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Colloquy: Juries and the Death Penalty

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JURIES AND THE DEATH PENALTY

Patrick E. Higginbotham*

WE HAVE PRIZED the role of the jury in this country's administration of its criminal laws. Paeans to juries are the common stuff of luncheon speeches from law day fetes to civic associations. Assured by the text of the Constitution as it left the Philadelphia Convention¹ and again in the Bill of Rights,² trial by jury is so much a part of our legal culture that administering our criminal law system without it is unthinkable. This commitment to the jury becomes less sure, however, when we shift from the determination of guilt or innocence to the determination of the sentence. First, sentencing is not in the exclusive province of juries in this country. Indeed the entire federal court system and many state court systems ask judges, not juries, to prescribe punishment. Second, the vision of the jury as a buffer between the state and

* Judge, United States Court of Appeals for the Fifth Circuit.
1. U.S. Const. art. III, § 2, cl. 3.
2. U.S. Const. amend. IV.
the accused becomes cloudy in sentencing. When the question is whether a jury that has convicted should also be allowed to impose the sentence, concerns over competence, bias, and motive (vengeance) arise.

In this essay, I examine generally the role of the jury in sentencing and consider some concerns over its role in capital sentencing. This passage will include a review of the tension in recent capital cases that results from reaching for the goal of objective symmetrical results by limiting jury discretion in order to reduce arbitrariness while simultaneously insisting that the jury tailor its sentence by taking into account the individual circumstances of each accused. Throughout, I will bear in mind the limits and values of the jury as an institution. This will require a brief review of the evolving constitutional law of capital punishment from the opinions of the Supreme Court of the United States in *Furman v. Georgia* to its most recent struggle with its seemingly conflicting goals in *Walton v. Arizona*. I will look at the Court's decisions regarding the role of the jury in such cases as *Spaziano v. Florida*, which reviewed Florida's use of judges and juries in the imposition of capital sentences, and *Cabana v. Bullock*, which allowed an appellate court to make the significant finding of whether a defendant in a felony murder case had the intent to kill required by *Enmund v. Florida*. Finally, I will return to *Walton* and the Court's review of Arizona's sentencing scheme, under which a judge would determine the existence of aggravating and mitigating factors and be required to impose a death sentence under certain findings.

In this country, the history of the death penalty and the history of juries are entangled. This should not be a surprise. The choice between a sentence of life or death is uniquely laden with expressions of anger and retribution and is freighted with goals of general and specific deterrence. By its nature, it is a decision that we instinctively believe is best made by a group of citizens, because a group better represents community values and because responsibility for such a decision is best shared. Equally, the ulti-

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3. 408 U.S. 238 (1972) (per curiam).
7. 458 U.S. 782, 797-98 (1986).
mate call is visceral. The decision must occur past the point to which legalistic reasoning can carry; it necessarily reflects a gut-level hunch as to what is just. The collective lay view of the jury, then, is understandably attractive. By nature, the jury's decision is inscrutable. Indeed, the jury is the blackbox of the judicial system. Thus, responding to perceptions that the death penalty is imposed in a capricious and irrational manner requires an inquiry such as this to focus on the jury. The jury shapes the debate about reform, because in the final analysis the nature of the jury's decision making cannot be changed.

Although the story begins much earlier than this, my starting point is McGautha v. California\(^9\) and the Court's abrupt about-face thirteen months later in Furman v. Georgia,\(^10\) but first a brief excursion into history.

I

Although several scholars have explored the subject, the origins of the jury remain obscure. Judge Arnold\(^11\) has written extensively on the history of the jury.\(^12\) Judge Arnold has observed that "[w]e do not even know where the jury came from."\(^13\) While that statement was made regarding the origins of the civil jury, it is equally true of the jury in criminal cases. He explains that the jury "had its origin in the need of the central royal government of England to know things . . . ; the jury was, in its inception, . . . an inquest, an inquiry, an effort by royal officials to gather together a certain number of people from the neighborhood . . . in an effort to discover the answer to questions."\(^14\) The evolution of the jury in its modern form is itself a fascinating story, but that is beyond today's compass. Rather, the relevant inquiry here is the "kind of world [that] allowed non-professionals to have this much

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11. The Honorable Morris S. Arnold, United States District Judge for the Western District of Arkansas, earlier served as Professor of Law and History, Associate Dean, and Vice President of the University of Pennsylvania. A. BROWNSON, JUDICIAL STAFF DIRECTORY 587-88 (1991).
14. Id.
power and authority.” Judge Arnold, in writing about the civil jury, pointed out that law in the early stages of the jury's development was seen as a “discoverable, and palpable fact, . . . any moral person could do it.” It is no coincidence, Judge Arnold has observed, that it was only as we experienced the “professionalization” of law that limits on the civil jury were introduced. It is similarly no coincidence that the doctrine of stare decisis and case law development by the medium of the written opinion did not take hold until this emergence of law as a distinct concern of professionals—unknowable by lay persons. Forrest McDonald succinctly put the British and American experience:

