,³ including New York,

* Brooklyn Law School Class of 2000; B.A., Binghamton University, 1997. This Note is dedicated to the author's mother for never letting him fail.

¹ See, e.g., William Glaberson, *For a Brooklyn Prosecutor, Duty Calls but Conviction Shouts*, N.Y. TIMES, June 8, 1998, at B4 (discussing Brooklyn District Attorney, Charles J. Hynes, who has openly opposed the death penalty, but upheld his responsibility to apply it as law).

² See *Gregg v. Georgia*, 428 U.S. 153, 179-80, 187 (1976). In *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the Supreme Court reversed a number of death sentences imposed without statutory guidelines. Four years later in 1976, the Supreme Court ruled in *Gregg* that the death penalty was per se constitutional. *Gregg*, 428 U.S. at 169. State legislatures, however, were required to create statutory sentencing standards to guide sentencing bodies. *Id.* at 195.

³ The 38 states that have adopted death penalty statutes are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Death Penalty Information Center, *State by State Death Penalty Information* (visited Nov. 16, 1999) <<http://www.essential.org/dpic/>>.

have death penalty statutes, each following its own statutory rules for imposition.⁴

While the moral debate over the death penalty endures outside the courts, the structuring of death penalty statutes has encountered many constitutional challenges in the Supreme Court. This Note will focus on the latter issue.

The United States Supreme Court has rendered numerous decisions regarding the structure of death penalty statutes, in effect setting minimum requirements that a statute must contain to pass constitutional scrutiny.⁵ Generally, the Supreme Court has held it to be unconstitutional for a state statute to permit imposition of a death sentence in an "arbitrary and capricious" manner,⁶ or in a

⁴ See ALA. CODE §§ 13A-5-39 to -59 (1994); ARIZ. REV. STAT. ANN. § 13-703 (West 1989 & Supp. 1999); ARK. CODE ANN. §§ 5-4-601 to -618 (Michie 1997); CAL. PENAL CODE §§ 190.1-9 (West 1988 & Supp. 1999); COLO. REV. STAT. § 16-11-103 (1998); CONN. GEN. STAT. § 53a-46a (1994 & Supp. 1999); DEL. CODE ANN. tit. 11, § 4209 (Supp. 1998); FLA. STAT. ch. 921.141 (1999); GA. CODE ANN. §§ 17-10-30 to -31 (1997); IDAHO CODE § 19-2515 (Supp. 1999); 720 ILL. COMP. STAT. 5/9-1 (West 1993 & Supp. 1999); IND. CODE § 35-50-2-9 (1998); KAN. STAT. ANN. § 21-4624 (1995); KY. REV. STAT. ANN. § 532.025 (Michie Supp. 1998); LA. CODE CRIM. PROC. ANN. art. 905 (West 1997); MD. ANN. CODE art. 27, § 413 (1996); MISS. CODE ANN. § 99-19-101 (1994 & Supp. 1999); MO. REV. STAT. §§ 565.030-.040 (1999); MONT. CODE ANN. §§ 46-18-301 to -310 (1999); NEB. REV. STAT. §§ 29-2521 to -2534 (1995); NEV. REV. STAT. §§ 200.030-.035 (1997); N.H. REV. STAT. ANN. § 630:5 (1996); N.J. STAT. ANN. § 2C:11-3 (West 1995 & Supp. 1999); N.M. STAT. ANN. §§ 31-18-14 to -15 (Michie 1994); N.Y. PENAL LAW § 125.27 (McKinney 1998 & Supp. 1999); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1999); N.C. GEN. STAT. § 15A-2000 (1999); OHIO REV. CODE ANN. §§ 2929.03-.05 (West 1999); OKLA. STAT. tit. 21, §§ 701.9-.15 (1983 & Supp. 1999); OR. REV. STAT. § 163.150 (1997); PA. STAT. ANN. tit. 42, § 9711 (West 1998); S.C. CODE ANN. §§ 16-3-20 to -25 (Law. Co-op. 1998); S.D. CODIFIED LAWS §§ 23A-27A-1 to -14 (Michie 1998); TENN. CODE ANN. §§ 39-13-202 to -206 (Supp. 1999); TEX. PENAL CODE ANN. § 19.03 (West 1994); TEX. CRIM. P. CODE ANN. § 37.071 (West 1981 & Supp. 1999); UTAH CODE ANN. §§ 76-3-206 to -207 (1999); VA. CODE ANN. §§ 19.2-264.2 to -264.5 (Michie 1996); WASH. REV. CODE §§ 10.95.020 - .190 (1990 & Supp. 1999); WYO. STAT. ANN. §§ 6-2-101 to -103 (Michie Supp. 1994).

⁵ See *infra* Part I, outlining the constitutional requirements of death penalty statutes.

⁶ *Gregg*, 428 U.S. at 188; *Furman*, 408 U.S. at 239-40. See also *infra* Part

manner that does not allow a jury to consider a defendant's background, character, and the circumstances of the crime.⁷ Presently, statutes meeting these conditions contain two provisions: first, a statute must provide for guided discretion⁸ in the form of aggravating factors that narrow eligibility;⁹ second, statutes must provide for individualized sentencing¹⁰ by permitting the sentencer to consider mitigating evidence.¹¹

New York's recently re-enacted death penalty statute¹² is a model statute for several reasons. Generally, death penalty statutes fall into two categories: weighing and non-weighing.¹³ New York,

I.B, discussing the guided discretion requirement.

⁷ *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). See *infra* Part I.C, discussing the individualized sentencing requirement.

⁸ The term "guided discretion" arose out of the Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. at 195. Guided discretion can be defined as "statutory sentencing standards to guide sentencing bodies" in making capital punishment decisions. Lief H. Carter, *Capital Punishment*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 126 (Kermit L. Hall ed., 1992).

⁹ Aggravating factors are defined as "any circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences." BLACK'S LAW DICTIONARY 65 (6th ed. 1990).

¹⁰ The term "individualized sentencing" arose out of the Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. at 604-05. Individualized sentencing can be defined as "consideration of the character and record of the individual offender and the circumstances of the particular offense." *Id.* at 604 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

¹¹ Mitigating circumstances are defined as those that "do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." BLACK'S LAW DICTIONARY 1002 (6th ed. 1990).

¹² In 1995, Governor George E. Pataki approved the long inactive New York death penalty legislation. See James Dao, *Death Penalty in New York is Restored After 18 Years: Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1 (discussing Gov. Pataki's signing of the death penalty bill into law). See also Act of Mar. 7, 1995, ch. 1, 1995 N.Y. Laws 218 (New York's death penalty legislation). New York's death penalty law took effect on September 1, 1995. See *infra* note 95 (discussing the history of the death penalty in New York).

¹³ Weighing schemes provide specific instructions on how the aggravating and mitigating factors are to be weighed against each other in determining a sentence. See Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 448-49 (1994).

however, falls into neither category, but rather incorporates aspects of both. Both weighing and non-weighing statutes have been held constitutional in format. Each, however, has been criticized for either failing to provide guidance to the sentencer or providing too much guidance to the sentencer, thus, failing to give full effect to the mandates of *Gregg v. Georgia*¹⁴ and *Lockett v. Ohio*.¹⁵ The New York statute gives full effect to both constitutional mandates by meeting each mandate in separate phases of the capital trial. New York limits the imposition of a death sentence to only those defendants convicted of first-degree murder.¹⁶ To be convicted of first-degree murder in New York, the murder must have been committed under one of twelve enumerated aggravating factors.¹⁷ Each factor, for which the prosecutor introduces evidence, must be proven in the guilt phase of trial beyond a reasonable doubt in order to be established during sentencing.¹⁸ The inclusion of twelve aggravating factors meets the *Gregg* mandate.¹⁹

The statute then essentially provides for a mitigation hearing during the sentencing phase, thereby eliminating the prejudice of introducing evidence of aggravation after the guilt stage has concluded.²⁰ The inclusion of mitigating evidence satisfies the

Non-weighing schemes simply list factors, both aggravating and mitigating, but do not provide guidelines as to how these factors should be considered. *Id.* at 448.

¹⁴ 428 U.S. 153 (1976) (requiring guided discretion).

¹⁵ 438 U.S. 586 (1978) (requiring individualized sentencing). *See generally* Srikanth Srinivasan, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347 (1995) (discussing the effects of weighing and non-weighing statutes).

¹⁶ N.Y. PENAL LAW § 60.06 (McKinney 1998 & Supp. 1999).

¹⁷ N.Y. PENAL LAW § 125.27(1)(a) (McKinney 1998 & Supp. 1999). *See infra* note 103 (listing New York's aggravating factors).

¹⁸ N.Y. CRIM. PROC. LAW § 400.27(3) (McKinney Supp. 1999). "[T]he aggravating factor or factors proved [beyond a reasonable doubt] at trial shall be deemed established beyond a reasonable doubt at the separate sentencing proceeding." *Id.*

¹⁹ *Gregg*, 428 U.S. at 206-07.

²⁰ N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1999). The prosecutor, however, is permitted to introduce, during the sentencing phase, evidence of terrorism and evidence that in the 10 years prior to the commission of the crime, the defendant had been convicted of two or more felony offenses

Lockett mandate.²¹ In addition to its procedural safeguards, the provisions of New York's statute afford maximum fairness, for example, by forbidding the execution of the mentally retarded.²² In total, the New York death penalty statute has been uniquely drawn to pass constitutional muster.

Like all other death penalty statutes New York's statute is subject to constitutional challenge. The New York State Court of Appeals has already held a portion of the statute to be unconstitutional.²³ Such constitutional challenges likely will continue. In 1998, the first death sentence in over thirty years was imposed in New York with others expected to follow.²⁴ The final destination of such appeals soon could reach the United States Supreme Court.

This Note first reviews the Supreme Court's capital punishment constitutional mandates and analyzes the various ways in which death penalty statutes can be structured. It then proceeds to make two arguments: first, that New York's death penalty statute should be upheld as constitutional by the New York State Court of Appeals; second, that a scheme such as New York's is the fairest type of statute and should be adopted by all state legislatures to satisfy the mandates set forth by the Supreme Court. While New York's overall scheme likely will survive constitutional scrutiny, this Note examines one provision that has not, and one provision that may not withstand constitutional challenge. This Note argues that New York's unique capital sentencing scheme is the most

committed at different times, if appropriate. *Id.* § 400.27(7).

²¹ *Lockett*, 438 U.S. at 604-05.

²² N.Y. CRIM PROC. LAW § 400.27(12) (McKinney Supp. 1999). *See infra* Part II.C.2, discussing other examples of the statute's fairness.

²³ *See Hynes v. Tomei*, 706 N.E.2d 1201 (N.Y. 1998) (striking down the plea-bargaining provision of New York's capital punishment statute).

²⁴ Darrel Harris is the first person to be sentenced to death under New York's re-enacted death penalty statute of 1995. *See Joseph P. Fried, Death Penalty for Ex-Guard in Murder of 3*, N.Y. TIMES, June 7, 1998, at A1 (discussing Harris' death sentence imposed for his murder of three people in a robbery). *See also Robert D. McFadden, Test of Death Penalty Law Quickly Follows Decision*, N.Y. TIMES, June 8, 1998, at B4 (discussing Harris' plans to appeal his death sentence); Clyde Haberman, *Golden Oldie From Pataki: Death Ditty*, N.Y. TIMES, June 16, 1998, at B1 (discussing Governor Pataki's active role in bringing back New York's death penalty).

comprehensive and consistent with the Supreme Court mandates of guided discretion and individualized sentencing. Part I provides a historical overview of the Supreme Court's three major decisions addressing the structure of death penalty statutes since 1972. Part II focuses on New York's death penalty statute, first, by examining its structure and then, by exploring the reasons why New York's death penalty statute accords with the Supreme Court's mandates. Additionally, Part II explains why New York's death penalty statute is statutorily superior to other state death penalty laws. Part III contains an analysis of some recent and potential constitutional challenges to New York's death penalty statute. This Note concludes that the New York statute is constitutional and that states without similar procedural protections should look to New York's model for guidance.

I. THE SUPREME COURT AND THE DEATH PENALTY: FROM *FURMAN*²⁵ TO *GREGG*²⁶ TO *LOCKETT*²⁷

In 1972, the Supreme Court in *Furman v. Georgia*²⁸ found that the imposition of two states' capital sentencing laws constituted "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."²⁹ While *Furman* was a *per curiam* decision, limited to the statutes at issue, four years later the elaborate reasoning of *Furman*'s concurring opinions was incorporated into the Court's holding in *Gregg v. Georgia*, which mandated guided discretion in order to eliminate the imposition of death sentences in an arbitrary and capricious manner.³⁰ The power of these concurrences was so far reaching that all executions in the

²⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²⁷ *Lockett v. Ohio*, 438 U.S. 586 (1978).

²⁸ 408 U.S. 238.

²⁹ *Id.* at 239-40 (holding Georgia's and Texas's death penalty statutes unconstitutional).

³⁰ *Gregg*, 428 U.S. 153. The Supreme Court, prior to *Furman*, held such guidelines unnecessary. *McGautha v. California*, 402 U.S. 183, 207 (1971). The Supreme Court found "it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id.*

thirty-nine states that utilized death penalty statutes were halted.³¹ Two years following *Gregg*, in *Lockett v. Ohio*, the Supreme Court's death penalty jurisprudence further developed to require individualized sentencing.³² Since *Furman*, the process by which a state can impose the death penalty has gone through extensive constitutional scrutiny evolving into its present form. To understand how the present capital statutory requirements came into existence, an examination of *Furman*, *Gregg*, and *Lockett*, the Supreme Court's three most significant decisions involving the capital sentencing statutes, is necessary.

A. *The Unconstitutionality of Unguided Discretion: The Impact of Furman v. Georgia*

In 1972, the United States Supreme Court was petitioned to review the death sentences of three defendants.³³ The defendants claimed that their sentences violated the Eighth and Fourteenth Amendments.³⁴ The capital statutes of Georgia and Texas appeared facially constitutional, however, their application was not.³⁵ While the *Furman* Court's brief *per curiam* opinion found that the imposition of the death penalty in the cases before the Court "constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments," nine separate opinions elaborated significant principles that would further delineate

³¹ See Carter, *supra* note 8, at 324 (discussing the impact of *Furman*).

³² *Lockett*, 438 U.S. at 604-05.

³³ The three defendants were Furman, Jackson, and Branch. *Furman*, 408 U.S. at 238. While the case name is designated *Furman v. Georgia*, the Supreme Court was reviewing the convictions of Furman and Jackson, sentenced to death under Georgia's death penalty statute, and Branch, sentenced to death under Texas' death penalty statute. *Id.* at 240 n.1.

³⁴ *Furman*, 408 U.S. at 240. The United States Constitution forbids the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII. "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

³⁵ *Furman*, 408 U.S. at 242 (Douglas, J., concurring). "What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions." *Id.*

constitutionally acceptable capital punishment laws.³⁶ In a particularly far reaching concurrence, Justice Stewart found that unbridled sentencing discretion in capital cases led sentencers to randomly impose the death penalty in violation of the Eighth and Fourteenth Amendments because the statutes at issue were so broad as to promote arbitrary imposition.³⁷

The Cruel and Unusual Punishment Clause of the Eighth Amendment requires "legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and [] require[s] judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."³⁸ Justice Douglas opined that "[i]t is unfair to inflict unequal penalties on equally guilty parties, or on any innocent part[y], regardless of what the penalty is."³⁹ Justice Stewart stated that the death penalty may not be administered in a "capricious and arbitrary" manner⁴⁰ in that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."⁴¹ Justice

³⁶ *Id.* at 239-40.

³⁷ *Id.* at 309-10 (Stewart, J., concurring). Georgia's penal law on forcible rape left the jury a choice in sentencing: the death penalty, life imprisonment, or imprisonment and labor for a period of between one and twenty years. *Id.* at 309 n.8. Texas' penal law on rape left the jury a choice between the death penalty, life imprisonment, or imprisonment for a period not less than five years. *Id.* The *Furman* Court questioned its holding in *McGautha v. California* that upheld the constitutionality of a statute allowing those responsible for deciding upon a death sentence to use their own discretion without the boundaries of mandated standards. *Id.* at 247 (Douglas, J., concurring).

³⁸ *Id.* at 256 (Douglas, J., concurring).

³⁹ *Id.* at 248 (Douglas, J., concurring). In strong disagreement with the *McGautha* holding, Justice Douglas stated that "[j]uries . . . have practically untrammelled discretion to let an accused live or insist that he die." *Id.*

⁴⁰ *Id.* at 310 (Stewart, J., concurring). "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful." *Id.* at 309-10. "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

⁴¹ *Id.* at 310 (Stewart, J., concurring).

White emphasized that the Court was not holding that the existence of the death penalty was unconstitutional, but rather that the means of application were.⁴² Ultimately, the Court held that the imposition of the death penalty in these cases was cruel and unusual in violation of the Eighth and Fourteenth Amendments.⁴³ Yet, the Court failed to set mandates on how death penalty statutes should be structured.

B. The Narrowing Requirement: Gregg and Guided Discretion

In response to the *Furman* decision, some states subsequently amended their death penalty statutes to meet the Court's mandate to eliminate the indistinguishable manner in which some defendants convicted of similar crimes were sentenced to death and others only to prison terms.⁴⁴ The new statutes limited the class of people who could be sentenced to death by limiting the potential imposition of the death penalty to specific categories of murders.⁴⁵

⁴² *Id.* at 310-11 (White, J., concurring). "In joining the Court's judgements, therefore, I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment." *Id.*

⁴³ *Id.* at 239-40. Historically, capital punishment was imposed on those of the lower class. *Id.* at 255 ("One cannot read this history without realizing that the desire for equality was reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment."). If the death penalty is limited by the Fourteenth Amendment's Equal Protection Clause, as are other laws in this country, then selectivity based on unpopular defendants is unconstitutional. *Id.* at 255-57. By giving full discretion to the jury or judge, the death penalty is "selectively applied"; those with more money, for example, are less likely than less popular indigents to receive a death sentence. *Id.*

⁴⁴ Texas, Florida, and Georgia each amended their death penalty statutes in response to *Furman*. See *Jurek v. Texas*, 428 U.S. 262, 268-271 (1976) (examining Texas' statute); *Proffitt v. Florida*, 428 U.S. 242, 253-55 (1976) (examining Florida's statute); *Gregg v. Georgia*, 428 U.S. 153, 196 (1976) (examining Georgia's statute).

⁴⁵ FLA. STAT. ch. 921.141 (1999); GA. CODE ANN. § 17-10-31 (1997); TEX. CRIM. P. CODE ANN. § 37.071 (West 1981 & Supp. 1999). Georgia, Florida, and Texas have enacted statutes placing limits on eligibility for imposing the death penalty. Florida limits application of the death penalty to cases of premeditated

1. Sentencing Guidance Through Statutory Aggravating Factors

In 1976, Georgia's death penalty statute again was subject to Supreme Court scrutiny.⁴⁶ In *Gregg v. Georgia*,⁴⁷ the defendant argued that the imposition of the death sentence violated the Cruel and Unusual Punishment Clause of the Eighth and the Fourteenth Amendments.⁴⁸ The Supreme Court upheld the death penalty as constitutional, per se.⁴⁹ The Court held that "the punishment of death does not invariably violate the Constitution . . . [as this] Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment."⁵⁰ The Court crafted its Eighth Amendment analysis around the *Furman* opinions,⁵¹ by

murder, murder in the perpetration of a felony, unlawful distribution of heroin which is the proximate cause of death, or sexual battery of a child under the age of 12. FLA. STAT. ch. 921.141 (1999). See also *infra* notes 58 and 65 (listing limitations on eligibility provided by Georgia's and Texas's new statutes).

⁴⁶ *Gregg*, 428 U.S. 153.

⁴⁷ *Id.*

⁴⁸ *Id.* at 162.

⁴⁹ *Id.* at 168. The question of "cruel and unusual" was traditionally narrowed to the "particular methods of execution" and "its similarity to 'torture' and other 'barbarous' methods." *Id.* at 169-70. "[T]he death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Id.* at 187.

On the same day that *Gregg* was decided, the Court also ruled in *Woodson v. North Carolina* that while the death penalty was constitutional per se, mandatory imposition of the death penalty violates the Eighth Amendment. 428 U.S. 280, 305 (1976). See also *Sumner v. Shuman*, 483 U.S. 66 (1987) (holding that a mandatory death sentence for a prison inmate convicted of murder while already serving a life sentence is unconstitutional); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (holding that a statute that calls for a mandatory death sentence for first degree murder is unconstitutional).

⁵⁰ *Gregg*, 428 U.S. at 168-69.

⁵¹ *Id.* at 171, 188-89. "[T]he [Eighth] Amendment has been interpreted in a flexible and dynamic manner." *Id.* at 171. The Court recognized the *Furman* Court's analysis of the Eighth Amendment in dealing with the "procedures employed to select convicted defendants for the sentence of death." *Id.* at 172. The Court quoted former Chief Justice Warren declaring, "[t]he [a]mendment must draw its meaning from the evolving standards of decency that mark the

finding that “*Furman* mandate[d] that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”⁵² The Court thus sought to eliminate the constitutional deficiencies left by the *Furman* Court and laid the foundation for guided discretion.⁵³

Emphasizing that it had “embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman*’s constitutional concerns,”⁵⁴ the Court held that this would best be “met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.”⁵⁵ The Court also held that the “further safeguard of meaningful appellate review” is necessary “to ensure that death

progress of a maturing society’.” *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁵² *Id.* at 189.

⁵³ *Id.* at 194-95. “[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.” *Id.* at 195.

⁵⁴ *Id.*

⁵⁵ *Id.* at 191-95. The Court cited the American Legal Institute’s Model Penal Code as recommending a bifurcated proceeding to reduce arbitrariness by ridding the guilt phase of prejudicial evidence relevant solely to sentencing determinations. *Id.* See MODEL PENAL CODE § 201.6, cmt. 5, at 74-75 (Tentative Draft No. 9, 1959). The Court reasoned that “a bifurcated system is more likely to ensure elimination of the constitutional deficiencies in *Furman*.” *Gregg*, 428 U.S. at 191-92. The Court also suggested that standards of guided discretion already existed. *Id.* at 193. The drafters of the Model Penal Code recommended, in a broad sense, that aggravating and mitigating factors should be weighed against each other. *Id.* “[I]t is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed and weighed against each other when they are presented in a concrete case’.” *Id.* at 193 (quoting MODEL PENAL CODE § 201.6 ch. 3 (Tentative Draft No. 9, 1959)).

sentences are not imposed capriciously.”⁵⁶ After recommending this general structure, the Court examined the statute at issue.⁵⁷

2. *Consideration of Georgia's Statute*

Following *Furman*, Georgia amended its statute and narrowed capital punishment eligibility, allowing the death penalty to be imposed only after the sentencer had determined beyond a reasonable doubt that at least one of ten aggravating factors accompanied the murder.⁵⁸ Furthermore, the statute also required

⁵⁶ *Gregg*, 428 U.S. at 195.

⁵⁷ *Id.* at 196.