Having a voice, through representatives, in the law-making process was not the only right of Englishmen in regard to government, nor was it even the most important: the genuinely crucial right was that of trial by jury. For in the absence of bureaucratic administrative machinery, juries were the dispensers of justice, both civil and criminal. It was widely believed, though it was not historically true, that trial by jury had existed in Britain “time out of mind,” as Blackstone put it, and that it was “certain . . . that they were in use among the earliest Saxon colonies.” For a long period, however, juries were subordinate to judges, who had the power to punish and imprison jurors for handing down verdicts contrary to law or to the judges' reading of the evidence. The Bushell case, in 1670, effectively terminated that power, and for the better part of ninety years English juries ruled with impunity both as to law and as to fact. Then, after William Murray, the Earl of Mansfield, became Lord Chief Justice in 1756, the English courts began to employ an assortment of devices—special pleading, special verdicts, compulsory nonsuits, instructions in law and evidence to juries, and the setting aside of verdicts for improper procedures or decisions that were contrary to law or to the evidence—to curtail the powers of juries.

In America such devices were largely unused or ineffective, and juries exercised all but absolute power on a case-by-case basis. In an everyday sense, juries were the government, and it was upon them that the safety of all rights to liberty and to property depended. *Juris dictio*: They spoke the law, finding its source in nature and in principles of natural justice and disregarding, if they saw fit to do so, the instructions of the judges as to what the law was and, for that matter, even the plain language of an

15. *Id.* at 13.
16. *Id.*
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act of Parliament or of a colonial or state legislative enactment. Moreover, after 1776 Americans repeatedly denounced "the new-fangled doctrine of lord Mansfield," whose "habit of controlling juries does not accord with the free institutions of this country."\(^{17}\)

It is significant that control over jury decisions in criminal cases did not parallel the civil experience. The idea persisted that lay persons are to determine guilt or innocence by the return of a general verdict with no obligation to explain. This persistence reflects a consensus that there is a larger role for the lay view of the criminal law than for the civil side, that moral culpability remains within the domain of everyone’s law. This is a retention of the notion that at least this "law" is a knowable and discoverable fact.

The greater degree of discretion retained by juries in criminal cases, as contrasted with civil cases, is animated by a second but closely related force—the vision of the jury interposed as a buffer between the government and an accused. This role of interposition has contributed powerfully to the willingness to extend greater freedom to juries in criminal cases. Despite a persistent debate over its propriety, juries retain a role as nullifier of government policy.

The cross-examining devices of the special verdict were not imposed upon the criminal jury's deliberative process.\(^{18}\) To the contrary, courts resist special verdicts in criminal cases and allow interrogatory submissions only in limited circumstances. Sentences in death cases have proven to be one of those exceptions.

As I have elsewhere explained, blackbox decisions are uniquely the province of the jury.\(^{19}\) While certain decisions must be made, yea or nay, the choice is not easily defended by rational exposition. To the contrary, the decisions can be no more than the collective hunch of the jury. This is the soul of decision making by juries, and it is inevitably discretionary in the sense that it is beyond the reach of jury instructions and other such devices designed to restrain or guide the jury’s discretion. These decisions are by necessity blackbox calls. The only check upon this core power of irreducible discretion is the jury’s representative charac-

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ter. By drawing persons from the populace and vesting them with powers over the liberty of others and maintaining their anonymity, we draw upon the jury's ability to mirror the community's values and attitudes. It necessarily follows that the assurance of a right to a jury trial is linked to vicinage—where the trial will occur. It is then no happenstance that the first assurance of trial by jury in criminal cases appeared in article III of the Constitution.20

Section 2 of article III provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed."21 Professor Amar has argued powerfully that the structure of article III was heavily influenced by pragmatic concerns of geography.22 The concern carried into the efforts to adopt the Bill of Rights. On June 8, 1789, Congressman James Madison addressed the House of Representatives:

I think it will be proper, with respect to the judiciary powers, to satisfy the public mind on those points which I have mentioned. Great inconvenience has been apprehended to suitors from the distance they would be dragged to obtain justice in the Supreme Court of the United States, upon an appeal on an action for a small debt. To remedy this, declare that no appeal shall be made unless the matter in controversy amounts to a particular sum; this, with the regulations respecting jury trials in criminal cases, and suits at common law, it is to be hoped, will quiet and reconcile the minds of the people to that part of the Constitution.23