⁵⁸ GA. CODE ANN. § 26-3102 (Supp. 1975). The Georgia statute made the death penalty a punishment for murder, kidnapping for ransom, kidnapping where the victim is harmed, armed robbery, and rape. GA. CODE ANN. §§ 26-1101, 26-1311, 26-1902, 26-2001, 27-2534.1 (Supp. 1975) (the statute also considered treason and aircraft hijacking capital offenses). These capital felonies were the same ones listed when *Furman* was decided, with the exception of capital perjury which was removed from the list. *Gregg*, 428 U.S. at 163 n.6. Following *Furman*, the statute was amended to list 10 aggravating factors of which, the presence of one could subject the convicted to the death penalty: 1) a capital offense committed by one with a prior capital felony conviction or murder committed by one with a “substantial history of serious assaultive criminal convictions”; 2) a capital offense committed while the offender was committing another capital felony or aggravated battery, or murder committed while the offender was committing first degree burglary or arson; 3) while committing a capital offense the offender “created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person”; 4) murder committed for money or hiring someone to murder for money; 5) murder of a present or former judicial officer or district attorney during or for reason of his duty in that position; 6) “[t]he offender caused or directed another to commit murder or committed murder as an agent or employee of another person”; 7) the capital offense was committed in a manner that was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim”; 8) murder committed against a peace officer, corrections employee, or a fireman engaged in duty; 9) murder committed by one who is in or has escaped the custody of a peace officer or imprisonment; and 10) murder committed for the reason of “avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement.” GA. CODE ANN. § 27-2534.1(b) (Supp. 1975). In *Arnold v. State*, 224 S.E.2d 386, 391 (Ga. 1976), the portion of the first aggravating factor dealing with “substantial history of serious

the sentencer to consider any other non-statutory aggravating and mitigating circumstances that were shown to be relevant to the case.⁵⁹ The sentencer could then choose to impose a sentence of death or recommend mercy even absent a finding of mitigating evidence.⁶⁰

The defendant contended that the statutory aggravating factors were overbroad and vague, the procedure for granting mercy was arbitrary and the sentencing proceeding allowed too large a scope of evidence to be introduced.⁶¹ The Court upheld Georgia's death penalty statute because it eliminated the risk of arbitrary imposition of a death sentence by requiring separate hearings for guilt and sentencing, the finding of at least one aggravating factor, presentation of mitigation evidence and appellate review.⁶² The Court held "[n]o longer can a Georgia jury do as *Furman's* jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die."⁶³ The Court concluded that:

The new Georgia sentencing procedures, by contrast [to the statute examined in *Furman*], focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative

assaultive criminal convictions" was held unconstitutional, because it did not outline "clear and objective standards." *Gregg*, 428 U.S. at 166 n.9. The current Georgia statute contains the amended first aggravating factor. GA. CODE ANN. § 17-10-30 (1997).

⁵⁹ *Id.* § 27-2534.1(b).

⁶⁰ *Id.* § 27-2302.

⁶¹ *Gregg v. Georgia*, 428 U.S. 153, 201-04 (1976).

⁶² *Id.* at 196-98, 204-06. "The provision for appellate review in the Georgia capital sentencing system serves as a check against the random or arbitrary imposition of the death penalty." *Id.* at 206.

⁶³ *Id.* at 197.

guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.⁶⁴

In the decades following *Gregg*, the Supreme Court upheld other state death penalty statutes that provided for guided discretion.⁶⁵

⁶⁴ *Id.* at 206-07.

⁶⁵ The same day the Court decided *Gregg*, it upheld Florida and Texas laws that contained similar provisions to the Georgia statute. Florida's death penalty statute provided that the judge weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty should be imposed. *Proffitt v. Florida*, 428 U.S. 242, 248 n.6 (1976). "Under Florida's capital sentencing procedures . . . trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." *Id.* at 253. "[I]n Florida . . . it is no longer true that there is 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'." *Id.* (citing *Gregg*, 428 U.S. at 188, quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)). The Texas death penalty statute enumerated the following five aggravating factors, one of which had to be proven to impose the death penalty:

The punishment for murder with malice aforethought shall be death . . . if: (1) the person murdered [is] a peace officer or fireman who was . . . acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman; (2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape or arson; (3) the person committed the murder for remuneration . . . or employed another to commit murder for remuneration; (4) the person committed murder while escaping or attempting to escape from a penal institution; (5) the person while incarcerated in a penal institution murdered another who was employed in the operation of the penal institution.

TEX. PENAL CODE ANN. § 19.03 (West 1974).

The jury then had to answer three questions regarding the defendant's actions and background and if the answer to any question was "no" then the death sentence would not be imposed. TEX. CRIM. P. CODE ANN. §37.071 (Supp. 1975-76). See *Jurek v. Texas*, 428 U.S. 262, 265, 268-69 (1976) (upholding the Texas death penalty statute). See also *Lewis v. Jeffers*, 497 U.S. 764 (1990) (holding Arizona's statute constitutional that provided for guided discretion through the use of aggravating factors). "We have reiterated the general principle that aggravating circumstances must be construed to permit the sentencer to make a

In addition the Court re-examined, and directed the states to narrowly define, aggravating factors.

3. *The Elimination of Vagueness in Aggravating Factors Subsequent to Gregg*

The *Gregg* Court failed to either specify the aggravating factors that would be acceptable or delineate how narrowly each must be defined. Thus, statutes that the Court initially found constitutional, such as Georgia's, were once again challenged, premised upon the vagueness of the aggravating factor provisions.⁶⁶

Just four years after approving the Georgia statute, the Court held, in *Godfrey v. Georgia*, that Georgia's aggravating factor, involving torture or aggravated battery, was not adequately narrowed and defined.⁶⁷ The language of the aggravating factors allowed for the death penalty if a murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."⁶⁸ As every murder is "outrageously or wantonly vile, horrible or

principled distinction between those who deserve the death penalty and those who do not." *Id.* at 776. The Supreme Court has upheld death penalty statutes in several other states that provided for guided discretion. *Harris v. Alabama* 513 U.S. 504, 514-15 (1995); *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994); *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990); *Walton v. Arizona*, 497 U.S. 639, 649, 655-56 (1990); *Baldwin v. Alabama*, 472 U.S. 372, 389 (1985); *Spaziano v. Florida*, 468 U.S. 447, 464-466 (1984).

⁶⁶ See *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (challenging Georgia's seventh aggravating factor); *Proffitt*, 428 U.S. at 255-56 (challenging Florida's fifth aggravating factor). The Georgia statute authorized a capital sentence for a murder that was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE ANN. § 27-2534.1(b) (1978). The Florida statute authorized a capital sentence for a murder committed in a manner that was "especially heinous, atrocious, or cruel." FLA. STAT. ANN. § 921.141(5) (West & Supp. 1976-1977). The Supreme Court just four years earlier acknowledged that the provisions of the statutes could be interpreted to apply to all murders, but still approved the statutes holding that the legislative intent was not to "adopt such an open-ended construction." *Gregg*, 428 U.S. at 201.

⁶⁷ *Godfrey*, 446 U.S. at 428.

⁶⁸ *Id.*

inhuman,”⁶⁹ “[t]here [was] no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.”⁷⁰ The Court found that the trial judge failed to provide guidance to the jury in the sentencing instructions regarding the meaning of the aggravating factor and thus the jury’s interpretation could only have been “the subject of sheer speculation.”⁷¹

Other death penalty statutes were challenged following *Gregg*, premised upon the grounds that the aggravating factors were also vague and over-broad.⁷² The Supreme Court invalidated the death sentence of an Oklahoma defendant convicted under its “heinous, atrocious or cruel” aggravating factor.⁷³ Conversely, the Supreme Court upheld Arizona’s capital statute which contained similar language.⁷⁴ Arizona’s statute prescribed that a judge act as sentencer, whereas Oklahoma’s and Georgia’s statutes allowed a jury to act as sentencer.⁷⁵ Thus, the Arizona statute was upheld in part because the sentencer was a judge, not a jury.⁷⁶ The Supreme Court also found other death penalty statutes valid where the aggravating factors were narrowly structured to limit the class of people eligible for a capital sentence.⁷⁷

⁶⁹ *Id.* at 429.

⁷⁰ *Id.* at 433.

⁷¹ *Id.* at 429.

⁷² See, e.g., *Clemons v. Mississippi*, 494 U.S. 738, 754-55 (1990) (holding that the language, murder committed in a “heinous, atrocious, or cruel” manner, is unconstitutionally vague).

⁷³ See *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (holding the aggravating circumstance provision unconstitutionally vague under the Eighth Amendment).

⁷⁴ See *Walton v. Arizona*, 497 U.S. 639, 653-54 (1990) (holding the “especially heinous, cruel or depraved” aggravating circumstance valid as providing sufficient guidance to the sentencer).

⁷⁵ See *id.* at 653.

⁷⁶ *Id.*

⁷⁷ See *Arave v. Creech*, 507 U.S. 463 (1993) (Idaho’s death penalty statute, which provided for an aggravating factor of murder “with utter disregard for human life,” was not found to be too vague where the sentencer was a judge). The Supreme Court found that a judge would not misinterpret the legislative intent of a facially broad aggravating factor. *Id.* at 471. “Where . . . the sentencer is a judge rather than a jury, the federal court must presume that the judge knew

While death penalty statutes will always present constitutional questions, many potential questions have been addressed by the states by having narrowed their statutes in the wake of *Gregg*. The *Gregg* decision eliminated capricious and arbitrary imposition of the death penalty and mandated guided discretion. In response, the states adopted aggravating factors into their statutes. Some states, however, took the Court's mandate to the extreme by prescribing a mandatory death sentence for certain crimes.⁷⁸ The Court, presented with this issue, banned mandatory death sentences and set the stage for individualized sentencing.⁷⁹

C. *The Lockett Requirement: Individualized Sentencing*

Two years following *Gregg*, the Supreme Court in *Lockett v. Ohio* held that the sentencer, in imposing the death penalty, must consider certain factors, such as the capital defendant's unique background, character, and the circumstances of the crime.⁸⁰ This statutory requirement became known as individualized sentencing.⁸¹

In *Lockett*, the defendant argued that Ohio's death penalty statute violated the Eighth and Fourteenth Amendments by precluding the sentencer from considering certain mitigating factors.⁸² The Ohio death penalty statute stated that when a

and applied any existing narrowing construction." *Id.*

⁷⁸ New York, among other states, had imposed a mandatory death penalty which was struck down as unconstitutional in light of the Supreme Court's holding in *Gregg*. *People v. Davis*, 371 N.E.2d 456 (N.Y. 1977).

⁷⁹ The Supreme Court in *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976), in outlawing mandatory imposition of the death penalty, held that "individualized" sentencing was a requirement. The Court in *Lockett v. Ohio* took this mandate a step further by specifically outlining the requirement of "individualized" sentencing. 438 U.S. 586, 605-08 (1978).

⁸⁰ *Lockett*, 438 U.S. at 604. Such factors are considered mitigating factors. *Id.* at 605-08.

⁸¹ *Id.* "Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases." *Id.* at 605.

⁸² *Id.* at 602.

defendant is found guilty of murder beyond a reasonable doubt and one of seven statutory aggravating circumstances exists, the death penalty would be imposed.⁸³ The statute listed three mitigating provisions that could justify a lesser sentence if proven by a preponderance of the evidence.⁸⁴ The Court reasoned that by not allowing an examination of the defendant's character, record, the circumstances of the crime, and other mitigating evidence, a death sentence could be imposed where a less severe penalty would be more appropriate.⁸⁵ Thus, the Court held that individualized consideration was a constitutional requirement in the imposition of a death sentence under the Eighth and Fourteenth Amendments.⁸⁶

⁸³ OHIO REV. CODE ANN. § 2929.04(B) (West 1975).

⁸⁴ *Id.* In consideration of "the nature and circumstances of the offense, the history, character, and background of the offender," one of the following three circumstances can be considered mitigating evidence:

- (1) The victim of the offense induced or facilitated it.
- (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
- (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Id.

⁸⁵ *Lockett*, 438 U.S. at 605.

⁸⁶ *Id.* The Court found that other statutes did indeed provide for individualized sentencing. Georgia's statute in *Gregg* was found to be compliant with the individualized sentencing requirement with a broad provision allowing for the introduction of any type of aggravating or mitigating evidence. *Id.* at 606. The Court cited its previous decision in *Gregg* stating that "the statute permitted the jury 'to consider any aggravating or mitigating circumstances'." *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 206 (1976)). While the Florida statute contained a list of mitigating factors, the Supreme Court had previously approved the statute, concluding that the list was not exclusive. *Proffitt v. Florida*, 428 U.S. 242, 250 n.8 (1976). The Court held that there existed "no such limiting language introducing the list of statutory mitigating factors." *Id.*

Despite the facial narrowness of the allowance of mitigation evidence, the Supreme Court also upheld the Texas death penalty statute due to a Texas appellate court's interpretation that left the door open to include virtually all mitigating factors. *Jurek v. Texas*, 428 U.S. 262, 272 (1976). While the Texas statute made no direct reference to mitigating factors, it did provide that juries would answer and consider three questions during their sentencing determination.

The *Lockett* requirement of individualized sentencing led to a proliferation of litigation determining what constituted mitigating evidence.⁸⁷ Thus, the Court has allowed evidence of turbulent family history,⁸⁸ adjustment to incarceration,⁸⁹ mental retardation and child abuse⁹⁰ and other non-statutory mitigating evidence to be introduced during the sentencing phase.⁹¹ In addition, the states retained the power to structure the consideration of mitigating evidence by governing “what factors the jury must be permitted to consider in making its sentencing decision.”⁹²

Id. at 269. The second question was “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” TEX. CODE CRIM. PROC. ANN., art. 37.071(b)(1) (West Supp. 1975-76). The Supreme Court found this question to be open-ended in light of the Texas Court of Criminal Appeals’ interpretation. *Lockett*, 438 U.S. at 607. The Court held that the interpretation would allow the sentencer to consider “whatever mitigating circumstances” the defendant could establish. *Jurek*, 428 U.S. at 272-73.

In comparison to these statutes, Ohio’s statute was found to be too narrow in its allowance of mitigating evidence. *Lockett*, 438 U.S. at 607. “None of the statutes we sustained in *Gregg* and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant’s character and record or any circumstances of his offense as an independently mitigating factor.” *Id.* The Court interpreted Ohio’s statute as allowing only the three statutory mitigating factors to be presented in determining a defendant’s sentence, finding that many other important mitigating circumstances, such as age, would be banned from consideration. *See id.* at 608. “[C]onsideration of a defendant’s comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision.” *Id.*

⁸⁷ *See, e.g.,* *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (allowing adjustment to incarceration as a mitigating factor); *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (allowing turbulent family history as a mitigating factor); *Bell v. Ohio*, 438 U.S. 637, 642 (1978) (upholding defendant’s challenge to Ohio’s death penalty statute, for failing to consider particular circumstances of the crime and aspects of his character as mitigating factors).

⁸⁸ *Eddings*, 455 U.S. at 113-15.

⁸⁹ *Skipper*, 476 U.S. at 8.

⁹⁰ *Penry v. Lynaugh*, 492 U.S. 302, 328, 340 (1989).

⁹¹ *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987). *See also* *Parker v. Dugger*, 498 U.S. 308, 322 (1991) (holding that non-statutory mitigating evidence must be considered).

⁹² *Johnson v. Texas*, 509 U.S. 350, 372-73 (1993).

The Court's evolving death penalty jurisprudence from *Furman* to *Gregg* to *Lockett* has evinced inherent contradictions. While *Furman* and *Gregg* eliminated the imposition of the death penalty in an arbitrary and capricious manner and mandated guided discretion, *Lockett* required individualized sentencing. Thus, on one hand, discretion is narrowed, while on the other hand, it is broadened.⁹³ Justice Scalia articulated this contradiction by opining that "[t]o acknowledge that 'there is perhaps an inherent tension' is rather like saying that there was perhaps an inherent tension between the Allies and the Axis powers in World War II."⁹⁴ A constitutionally superior statute would reconcile these competing mandates.

II. THE NEW YORK DEATH PENALTY STATUTE

In 1995, New York revised and re-enacted the death penalty statute.⁹⁵ The New York statute follows the mandates of *Furman*,

⁹³ See Srinivasan, *supra* note 15, at 1353-54 (discussing the asymmetrical implications of guided discretion and individualized sentencing). "On one hand, states must narrow the sentencer's discretion regarding whether she can impose the death penalty in a particular case. On the other hand, states cannot limit the sentencer's discretion to decide against imposing the death penalty for any mitigating reason." See Srinivasan, *supra* note 15, at 1353. The fact that statutes must narrow sentencer discretion and at the same time broaden discretion "creates not just an asymmetry, but an untenable and irreconcilable doctrinal contradiction." *Id.* See generally Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345 (1998); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

⁹⁴ *Walton v. Arizona*, 497 U.S. 639, 664 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting)).

⁹⁵ Before New York's death penalty statute was re-enacted, the last execution in New York took place in 1963. See William C. Donnino, *McKinney's Practice Commentaries*, N.Y. PENAL LAW § 125.27, at 384 (McKinney 1998) (discussing the history of New York's death penalty law). In light of *Furman*'s ruling, New York's death penalty statute, which previously allowed for complete jury discretion, was held unconstitutional. *People v. Fitzpatrick*, 300 N.E.2d 139 (N.Y. 1973). After instituting mandatory capital punishment for certain crimes, New York's statute again was declared unconstitutional in the aftermath of

Gregg and Lockett.⁹⁶ The structure of the statute is unique in that it meets these mandates in an unprecedented fashion. Similar to other death penalty statutes, the New York statute provides for bifurcation of the guilt and sentencing phases, the introduction of aggravating and mitigating factors, and appellate review.⁹⁷ The

Gregg. People v. Davis, 371 N.E.2d 456 (N.Y. 1977).

On March 8, 1995, after 18 years without the death penalty, Governor George E. Pataki approved the revised New York death penalty legislation. See James Dao, *Death Penalty in New York is Restored After 18 Years: Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1 (discussing Gov. Pataki's signing of the death penalty bill into law); James Dao, *New York Senate Approves Revival of Death Penalty*, N.Y. TIMES, Mar. 7, 1995, at A1 (discussing the New York Senate's vote approving the death penalty legislation). See also Act of Mar. 7, 1995, ch. 1, 1995 N.Y. Laws 218 (New York's death penalty legislation). New York's death penalty law took effect on September 1, 1995. See Jan Hoffman, *Lawyers Prepare for New York's Death Penalty*, N.Y. TIMES, Aug. 31, 1995, at A1 (discussing prosecuting and defense attorneys' reactions prior to New York's death penalty statute taking effect).

In approving and signing into law the death penalty, Governor Pataki declared, "the citizens of New York State have spoken loudly and clearly in their call for justice for those who commit the most serious of crimes by depriving other citizens of their very lives. The citizens of New York State are convinced the death penalty will deter these vicious crimes and I, as their Governor agree." William C. Donnino, *McKinney's Practice Commentary*, N.Y. PENAL LAW § 125.27, at 381 (McKinney Supp. 1999) (quoting Approval Mem. from Governor approving L. 1995, ch. 1; Death Penalty (Sept. 1, 1995)). "The purpose of this legislation is to allow for the imposition of the death penalty when a defendant is convicted for certain types of intentional murder." Bill Mem. from the New York State Assembly, 218th Session, 1995 Regular Session for L. 1995, ch. 1 (March 7, 1995).

The death penalty is now authorized by law. N.Y. PENAL LAW § 60.06 (McKinney 1998 & Supp. 1999). The statute reads,

When a person is convicted of murder in the first degree . . . the court shall, in accordance with the provisions of section 400.27 of the criminal procedure law, sentence the defendant to death, to life imprisonment without parole . . . or to a term of imprisonment for a class A-I felony other than a sentence of life imprisonment without parole.

Id.

⁹⁶ Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

⁹⁷ N.Y. CRIM. PROC. LAW §§ 400.27, 470.30 (McKinney Supp. 1999).

statute, however, is *sui generis* in that it completely separates the competing mandates of guided discretion and individualized sentencing in a manner that enhances the value of each. While implementing a weighing process between aggravating and mitigating factors during the sentencing process, New York's statute also instills a value of the non-weighing scheme to ensure less arbitrary application of the statute, by having the aggravating factors proven during the guilt phase.⁹⁸

A. Statutory Structure

In New York, as in all states, the capital trial is bifurcated into a guilt phase and a sentencing phase.⁹⁹ In the guilt phase, the prosecutor must prove beyond a reasonable doubt that the defendant is guilty of a crime constituting first degree murder.¹⁰⁰ Only those crimes listed under first degree murder constitute crimes punishable by the death penalty.¹⁰¹ Pursuant to section 125.27 of the New York Penal Law, a person is guilty of first degree murder when, with the intent to cause the death of a person, he causes the death of that person or of a third person, and one of twelve aggravating factors is present.¹⁰² These aggravating factors include the special status of the victim, present or past circumstances of the defendant, actual circumstances of the crime and whether the criminal act was a contract or serial killing.¹⁰³ The defendant

⁹⁸ A true weighing statute, such as Florida's, would first, at the trial phase, determine guilt of murder in the first degree, and then, at the sentencing phase deal with proving both aggravating and mitigating factors. FLA. STAT. ch. 921.141 (1999). In New York, the aggravating factors are elements of the crime of murder in the first degree. N.Y. PENAL LAW § 125.27(1)(a) (McKinney 1998 & Supp. 1999). Procedures for New York's death penalty statute are found in N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1999).

⁹⁹ N.Y. CRIM. PROC. LAW § 400.27(1) (McKinney Supp. 1999). "Upon the conviction . . . for the offense of murder in the first degree . . . the court shall promptly conduct a separate sentencing proceeding." *Id.*

¹⁰⁰ N.Y. PENAL LAW § 125.27 (McKinney 1998 & Supp. 1999).

¹⁰¹ *Id.* § 125.27(1)(a)(i-xii).

¹⁰² *Id.*

¹⁰³ William C. Donnino, *McKinney's Practice Commentary*, N.Y. PENAL LAW § 125.27, at 385-92 (McKinney Supp. 1999). New York's Penal Law

must also be more than eighteen years old at the time of the crime.¹⁰⁴

Unlike most weighing and non-weighing statutes, which would introduce the aggravating factors only in the sentencing phase, New York's statute includes the aggravating factors as part of the definition of first degree murder.¹⁰⁵ Thus, the aggravating factors must be proven in the guilt phase.¹⁰⁶ This statutory provision upholds the "innocent until proven guilty" component of the criminal justice system, while instilling a non-arbitrary means of deciding who is eligible for the death penalty.

contains a total of 12 aggravating factors: 1) the intended victim was a police officer engaged in the performance of his or her duties, which the defendant should have reasonably known; 2) the intended victim was a peace officer engaged in the performance of his or her duties, which the defendant should have reasonably known; 3) the intended victim was an employee of a state or local correctional facility engaged in the performance of his or her duties, which the defendant should have reasonably known; 4) at the time of the crime the defendant was confined in a state correctional facility or was in custody upon a sentence not less than 15 years, or the defendant had escaped from such confinement or custody; 5) the intended victim was a witness to a crime, previously testified in a criminal trial, or was an immediate family member of a witness and the killing was done to prevent such testimony or for the purpose of exacting retribution for prior testimony; 6) the defendant committed or procured commission of the killing pursuant to an agreement for something of pecuniary value; 7) the murder was committed in the course of a felony with requirement of intent; 8) the defendant killed multiple people; 9) prior to the killing, the defendant had been convicted of murder in the second degree, as defined in section 125.25 of the Penal Law; 10) the killing was done in "an especially cruel or wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death"; 11) "the defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan" (known also as a serial-killer aggravating factor); or, 12) the intended victim was a judge and the defendant committed the murder because of that fact. N.Y. PENAL LAW § 125.27(1)(a) (McKinney 1998 & Supp. 1999).

¹⁰⁴ *Id.* § 125.27(1)(b).

¹⁰⁵ "A person is guilty of murder in the first degree when: With intent to cause the death of another person, he causes the death of such person or of a third person; and [at least one of the 12 aggravating factors is present]." *Id.* § 125.27(1)(a).

¹⁰⁶ *Id.*

The sentencing hearing centers on the defendant's introduction of all relevant mitigating evidence to assist the jury in determining whether a sentence of death or life imprisonment is appropriate.¹⁰⁷ The jury must then weigh the mitigating evidence presented by the defendant against the aggravating factor(s) proven during the guilt phase to determine whether a death sentence is appropriate.¹⁰⁸ The statute provides that "[t]he jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed."¹⁰⁹

The sentencing phase is thus, in effect, a mitigation hearing. Aggravating factors, proven beyond a reasonable doubt in the guilt phase, are deemed established beyond a reasonable doubt at the sentencing phase.¹¹⁰ During this part of the trial, the prosecutor cannot relitigate the aggravating factors, nor present any non-statutory factors and is limited to presenting only rebuttal evidence.¹¹¹ The only exceptions are that the prosecutor can introduce evidence of terrorism or evidence that the defendant had been convicted of two or more separate felonies within ten years of the present crime.¹¹² The defendant is permitted to prove a number of mitigating circumstances, including, but not limited to, defendant's prior lack of criminal convictions, mental retardation or impairment of mental capacity, duress, the level of participation in

¹⁰⁷ N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1999).

¹⁰⁸ *Id.* § 400.27(11)(a).

¹⁰⁹ *Id.* The remainder of the provision provides that, "[a]ny member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established." *Id.*

¹¹⁰ *Id.* § 400.27(3).