We tend to forget these concerns. A look at the country in its early years may be helpful. At the time of Marbury v. Madison,24 "[t]he huge size of the country meant that few Americans travel[ed] very far very often."25 A trip of fifty miles was rare. The young country's geographical size was unique among nations, with a population stretching 1200 miles from north to south along the Atlantic coast and two hundred miles inland. Yet, from this thin strip along the Atlantic to the Mississippi lay land virtually

20. U.S. Const. art. III.
21. Id. art. III, § 2.
24. 5 U.S. (1 Cranch) 137 (1803).
uncharted. In 1790, the population center was twenty-five miles east of Baltimore, and not more than ten percent of the population lived in anything that could be called a city or a town. At the time of the Philadelphia Convention, only 5.4% of the population lived in a municipality of 2500 people or more, and ninety percent of white American men were farmers. The population was relatively homogeneous, with over seventy-five percent of the population of British and Irish stock in a country overwhelmingly Protestant. When the Constitution was written, America was seen abroad as a place too large to be governed as a unit.26

It is not surprising then that the writers of the Constitution saw trial by jury as important to local control over critical decisions of government. Article III's grant of original jurisdiction to the Supreme Court over all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party describe disputes centered in the nation's capital.27 The framers left to Congress, the representative branch, the power to allocate other places for dispute resolution. But, with the criminal trial, the framers went farther, insisting on local justice. With this preface, I return to my beginning point and McGautha v. California.28

II

McGautha and Wilkinson robbed a market owned by Mrs. Pon Lock of approximately three hundred dollars. A few hours later they robbed another shop. During the second robbery, one of the two struck Mrs. Smetana on the head, and the other shot Mr. Smetana. A California jury convicted both of armed robbery and first degree murder. A penalty trial followed, and the jury sentenced Wilkinson to life imprisonment and McGautha to death. The trial judge instructed the jury to consider all the evidence of the crime and the surrounding events, along with any evidence in mitigation or aggravation.29 The state trial judge then advised the jury that “you are entirely free to act according to your own judgment, conscience, and absolute discretion.”30 He continued, explaining that “the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather commits the

26. Id. at 14-17.
30. Id. at 189-90.
whole matter . . . to the judgment, conscience, and absolute discretion of the jury." The Supreme Court of California affirmed, rejecting the defendant's contention that standardless jury sentencing is unconstitutional.

Meanwhile, a similar case arose in Ohio. Crampton was an Ohio resident who was convicted of murdering his wife and was sentenced to death by an Ohio jury that had received an instruction similar to that given in McGautha. The Ohio trial judge gave the jury the standard instruction regarding its verdict: "[Y]ou must not be influenced by any consideration of sympathy or prejudice . . . ." As for the jury's choice between a sentence of life and a sentence of death, the judge gave only one specific instruction: "If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life." The Ohio courts, in accordance with the California courts, affirmed the sentence and rejected Crampton's argument that the absence of standards to guide the jury's discretion on punishment is unconstitutional. Ohio and California thus joined every jurisdiction that had then considered the issue, which included four federal circuits and fourteen states.

The Supreme Court of the United States granted certiorari in both the California case and the Ohio case and affirmed the California and Ohio Supreme Court decisions. In an opinion joined by four other justices, Justice Harlan rejected the argument that unbridled jury discretion is unconstitutional. Justice Black concurred in a separate opinion but gave the sixth vote to the rejection of the unbridled discretion argument. Justice Brennan, joined by Justices Douglas and Marshall, dissented, specifically insisting that such submissions denied petitioners due process.

Justice Harlan first summarized "the salient features of the history of capital punishment for homicides," arguing that efforts "to identify before the fact" homicides for which a person should

31. Id. at 190.
32. Id. at 194-95.
33. Id. at 194.
34. Id.
35. See id. at 196.
36. Id. at 207.
37. Id. at 226 (Black, J., concurring).
38. Id. at 248-52 (Brennan, J., dissenting).
be put to death had failed.\textsuperscript{39} He pointed out that legislatures had responded to opposition to mandatory death sentences for homicides by creating degrees of murder, such as Pennsylvania's effort in 1794. This proved largely unsuccessful. The common experience was that juries would take matters into their own hands and refuse to convict when they thought that death was inappropriate. State legislatures, led by Tennessee in 1838, responded to this jury nullification by explicitly granting juries the discretion they were in fact already exercising.\textsuperscript{40} So it continued. As late as 1968, holding that venirepersons with scruples against the death penalty could not automatically be excluded from jury service, the Supreme Court continued to affirm this role of the jury.\textsuperscript{41} This accent in death cases upon the attitudes brought to the jury room had its urgency in the core power of the sentencing jury.