¹¹¹ *Id.* § 400.27(6). "At the sentencing proceeding the people shall not relitigate the existence of aggravating factors proved at the trial." *Id.* In addition, the prosecutor can not present evidence at the sentencing proceedings "except . . . in rebuttal of the defendant's evidence." *Id.*

¹¹² *Id.* § 400.27(7).

the crime, mental or emotional disturbance and alcohol or drug influence.¹¹³ The statutory provision permitting the presentation of mitigating evidence also includes a catch-all provision that states “any other circumstance concerning the crime, the defendant’s state of mind or condition at the time of the crime, or the defendant’s character, background, or record that would be relevant to mitigation or punishment for the crime” may be presented.¹¹⁴ Because the defendant has already been found guilty of first degree murder, these mitigating factors may no longer constitute a defense to the actual crime. Therefore, they need only be proven by a preponderance of the evidence.¹¹⁵

The jury weighs the mitigating circumstances against the aggravating factor(s) when determining the sentence.¹¹⁶ Jury

¹¹³ *Id.* § 400.27(9).

Mitigating factors shall include the following:

- (a) The defendant has no significant history of prior criminal convictions involving the use of violence against another person;
 - (b) The defendant was mentally retarded at the time of the crime, or the defendant’s mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution;
 - (c) The defendant was under duress or under the domination of another person, although not such duress or domination as to constitute a defense to prosecution;
 - (d) The defendant was criminally liable for the present offense of murder committed by another, but his participation in the offense was relatively minor although not so minor as to constitute a defense to prosecution;
 - (e) The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution;
- or
- (f) Any other circumstance concerning the crime, the defendant’s state of mind or condition at the time of the crime, or the defendant’s character, background or record that would be relevant to mitigation or punishment for the crime.

Id.

¹¹⁴ *Id.* § 400.27(9)(f).

¹¹⁵ *Id.* § 400.27(6).

¹¹⁶ *Id.* § 400.27(11)(a).

unanimity is not required in evaluating mitigating evidence.¹¹⁷ Rather, each individual juror can consider whether the defendant has proven any mitigating factor by a preponderance of the evidence.¹¹⁸ After each juror's assessment, a finding that the death penalty should be imposed must be a unanimous decision by the jury that the aggravating factors substantially outweigh the mitigating factors beyond a reasonable doubt.¹¹⁹ The jury, however, despite finding that the aggravating factors outweigh the mitigating factors, may impose a life sentence rather than the death penalty.¹²⁰ After the jury announces the sentence, each juror is required to state for the record both the mitigating and aggravating factors each considered in its deliberations.¹²¹ The New York death penalty statute also has a provision calling for mandatory and direct appeal to the New York State Court of Appeals.¹²²

The Jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.

Id.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* § 400.27(11)(a).

¹²⁰ *Id.* In order to impose a death sentence the jury must find that the aggravating factors outweigh the mitigating factors and then "unanimously determine that the penalty of death should be imposed." *Id.* While the jury cannot impose a death sentence if it finds that the mitigating evidence outweighs the aggravating factors proven, it can still decide upon a life sentence even if it finds correctly that the aggravating factors outweigh the mitigating circumstances based on other circumstances, such as mercy. *Id.*

¹²¹ *Id.* § 400.27(11)(b).

¹²² N.Y. CRIM. PROC. LAW § 470.30 (McKinney Supp. 1999). The New York State Court of Appeals is required to review standard issues on appeal, if the sentence was disproportionate to the sentences of similar cases, and whether or not prejudice or race of the defendant or victim played a part in the sentence. *Id.*

*B. The Verdict on New York's Death Penalty Statute:
Constitutional*

New York's death penalty statute, while subject to constitutional challenge,¹²³ is indeed constitutional.¹²⁴ The statute affords capital defendants substantive protective measures. It was drafted within New York's tradition of affording greater protection of individual rights under its state constitution than the United States Constitution, as interpreted by the Supreme Court, requires.¹²⁵ The New York death penalty statute complies with the Supreme Court's mandates in *Furman*,¹²⁶ *Gregg*,¹²⁷ and

¹²³ See *infra* Part III, discussing challenges to aspects of the New York statute.

¹²⁴ The New York State Court of Appeals gives an inherent presumption of constitutionality generally to New York statutes. In *People v. Davis*, the New York State Court of Appeals held that "the State statutes under scrutiny carry with them a strong presumption of constitutionality, that they will be stricken as unconstitutional only as a last resort and that courts may not substitute their judgment for that of the Legislation as the wisdom and expediency of the legislation." 371 N.E.2d 456, 462 (N.Y. 1977).

¹²⁵ Hon. Stewart F. Hancock et al., *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute—Two Questions*, 59 ALB. L. REV. 1545, 1546 (1996). "The New York death penalty statute is a well crafted one. It reflects a careful consideration of Supreme Court decisions and precedents, and is unlikely to be deemed unconstitutional by the Supreme Court." Richard Klein, *Constitutional Concerns About Capital Punishment: The Death Penalty Statute in New York State*, 11 J. SUFFOLK ACAD. L. 1, 11 (1996). "In the adoption of the new Death Penalty Statute in 1995, the legislative history shows that every effort was made to make this statute comply with all of the Supreme Court cases." *Symposium, Does New York's Death Penalty Statute Violate the New York Constitution?*, 14 Touro L. Rev. 715, 731 [hereinafter *Symposium*]. "[T]he death penalty statute was formulated and enacted in the wake of several United States Supreme Court decisions . . . ; the Legislature most certainly took these decisions into account in drafting the statute, and intended the terms of the statute to be consistent with them." *People v. Hale*, 661 N.Y.S.2d 457, 488 (Sup. Ct. 1997).

¹²⁶ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹²⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976).

Lockett.¹²⁸ The constitutionality of any unchallenged statute must be examined in light of these mandates.

The *Furman* decision established that death penalty statutes could not be structured so as to promote arbitrary imposition of the death penalty.¹²⁹ In *Gregg* the Court mandated guided discretion through the use of aggravating factors to narrow the class of defendants eligible for a capital sentence.¹³⁰ Section 125.27(1) of the New York Penal Law sets forth twelve statutory aggravating factors that limit the defendant's eligibility, thereby narrowing the class of defendants that may be punished by death.¹³¹ While the aggravating factors to be considered for a capital sentencing determination are at the same time the elements of the crime of first-degree murder, the Supreme Court has ruled this structure to be constitutional.¹³² The New York statute permits the death

¹²⁸ *Lockett v. Ohio*, 438 U.S. 586 (1978). See Kerry E. Ford, *The New York Death Penalty: Are Murderers in Your County Excluded?*, 17 PACE L. REV. 273, 309-10 (1996). "The New York statute mirrors the statute approved by the Supreme Court in *Gregg v. Georgia* and would therefore meet the standards required by *Furman* and *Gregg*." *Id.* at 310.

¹²⁹ *Furman*, 408 U.S. at 242. See also *supra* Part I.A, discussing *Furman* as the precursor to the disallowance of arbitrary and capricious sentencing.

¹³⁰ *Gregg*, 428 U.S. at 195. See also *supra* Part I.B, discussing the *Gregg* mandate of guided discretion.

¹³¹ N.Y. PENAL LAW §125.27(1) (McKinney 1998 & Supp. 1999). See *supra* note 103 and accompanying text (listing the New York death penalty statute's aggravating factors).

¹³² See *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988) (holding Louisiana's statute constitutional where the only aggravating factor found by the jury duplicated an element of the capital crime). The Supreme Court found "no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." *Id.* at 244-45. The Court further explained:

Here, the 'narrowing function' was performed by the jury at the guilt phase The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process. . . . [The state statutory] scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Id. at 246.

penalty to be imposed only after the jury finds that at least one of the twelve aggravating factors has been proven beyond a reasonable doubt.¹³³ After an aggravating factor is proven during the guilt phase, the jury must conduct a weighing process during deliberation to impose such a sentence.¹³⁴ New York's statutory aggravating factor scheme is modeled after the scheme held constitutional in *Gregg*.¹³⁵ Thus, challenging the scheme should prove to be difficult, because the guided discretion employed by New York complies with the *Gregg* mandate.

Lockett mandated individualized sentencing by requiring that the sentencing body "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."¹³⁶ In meeting this mandate, New York's statute guides the jury in determining a sentence.¹³⁷ It specifically lists certain mitigating factors that the jury should consider in its decision-making process.¹³⁸ In addition, the section has a catch-all provision allowing consideration of any non-statutory mitigating circumstance that is presented by the defendant.¹³⁹ The allowance of a broad range of mitigating evidence is similar to other death penalty statutes that have already been found constitutional.¹⁴⁰ In fact, the New York statute exceeds the *Lockett* mandate by requiring that the aggravating factors be proven in the guilt phase, thus limiting the prosecutor's role in the sentencing phase to presentation of rebuttal evidence. While instructions for the jury to follow in considering aggravating and

¹³³ N.Y. CRIM. PROC. LAW § 400.27(7)(c) (McKinney Supp. 1999).

¹³⁴ *Id.* § 400.27(11)(a).

¹³⁵ Compare N.Y. PENAL LAW § 125.27(a)(1) (McKinney 1998 & Supp. 1999), with GA. CODE ANN. § 27-2534.1(b) (Supp. 1975).

¹³⁶ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

¹³⁷ N.Y. CRIM. PROC. LAW § 400.27(11)(a) (McKinney Supp. 1999).

¹³⁸ *Id.* § 400.27(9). See *supra* note 113 (listing New York's mitigating factors).

¹³⁹ N.Y. CRIM. PROC. LAW § 400.27(9)(f).

¹⁴⁰ See *supra* note 86 and accompanying text (discussing Georgia's and Texas' mitigating schemes that were declared constitutional).

mitigating evidence are not constitutionally required,¹⁴¹ New York's weighing scheme does in fact establish such guidelines.¹⁴² Consequently, the New York death penalty statute will survive constitutional challenge as the overall structure of the statute is constitutional.¹⁴³ The statute meets both of the Supreme Court's capital punishment constitutional requirements: it complies with the *Furman* and *Gregg* mandates by eliminating arbitrary and capricious sentencing through the use of guided discretion and for automatic appellate review and follows the *Lockett* mandate by providing for individualized sentencing.¹⁴⁴

¹⁴¹ See *Zant v. Stephens*, 462 U.S. 862, 875 (1983). The jury is permitted "to exercise unbridled discretion in determining whether the death penalty should be imposed after it [finds] that the defendant is a member of the class made eligible for that penalty." *Id.* See also *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) (stating that "[a] capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision").

¹⁴² See N.Y. CRIM. PROC. LAW § 400.27(11)(a)(McKinney Supp. 1999). "The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed." *Id.*

¹⁴³ Darrel Harris, the first person to be sentenced under the New York Statute, made a motion during his capital trial challenging the constitutionality of section 400.27(3) of the Criminal Procedure Law for not permitting the relitigation of aggravating factors during the sentencing phase. *People v. Harris*, 676 N.Y.S.2d 440, 442 (Sup. Ct. 1998). The trial court concluded in its denial of the motion:

The New York statutory scheme fulfills both of these requirements [guided discretion and individualized sentencing]. Penal Law 125.27(1) narrows the class of death-eligible persons by delineating twelve separate aggravating factors, each of which contains a specific aggravating factor which raises the particular crime above the vast majority of murders. Only these enumerated aggravators, if proven at trial, are incorporated as established into the sentencing phase. As to the requirement that sentencing be imposed on an individualized basis, the statute provides for a wide range of mitigators, allowing the sentencing jury to consider "any aspect of a defendant's character or record and circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Id. at 442 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

¹⁴⁴ "Governor Pataki assures that the infirmities in past New York legislation

C. Statutorily Superior

The New York death penalty statute not only complies with the Supreme Court's constitutional requirements, but its unique structure makes it statutorily superior to the death penalty statutes of other states.¹⁴⁵ Additionally, the statute provides for enhanced procedural safeguards neither required by the Supreme Court nor adopted by the majority of the states with death penalty statutes. Specifically, New York law prohibits imposition of the death penalty on the mentally retarded¹⁴⁶ and on those not older than

are avoided in the current law which establishes a bifurcated trial procedure and sets forth clear standards to narrow the scope of the death penalty and to guide the jury in determining whether to impose it." Mem. from Governor George E. Pataki approving L. 1995, ch. 1; Death Penalty (Sept. 1, 1995).

¹⁴⁵ "In drafting and debating a death penalty, the New York legislature eventually passed a law that established a minimum standard for a legally acceptable death sentencing system that is substantially higher than any set forth by a state legislature anywhere else." Franklin E. Zimring, *The Wages of Ambivalence: On the Context and Prospects of New York's Death Penalty*, 44 BUFF. L. REV. 303, 317 (1996). See Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283 (1996) (arguing that New York's death penalty law is morally superior). "If one reads the MPC's [Model Penal Code's] death penalty provision as an aspiration towards a legally ideal form of death penalty law, the New York Law is its fruition, its refinement, the Vergilian classical fulfillment of it—its legal Gothic cathedral." *Id.* at 293. Professor Weisberg, in declaring New York's statute as constitutional, states:

In one sense the New York law is itself a 'constitutional moment.' It might be read as the original MPC law with constitutional annotations folded in to it. Line after line, the New York law incorporates identifiable post-*Furman* Supreme Court cases: In its aim at being proof against constitutional attack, it not only accrues the constitutional wisdom of the last twenty years; it takes the most 'conservative' and prophylactic view of constitutional law possible. One senses a sort of contingency clause written into the margins of the New York law, saying that this law shall be deemed prospectively amended by any new constitutional rulings to be handed down in the future.

Id.

¹⁴⁶ N.Y. CRIM. PROC. LAW § 400.27(12) (McKinney Supp. 1999).

eighteen years of age.¹⁴⁷ Equally important, New York has established the Capital Defender Office to provide those facing a possible death sentence with skilled and experienced counsel. Finally, the New York statute allows for direct appeal of a death sentence to the State's highest court.¹⁴⁸

1. *Structural Superiority*

The New York statute's unique structure makes it statutorily superior to others. The statute provides a balance between the inherently contradictory constitutional requirements of individualized, yet non-arbitrary, sentencing and at the same time, promotes a high level of equality and fairness.¹⁴⁹ In doing so, the statute is neither weighing nor non-weighting, but rather is a balance between both, a particular aspect of the statute that makes it unique.

While weighing schemes provide specific instructions on how the separately listed aggravating and mitigating factors are to be weighed in determining a sentence,¹⁵⁰ they are criticized for focusing too heavily on individualized sentencing, thus leading to arbitrary imposition of a death sentence.¹⁵¹ Conversely, non-

¹⁴⁷ N.Y. PENAL LAW § 125.27(1)(b) (McKinney 1998 & Supp. 1999).

¹⁴⁸ N.Y. CRIM. PROC. LAW § 470.30 (McKinney Supp. 1999).

¹⁴⁹ See *supra* notes 93-94 and accompanying text (discussing inherent contradiction between guided discretion and individualized sentencing).

¹⁵⁰ Arizona's death penalty statute, for example, approved by the Supreme Court, is constructed so that the court, as the sentencer, can impose a death sentence if it finds that one or more aggravating factors are present and "no mitigating circumstances sufficiently substantial to call for leniency" exist. See ARIZ. REV. STAT. ANN. § 13-703 (West 1999). See also *Walton v. Arizona*, 497 U.S. 639, 644 (1990) (upholding Arizona's mitigation scheme as constitutional). The Court also has approved Pennsylvania's statute, which provides that the jury, as the sentencer, can impose a death sentence if it finds at least one statutory aggravating factor and no mitigating circumstances. See PA. STAT. ANN. tit. 42, § 9711 (1999). See also *Blystone v. Pennsylvania*, 494 U.S. 299, 301 (1990) (upholding Pennsylvania's mitigation scheme as constitutional).

¹⁵¹ See Srinivasan, *supra* note 15, at 1370-71. "The weighing statute plainly promotes the liberty view more than the nonweighing statute." *Id.* The "liberty view of *Furman* . . . accepts inconsistent outcomes in similar cases, as long as sentencers do not base their decisions on irrelevant considerations. Since the liberty view tolerates inconsistency, it can more easily rationalize guided

weighing schemes list factors, both aggravating and mitigating, but fail to provide guidelines on how these factors should be considered¹⁵² and thus, are criticized for not focusing enough on individualized sentencing.¹⁵³ New York's statutory structure strikes a balance between weighing and non-weighing statutes by meeting the Supreme Court's constitutional mandates in separate phases of the capital trial and by prohibiting relitigation of aggravating factors in the sentencing phase.¹⁵⁴ With few exceptions, the majority of other states reserve proving aggravating factors until the sentencing phase.¹⁵⁵ This, in effect, prejudices a

discretion and individualized sentencing." *Id.* at 1373-74.

¹⁵² In California, for example, the non-weighing statute simply lists factors, both aggravating and mitigating, to be considered by the jury. CAL. PENAL CODE §§ 190.2, 190.3 (West 1999). In non-weighing states, such as California, *Gregg's* guidance requirement is met by a narrowly tailored list of crimes which are death penalty eligible. *Id.* § 190.2. *Lockett's* individualized sentencing requirement is met by the admission of mitigating evidence. The sentencer is then provided with no specific instructions on what to do with the evidence. *Id.* § 190.3.

¹⁵³ Although non-weighing statutes allow the defendant to present mitigating evidence, they lack specific guidelines for the manner in which the evidence is to be used. *See Srinivasan, supra* note 15, at 1368 ("the sentencer in a nonweighing jurisdiction remains free to process the evidence in whatever way she chooses").

¹⁵⁴ N.Y. CRIM. PROC. LAW § 400.27(6) (McKinney Supp. 1999). *See generally* James R. Acker, *When the Cheering Stopped: An Overview & Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. 41, 225 (1996) (reviewing the history of New York's death penalty law). "In many of its particulars, New York's death penalty statute is procedurally rigorous." *Id.*

¹⁵⁵ New York, Louisiana, and Utah are among the minority states who define murder with aggravating factors. *See* UTAH CODE ANN. § 76-5-202 (1999) (stating Utah's definition of aggravated murder, including numerous specific aggravating factors). However, in Utah and other states that define murder with aggravating factors, the death penalty statutes permit the relitigation of aggravation. *Id.* §§ 76-3-207(2)(iv), 76-3-207(3). In Utah, while aggravating factors are used to define aggravated murder and need to be proven at the guilt phase, statutory and nonstatutory aggravating factors are also presented at the sentencing phase. *Id.* Utah is considered a non-weighing state. *Id.* § 76-3-207(4)(b). The Supreme Court has ruled such a structure constitutional.

New York's statute is unique compared with even the minority of states that define murder with aggravating factors. *See Acker, supra* note 154, at 111 (stating that "[t]he New York statute stands virtually alone in providing that the aggravating factors to be considered for capital sentencing purposes are one and

defendant, because it permits the prosecutor to introduce the aggravating factors during the sentencing phase.¹⁵⁶

In New York, the sentencing phase provides for the defendant to present mitigating evidence, which needs only to be proven by a preponderance of the evidence.¹⁵⁷ In addition, the defendant is permitted to submit reliable hearsay, contrary to the usual rules of evidence.¹⁵⁸ The hearing is led by the defendant and the prosecutor may only rebut the evidence presented.¹⁵⁹ By prohibiting the relitigation of aggravating factors at the sentencing phase, New York's statute prevents the resulting prejudice by a prosecutor orchestrating the proceedings. In addition, the prosecutor is not permitted to introduce non-statutory aggravating factors.¹⁶⁰ In other state statutes, the sentencing phase is not a defendant mitigation hearing. Control over the hearing is shared, and the prosecutor's duty to present and prove aggravating factors often overshadows the defendant's presentation of mitigating factors. New York's structure limits the role of the prosecutor more than any other state statute.¹⁶¹ Thus, while the jury must weigh the aggravating and mitigating factors against each other during deliberation, the sentencing hearing is not a forum for the prosecutor to present aggravating evidence. The undue prejudice, evident in other statutory structures, is thus minimized.

New York's statute also goes to considerable lengths in defining aggravating factors, such as felony-murder,¹⁶² serial

the same . . . as the elements of the crime of first-degree murder."'). While Utah has a similar structure to New York's, it is classified as a non-weighting statute. *Id.* See also UTAH CODE ANN. § 76-3-207(2) (1999) (stating that "any other facts in aggregation or . . . any evidence" is permitted to be considered by the court during the sentencing phase).

¹⁵⁶ N.Y. PENAL LAW § 125.27(1)(a) (McKinney 1998 & Supp. 1999).

¹⁵⁷ N.Y. CRIM. PROC. LAW § 400.27(6) (McKinney Supp. 1999).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² New York's aggravating factor of felony-murder is limited and varies significantly from the second degree murder felony-murder provision. N.Y. CRIM PROC. LAW § 125.27(1)(a)(vii) (McKinney 1998 & Supp. 1999). For felony-murder to be considered a capital aggravating factor, the murder must be

killing¹⁶³ and murder committed in a “heinous, atrocious, and cruel” manner.¹⁶⁴ Further, New York’s statute provides a substantive mitigation section.¹⁶⁵ The statute circumscribes the broad allowance of mitigation through a comprehensive list of factors.¹⁶⁶ A catch-all mitigation provision is also included allowing for any other relevant mitigating evidence to be admissible at the sentencing phase.¹⁶⁷ In addition, juror unanimity is not required,¹⁶⁸ allowing jurors to make individual determinations and not to be swayed by other jurors who may not accept the mitigating factors presented.¹⁶⁹ While this scheme seems the most obvious

intentional. *Id.* In addition, the types of felonies defined in capital felony-murder are limited. *Id.* See Weisberg, *supra* note 145, at 293-94 (stating that capital felony-murder in New York maintains the concept of intent as a necessary element of capital eligibility).

¹⁶³ New York’s aggravating factor of serial killing is defined as the intentional murder “of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan.” N.Y. CRIM PROC. LAW § 125.27(1)(a)(xi) (McKinney 1998 & Supp. 1999). See Weisberg, *supra* note 145, at 295 (stating that New York’s serial killer aggravating factor gives the “first formal definition of serial killing in American legislation”). See also *People v. Mateo*, 712 N.E.2d 692 (N.Y. 1999) (finding that the defendant charged with capital murder under the serial killer aggravating factor had not committed the crimes in a similar fashion therefore dismissing the counts).

¹⁶⁴ New York’s 10th aggravating factor, murder committed in a “heinous, atrocious, and cruel” manner, specifically defines the terms “torture” and “depraved” to hinder attempts to challenge it for vagueness. N.Y. CRIM PROC. LAW § 125.27(1)(a)(x) (McKinney 1998 & Supp. 1999). See Weisberg, *supra* note 145, at 297 (stating that New York’s 10th aggravating factor goes to lengths to satisfy the mandate of *Godfrey v. Georgia*, 446 U.S. 420 (1980)).

¹⁶⁵ See Brian Hauck et al., *Capital Punishment Legislation in Massachusetts*, 36 HARV. J. ON LEGIS. 479, 496 (1999) (comparing Massachusetts’s death penalty legislation with New York’s death penalty statute). “This is consistent with guidelines laid out in *Lockett* and is similar to language used in New York’s much-praised death penalty statute.” *Id.* (citations omitted).

¹⁶⁶ N.Y. CRIM. PROC. LAW § 400.27(9) (McKinney Supp. 1999).

¹⁶⁷ *Id.* § 400.27(9)(f).

¹⁶⁸ *Id.* § 400.27(11)(a). See *Mills v. Maryland*, 486 U.S. 367 (1988) (setting forth the rule that juror unanimity on individual mitigating circumstances is unnecessary). See also Hauck et al., *supra* note 165, at 496 (comparing Massachusetts’s death penalty legislation with New York’s death penalty statute).

¹⁶⁹ N.Y. CRIM. PROC. LAW § 400.27(11)(a) (McKinney Supp. 1999).

way to conform to the individualized sentencing requirement, many death penalty statutes fail to include such a provision.¹⁷⁰

2. Procedural Safeguards

New York's statute provides for procedural safeguards not mandated by the Supreme Court or incorporated into the death penalty statutes of a majority of other states. In New York, the prosecutor is required to give notice of intent to seek the death penalty.¹⁷¹ The statute permits the prosecution to withdraw its intent to seek the death penalty at any time.¹⁷² Jurors must be questioned on their bias in favor of or against the death penalty.¹⁷³ In addition, upon a showing of good cause that the jury was prejudiced during the guilt phase, the court may dismiss the jury and empanel a second jury for the sentencing phase.¹⁷⁴

While the United States Supreme Court has held that execution of the mentally retarded is not unconstitutional,¹⁷⁵ New York's

¹⁷⁰ See, e.g., *supra* note 86 and accompanying text (discussing the Texas statute's facially narrow mitigation scheme).

¹⁷¹ N.Y. CRIM. PROC. LAW § 250.40(1) (McKinney 1998). The prosecution must serve notice of intention to seek the death penalty within 120 days of the defendant's arraignment, unless the court extends the time period for a showing of good cause. *Id.* § 250.40(2). Upon filing of such a notice the defendant has 60 additional days in which to file new or supplemental motions. *Id.* § 250.40(3). A notice to seek the death penalty may be withdrawn at any time by written notice filed with the court and served upon the defendant. *Id.* § 250.40(4). After such a withdrawal, another notice of intent to seek the death penalty may not be refiled. *Id.*

¹⁷² *Id.* § 400.27(1). "Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought." *Id.*

¹⁷³ See N.Y. CRIM. PROC. LAW §§ 270.16(1), 270.20(f) (McKinney 1998). A challenge for cause to a prospective juror may be based on the fact that "the prospective juror entertains such conscientious opinions either against or in favor of such punishment [of death] as to preclude such juror from rendering an impartial verdict or from properly exercising the discretion conferred upon such juror." *Id.* § 270.20(1)(f).

¹⁷⁴ N.Y. CRIM. PROC. LAW § 400.27(2) (McKinney Supp. 1999). See also Weisberg, *supra* note 145, at 295.

¹⁷⁵ See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (permitting the

statute forbids the execution of a defendant found to be mentally retarded.¹⁷⁶ The only exception is the allowance of the death penalty to be imposed on an inmate found mentally retarded who murders another in prison.¹⁷⁷ New York's statute provides that upon a motion by the defendant, the Court will conduct a separate hearing to determine whether the defendant suffers from mental retardation.¹⁷⁸ The statute also provides a concise definition of mental retardation.¹⁷⁹ While New York is not the only state to ban the death penalty on those found to be mentally retarded, it holds the minority position.¹⁸⁰ Of the thirty-eight states that have active death penalty statutes, only twelve have banned such executions.¹⁸¹

The United States Supreme Court has established a minimum age limit of sixteen for a defendant to be eligible for the death penalty.¹⁸² Following the Court's concession, the majority of

execution of an individual found to be functioning at a seven year old level).

¹⁷⁶ N.Y. CRIM. PROC. LAW § 400.27(12) (McKinney Supp. 1999) (providing a mental retardation exception to New York's death penalty statute).

¹⁷⁷ *Id.* § 400.27(12)(d).

¹⁷⁸ *Id.* § 400.27(12)(a).

¹⁷⁹ Mental retardation is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen." *Id.* § 400.27(12)(e). See Weisberg, *supra* note 145, at 283 (praising the New York statute's definition and procedures for determining if a defendant is mentally retarded).

¹⁸⁰ See, e.g., TEX. CODE CRIM. P. ANN. art. 37.071(b) (West 1981 & Supp. 1998). Texas's death penalty statute fails to exclude those found to be mentally retarded. *Id.*

¹⁸¹ The 12 states in addition to the Federal Government that forbid the execution of defendants found to be mentally retarded are Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, Tennessee and Washington. Death Penalty Information Center, *Mental Retardation and the Death Penalty* (visited Nov. 16, 1999) <<http://www.essential.org/dpic/dpicmr.html>>. Nebraska recently became the 12th state to ban the execution of the mentally retarded. See NEB. REV. STAT. § 28-105.1 (1995 & Supp. 1998). Since the reinstatement of the death penalty in 1976, 34 defendants with mental retardation have been executed. Death Penalty Information Center (visited Nov. 16, 1999) <<http://www.essential.org/dpic/dpicmr.html>>.

¹⁸² 18 U.S.C. § 1111 (1994). See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding defendant must be 16 years old to be eligible for the death penalty); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding that the

states with capital punishment laws set the minimum age at something less than eighteen.¹⁸³ More justly, New York provides that the defendant must be at least eighteen years of age.¹⁸⁴

New York's statute provides that all indigent capital defendants receive the assistance of two attorneys, one of whom must be an experienced lead attorney.¹⁸⁵ One of the concerning aspects of capital punishment litigation is the high level of ineffective assistance of counsel.¹⁸⁶ This is due in large part to the lack of funding to capital defender organizations and individual lawyers. This situation is magnified in southern states that place caps on the fees that may be received for court-appointed lawyers in felony cases.¹⁸⁷ As a result, the representation afforded to capital defendants generally is substandard. New York, however, has established the Capital Defender's Office to provide quality legal services for those facing capital punishment.¹⁸⁸ The Office not only hired a

age of 15 was too young for a defendant to be found eligible for the death penalty).

¹⁸³ Death Penalty Information Center, *Minimum Death Penalty Ages by American Jurisdiction* (visited Nov. 16, 1999) <<http://www.essential.org/dpic/juvagem.html>>. Currently, only 16 states have a minimum age of 18. *Id.* Five states have chosen 17 and the remaining seventeen states have chosen 16 for the minimum age to be eligible for the death penalty. *Id.*

¹⁸⁴ See N.Y. PENAL LAW § 125.27(1)(b) (McKinney 1998 & Supp. 1999). See also *Symposium*, *supra* note 125, at 732 (discussing the federal and New York age limitation for the death penalty).

¹⁸⁵ N.Y. JUD. LAW § 35-b(2) (McKinney Supp. 1999). See also *id.* § 35-b(1) ("the defendant shall be entitled to the appointment of counsel and investigative, expert and such other reasonably necessary services").

¹⁸⁶ See Klein, *supra* note 125, at 27 (discussing the quality of counsel afforded defendants in capital cases).

¹⁸⁷ Klein, *supra* note 125, at 27-28. See also *Symposium*, *supra* note 125, at 749 (discussing quality of capital defense in southern states as compared to New York).

¹⁸⁸ N.Y. JUD. LAW § 35-b (McKinney Supp. 1999). See Klein, *supra* note 125, at 28-29 (discussing effective assistance of counsel through creation of Capital Defender Office). See also Zimring, *supra* note 145, at 317 (stating that "no element in the new system undermines the executioner's prospects as much as the extensive provisions for defense representation").

highly trained staff,¹⁸⁹ but a widely respected and experienced director.¹⁹⁰

While the Supreme Court has mandated appellate review of death sentences,¹⁹¹ the New York statute provides for automatic and direct review by the New York State Court of Appeals, the State's highest court.¹⁹² The New York State Court of Appeals is empowered to review the record and decide whether the sentence imposed was excessive or disproportionate to the crime committed, against the weight of the evidence, or influenced by "passion, prejudice, or any other arbitrary" factor including race.¹⁹³ In addition, the court must consider aggravating and mitigating factors established in the record and any similar cases the lower court analyzed in conducting its proportionality review.¹⁹⁴ The court also has the power to review unpreserved errors.¹⁹⁵

The New York statute's unique structure, providing for a mitigation hearing conducted by the defendant, is superior to other statutes because it promotes fairness and allows defendants to

¹⁸⁹ See *Symposium, supra* note 125, at 749-50 ("In New York we have had the Court of Appeals approve monies being given to assist counsel in a capital case for paralegal work, as well as for lower-level associates").

¹⁹⁰ See Daniel Wise, *State's Capital Defender with a Calling*, N.Y.L.J., Sept. 11, 1995, at 1 (discussing the qualifications of Kevin Doyle, the chief Capital Defender in New York). Mr. Doyle displayed his intense dedication by proclaiming to be "committed to the intense litigation of every capital case." *Id.* Mr. Doyle was chosen after a nationwide search of over 50 applicants. *Id.* Mr. Doyle's previous experience included a period of six years as an attorney at the Alabama Capital Representation Resource Center. *Id.* The Capital Defender Office has also produced work for New York's Legal Aid Society and other private attorneys. *Id.*

¹⁹¹ See *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (calling appellate review an "important constitutional safeguard").

¹⁹² N.Y. CRIM. PROC. LAW § 470.30(2) (McKinney Supp. 1999). "Whenever a sentence of death is imposed, the judgment and sentence shall be reviewed on the record by the court of appeals. Review by the court of appeals . . . may not be waived." *Id.* See also N.Y. CONST. art. VI, § 3(b) (1987) ("Appeals to the court of appeals may be taken . . . [i]n criminal cases, directly from a court of original jurisdiction where the judgment is of death").

¹⁹³ N.Y. CRIM. PROC. LAW § 470.30(3) (McKinney Supp. 1999).

¹⁹⁴ *Id.* § 470.30(4).

¹⁹⁵ *Id.* § 470.15.

present evidence that a death sentence is not warranted. The New York statute is also one of the most humane, disallowing imposition on the mentally retarded and those younger than eighteen. Furthermore, the enhanced procedural safeguards, especially the formation of the Capital Defender Office and direct appeal to the New York State Court of Appeals, makes New York's death penalty law not only one of the most comprehensive, but also one that significantly attempts to protect the defendant's rights.

III. RECENT AND POTENTIAL CONSTITUTIONAL CHALLENGES TO NEW YORK'S DEATH PENALTY STATUTE

As with all death penalty statutes, the New York statute is subject to constitutional challenge. A successful challenge to a particular provision of the death penalty statute, however, will most likely not result in a repeal of the entire law.¹⁹⁶ The unchallenged or unaffected remainder will remain in force.¹⁹⁷ In fact, such challenges have commenced. In December 1998, the New York State Court of Appeals struck down the plea-bargaining provision for capital crimes.¹⁹⁸ The court will be hearing several arguments presented by Darrel Harris, the first defendant to be sentenced to death in New York under the re-enacted legislation.¹⁹⁹ Future

¹⁹⁶ See, e.g., *Hynes v. Tomei*, 706 N.E.2d 1201 (N.Y. 1998) (striking down the plea-bargaining provision of the statute while leaving the remainder of the statute in effect). Although the New York State Court of Appeals struck down the plea-bargaining provision, it held that the legislature's desire to keep the law as a whole intact was evidenced in its creation of the severance clause. *Id.* at 1207-08.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ On June 6, 1998, Darrel Harris was the first person to be sentenced to death under New York State's re-enacted death penalty law. Joseph P. Fried, *Death Penalty for Ex-Guard in Murder of 3*, N.Y. TIMES, June 7, 1998, at A1. Harris was convicted of first degree murder for killing three people during an attempted robbery. *Id.* While his execution by lethal injection was scheduled for September 1998, Harris is presently appealing his sentence. See Robert D. McFadden, *Test of Death Penalty Law Quickly Follows Decision*, N.Y. TIMES, June 8, 1998, at B4 (discussing Harris' plans to appeal his death sentence). The New York State Court of Appeals has granted a motion for assignment of counsel for any appeals brought on behalf of Darrel Harris. *People v. Harris*, 703

challenges may test the strength of New York State's death penalty statute.²⁰⁰

N.E.2d 267 (N.Y. 1998).

²⁰⁰ This Note discusses two provisions of the New York statute, one of which was ruled unconstitutional and another that appears vulnerable to constitutional challenge. Other provisions, of course, may face constitutional scrutiny.

While it has not been used by a prosecutor yet, the 10th aggravating factor listed in New York's statute may be subject to constitutional scrutiny. N.Y. PENAL LAW § 125.27(1)(a)(x) (McKinney 1998 & Supp. 1999). The factor states, "the defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death." *Id.* Many state statutes that have as an aggravating factor crimes committed in a "cruel and wanton manner," or similar language, have been tested by the United States Supreme Court for vagueness and continue to be challenged. The New York provision appears on its face to be more narrowly defined than those found to be unconstitutionally vague. *Id.* The aggravating factor defines torture as "the intentional and depraved infliction of extreme physical pain." *Id.* The statute defines depraved as "the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain." *Id.* New York's provision defines "torture" and "depraved" in an attempt to narrow the provision's meaning. While the New York provision does not simply use the "especially heinous, atrocious or cruel" language that was common among provisions struck down in the past, it still may be deemed unconstitutionally vague due to the nature of such provisions. *See Klein, supra* note 125, at 23 ("Such language [§ 125.27(1)(a)(x)] lacks clarity and specificity"). The New York provision, however, has yet to be tested. The likelihood is that New York district attorneys will avoid seeking the death penalty under this aggravating factor to avoid potentially strong appellate debate on the issue.

An attempt was made to challenge New York's age requirement as vague since its language, "more than 18," may be interpreted to mean 19. *Today's News: Update*, N.Y.L.J., Sept. 7, 1999, at 1 (describing where a defendant argued the statute required a minimum age of 19 to be eligible for the death penalty). The judge ruled that the statute simply meant that a defendant could be charged with first-degree murder any time after his 18 birthday. *Id. See* N.Y. PENAL LAW § 125.27(1)(b) (McKinney 1998 & Supp. 1999) (providing that the defendant must be "more than eighteen years old at the time of the commission of the crime"). *See also* Salvatore J. Modica, *New York's Death Penalty: The Age Requirement*, 13 ST. JOHN'S J. LEGAL COMMENT. 585 (1999) (discussing the legislative intent behind the language of the age requirement).

A. *Plea-Bargaining Provision*

New York amended its statute in 1995 enabling a defendant charged with first-degree murder to plead guilty in exchange for a lesser sentence than death.²⁰¹ The constitutional dilemma surrounding a plea-bargaining provision is that it gives prosecutors ammunition to use against defendants potentially facing a death sentence.²⁰² The defendant on trial for first-degree murder risks a potential death sentence. The risk of death thus can be used to compel a defendant to plead guilty and waive his Sixth Amendment right to a trial by jury.²⁰³ The New York State Court of Appeals in 1998, following the reasoning of the Supreme Court decision in *United States v. Jackson*,²⁰⁴ struck down the plea-bargaining provision of the statute.²⁰⁵

²⁰¹ N.Y. CRIM. PROC. LAW § 220.10(5)(e) (McKinney 1995). The statute provides in pertinent part:

A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the Penal Law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-1 felony of murder in the first degree other than a sentence of life imprisonment without parole.

Id. A defendant can also change his plea from not guilty to guilty pursuant to section 220.10(5)(e). *Id.* § 220.30(3)(b)(vii). Prior to 1995, a defendant could not plead guilty to a first degree murder charge. *Id.* § 220.10(5)(e) (McKinney 1980) (amended 1995).

²⁰² See *Symposium, supra* note 125, at 722-23 (arguing that such a provision puts an "unconstitutional burden" on the defendant).

²⁰³ The United States Constitution provides that all criminal defendants have "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. See Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York's Death Penalty*, 4 J.L. & POL'Y 161 (1995) (stating that it can "undoubtedly be argued that the new statute impermissibly burdens the guarantee against compelled self-incrimination and the right to trial by jury that are contained in both the New York and Federal Constitutions").

²⁰⁴ 390 U.S. 570 (1968).

²⁰⁵ *Hynes v. Tomei*, 706 N.E.2d 1201 (N.Y. 1998).

In 1968, the Supreme Court in *United States v. Jackson*,²⁰⁶ reviewing a similar provision stated that, “[t]he inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.”²⁰⁷ While acknowledging the necessity of plea-bargaining in the criminal justice system,²⁰⁸ the Court held that such a provision penalizes a defendant for pleading not guilty and, thus is unconstitutional.²⁰⁹ The Court then concluded that the unconstitutionality of an aspect of a statute does not always defeat the constitutionality of the entire statute.²¹⁰

On December 22, 1998, the New York State Court of Appeals, following this reasoning, found the plea-bargaining provision unconstitutional.²¹¹ “[U]nder the New York statute, only those defendants who exercise the Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial put themselves at risk of death.”²¹² The New York State Court of Appeals, while upholding the goals of plea-bargaining, ruled that

²⁰⁶ 390 U.S. 570 (1968).

²⁰⁷ *Jackson*, 390 U.S. at 581. “If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.” *Id.*

²⁰⁸ “The power of a court to accept a plea of guilty is traditional and fundamental. Its existence is necessary for the practical administration of the criminal law.” *Id.* at 584 (quoting *United States v. Willis*, 75 F. Supp. 628, 630 (D.D.C. 1948)).

²⁰⁹ “It is established that due process forbids convicting a defendant on the basis of a coerced guilty plea.” *Id.* at 582 n.20. Such actions “needlessly chill the exercise of basic constitutional rights.” *Id.* at 582.

²¹⁰ *Id.* at 585.

²¹¹ *Hynes v. Tomei*, 706 N.E.2d 1201, 1209 (N.Y. 1998) (ruling sections 220.10(5)(e) and 220.30(3)(b)(vii) of the New York death penalty statute unconstitutional). See also *New York State Constitutional Decisions: 1998 Compilation Right to Trial by Jury*, 15 *TOURO L. REV.* 1324 (1999) (discussing the New York State Court of Appeals striking down the plea bargaining provision in *Hynes*).

²¹² *Hynes*, 706 N.E.2d at 1205. See U.S. CONST. amend. V (providing that no person “shall be compelled in any criminal case to be a witness against himself”); U.S. CONST. amend. VI (providing criminal defendants the right to a trial by jury).

a defendant could not plead guilty to first-degree murder during the period of time that a notice of intent to seek the death penalty was pending.²¹³ In the most significant part of the ruling, the court considered whether the plea-bargaining provisions were severable.²¹⁴ The court examined the legislative intent, holding that the goal behind New York's death penalty law was evident from its severability clause and that its main purpose was to provide for capital punishment.²¹⁵ Thus, the New York State Court of Appeals ruled that, while the plea-bargaining provisions were indeed unconstitutional, they were severable, and the remaining portions of the statute would remain intact.²¹⁶

B. Prosecutorial Discretion

The New York statute lacks guidelines regarding prosecutorial discretion, leaving prosecuting attorneys to decide whether to invoke the death penalty in their particular jurisdictions.²¹⁷ Thus,

²¹³ *Hynes*, 706 N.E.2d at 1208-09.

²¹⁴ *Id.* at 1207-08.

²¹⁵ *Id.* at 1208.

[I]t is clear from the face of the statute before us that the very purpose of the Legislature and Governor in enacting the statute was to provide for capital punishment in New York. The statute's severability clause indicates that the lawmakers would not have wanted the entire statute to fail if the particular provisions regarding pleas were declared unconstitutional.

...

Their removal would not affect the classification of capital offenses, or the conduct of the trial or penalty phase of capital cases.

Id.

²¹⁶ *Id.*

²¹⁷ No provision providing for prosecutorial discretion, other than the eligibility requirements of section 125.27, exist in New York's death penalty statute. See Jonathan DeMay, Note, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L. J. 767 (1999) (arguing for the imposition of controls over prosecutorial discretion); John M. Shields, *Constitutional Challenges to New York State's Death Penalty Statute*, 25 FORDHAM URB. L. J. 255, 262-66 (1998) (discussing unfettered discretion given to prosecutors leading to arbitrary application of death penalty); Hancock et al., *supra* note 125, at 1563-64 (discussing impact of unlimited

there is a strong argument that the statute will and has been applied in an arbitrary and discriminatory manner.²¹⁸ Prosecutors in different jurisdictions and locations hold different beliefs regarding the use of the death penalty.²¹⁹ The lack of standards in the power to seek the death penalty may lead to arbitrary imposition, which would directly conflict with the *Furman* and *Gregg* mandates.²²⁰ The result may be different sentences for similarly situated defendants in different jurisdictions, depending on the individual beliefs of each prosecuting attorney.²²¹ In fact, lack of uniformity already is apparent.²²² Not only does there appear to be a disparity between prosecutors in upstate and downstate New York in seeking the death penalty,²²³ but the disparity is evident

prosecutorial discretion as based upon individual prosecutors' beliefs); Klein, *supra* note 125, at 19-20 (discussing how the lack of prosecutorial discretion causes an inconsistency with the *Furman* and *Gregg* mandates).

²¹⁸ See *People v. Harris*, 675 N.Y.S.2d 743 (Sup. Ct. 1998) (denying Harris' motion challenging New York's death penalty statute for failing to provide prosecutors guidelines for selecting defendants for the death penalty).

²¹⁹ See Klein, *supra* note 125, at 19 (discussing different district attorneys' beliefs regarding the death penalty). The District Attorney of Bronx County, Robert T. Johnson, has often stated that he will not seek the death penalty no matter what the circumstance. See Klein, *supra* note 125, at 19. On the other hand, District Attorney Jeane Pirro of Westchester County favors the death penalty. See Klein, *supra* note 125, at 19-20.

²²⁰ See Klein, *supra* note 125, at 20 ("[B]ecause of the geographic disparity, there might very well be a strong argument made that the New York statute does not have the kind of consistency in the application of the death penalty that was mandated in *Furman* and *Gregg*.").

²²¹ See Ford, *supra* note 128, at 274-78 (discussing prosecutors' different beliefs in regards to the death penalty).

²²² See *Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997) (holding that the Governor has the discretionary authority to supersede a district attorney in a particular matter). Governor Pataki removed District Attorney Johnson from a capital eligible case because of his refusal to seek the death penalty. See James Dao, *The Governor: District Attorney Wouldn't Move, Pataki Aides Say, So He Was Moved*, N.Y. TIMES, Mar. 22, 1996, at B2 (discussing District Attorney Johnson's unwillingness to seek the death penalty and Governor Pataki's response).

²²³ See Daniel Wise, *Prosecutors Show Caution Seeking Capital Sentences*, N.Y.L.J., Sept. 13, 1999, at 1 (discussing the disparity between upstate and downstate prosecutors in seeking the death penalty in capital eligible cases).

even between prosecutors in the five boroughs of New York City.²²⁴

Among the appeals that Darrel Harris is likely to bring before the New York State Court of Appeals, an argument based on lack of prosecutorial guidance in seeking the death penalty is foreseeable, considering the level of opposition to the lack of guidelines. While the lower court rejected Harris' challenge, there are strong arguments to support a challenge to the lack of prosecutorial guidelines.²²⁵ It is possible, however, that such disparities have been and will continue to be tolerated.²²⁶ The fact is, once a defendant is eligible for capital punishment, it is difficult to determine the precise reasons a district attorney seeks the death penalty.²²⁷

CONCLUSION

The death penalty is a constantly debated topic in our society. From the morality of the punishment to its procedural implementation, the United States Supreme Court has rendered countless decisions in an attempt to conform the death penalty to the United

Upstate prosecutors are seeking the death penalty at a much higher rate than those from New York City. *Id.* While many reasons exist to explain this disparity, the reluctance of District Attorneys in New York, Bronx, and Nassau Counties to consider the death penalty, might be one explanation. *Id.*

²²⁴ See *supra* note 219 (discussing the different beliefs of district attorneys within New York City).

²²⁵ See *People v. Harris*, 675 N.Y.S.2d 743 (Sup. Ct. 1998) (denying Harris' motion that challenged the New York death penalty statute's lack of prosecutorial guidelines in choosing who will receive the death penalty). See also *New York State Constitutional Decisions: 1998 Compilation Separation of Powers*, 15 *TOURO L. REV.* 1381 (1999) (reviewing the Court's decision on Harris' motion).

²²⁶ See *Harris*, 675 N.Y.S.2d at 744. In denying Harris' motion challenging the lack of prosecutorial discretion, the court held that "[t]here is no basis for this claim. The Legislature is not required to set such standards. . . . It is well settled that prosecutors are given wide latitude to charge offenses under the law. Such decisions are generally beyond judicial review." *Id.*

²²⁷ See *Symposium*, *supra* note 125, at 742 (stating that it is unlikely "that a defendant is going to have the ability to go in behind the closed door of the decision-making process to determine what went into that prosecutor's mind in determining whether to seek the death penalty or not").

States Constitution, specifically the Eighth and Fourteenth Amendments. While *Gregg* declared the death penalty constitutional, two requirements must be met before a state's capital punishment statute can pass constitutional scrutiny: guided discretion and individualized sentencing. In addition, several other factors shape the way a state legislature can mold death penalty statutes. While the Supreme Court has not ruled on its preference for a particular scheme, this Note has illustrated that the structure adopted by New York ensures the highest degree of equality and fairness for capital defendants.

The New York death penalty statute does not simply meet the constitutional threshold established by the United States Supreme Court but rises above the Court's mandates. Its unique structure and ability to strike a balance between the inherently contradictory constitutional requirements of guided discretion and individualized sentencing allows New York to impose the penalty of death evenhandedly. Moreover, the statute provides for enhanced procedural safeguards neither required by the Supreme Court nor adopted by the majority of the states with death penalty statutes. This combination makes New York's death penalty law statutorily superior to the capital punishment laws of other states.