In \textit{McGautha}, Justice Harlan stressed that the Court's holding rested on the then-accepted wisdom that juries "do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."\textsuperscript{42} The Court then confronted the argument that the discretion of juries must be directed:

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.\textsuperscript{43}

The Court's decision in \textit{McGautha} was not only in accord with every state court of last resort and every federal appellate court to have addressed the issue but also was supported by the Model Penal Code\textsuperscript{44} as well as a British Royal Commission on Capital Punishment.\textsuperscript{45} The matter seemed settled. But on June 29 of the fol-

\begin{itemize}
\item \textsuperscript{39} Id. at 197.
\item \textsuperscript{40} Id. at 200.
\item \textsuperscript{41} See Witherspoon v. Illinois, 391 U.S. 510, 521-22 (1968).
\item \textsuperscript{42} McGautha, 402 U.S. at 202 (quoting Witherspoon, 391 U.S. at 519).
\item \textsuperscript{43} Id. at 204 (emphasis added).
\item \textsuperscript{44} See \textsc{Model Penal Code} § 201.6 comment 3 (Tent. Draft No. 9, 1959).
\item \textsuperscript{45} \textsc{Royal Comm'n on Capital Punishment, Report, 1953, Cmnd. Ser., No. 8932, ¶ 553(b).}
\end{itemize}
The following year, the Supreme Court in one swoop invalidated death penalty laws in thirty-nine states as well as the federal death penalty law and reversed more than six hundred death sentences. The five-to-four decision in *Furman v. Georgia* produced nine opinions. The per curiam opinion held that the imposition and carrying out of the death penalty in the cases before the Court constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments because of unbridled jury discretion. As a result, thirty-five states enacted new death penalty statutes, and in 1976 the Court upheld three guided-discretion systems. In *Gregg v. Georgia*, one of these three, *Furman* was read to require "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." As Justice Scalia recently summarized:

> Since the 1976 cases, we have routinely read *Furman* as standing for the proposition that "channelling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement," . . . and have insisted that states furnish the sentencer with "'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'"

In short, the Supreme Court in the five years following its decision in *McGautha* set sail in exactly the opposite direction.

The Court in *McGautha* solemnly explained that it was not humanly possible to develop standards for guiding juries' sentencing in capital cases. This confident pronouncement was short-lived. Nonetheless, I am persuaded that *McGautha*’s vision of the sentencing jury was sound and that the enterprise we have embarked upon—guided discretion of juries—is easily overdone, because it is at some point a charade. There is a point at which we must either accept the irreducible core of discretion inherent in the function of juries or confess that we do not want juries making the decision at all. In any event, ultimate outcomes aside, recogni-

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46. 408 U.S. 239 (1972).
47. *Id.* at 239-40.
49. *Id.* at 189 (Stewart, Powell & Stevens, JJ.) (plurality opinion).
tion of the jury function is a powerful informing force for the present enterprise—or should be. If, for example, as I argue, there is a level of discretion inherent in a jury decision, its ambit cannot be penetrated in an effort to solve perceived “arbitrary” decisions. Rather, further narrowing of discretion is best achieved by limiting the number of capital offenses as a matter of substantive definition. Before I turn to that question, it is necessary that I explain a second strand of the post-Furman effort to mitigate perceived arbitrary imposition of the death penalty.

This second strand, termed “counterdoctrine” by Justice Scalia, grew from the court’s treatment of mandatory sentencing schemes adopted in response to Furman’s rejection of unbridled jury discretion. These decisions, Woodson v. North Carolina and Roberts v. Louisiana, were perfect responses to Furman, but they failed because they were seen as not allowing sufficient consideration of “the character and record of the individual offender.”

Two years after Woodson and Roberts, this rejection of objective-offense-focused sentencing for individual “tailored” sentences was expanded in Lockett v. Ohio, where a plurality held that the sentencer may “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.” Lockett was sentenced to death by a judge applying an Ohio law that limited the factors to be considered in sentencing. The plurality opinion emphasized the virtues of individualized sentencing in general, concluding that it was essential in capital cases.

A tension inheres in the effort to control or limit decisions that are at their core difficult to explain beyond the visceral sense of their justness. Such efforts to control can skew the decision-making process. For instance, as to the Supreme Court’s capital-sentencing jurisprudence, it can be argued that the Court is insisting that a sentencer be given discretion to consider all mitigating evidence but not all aggravating evidence. That is, a jury has un-

51. See id. at 3061-64 (Scalia, J., concurring).
54. Woodson, 428 U.S. at 304 (emphasis added).
56. Id. at 604 (emphasis in original) (plurality opinion).
fettered discretion not to impose the death penalty, but its discretion to impose a death sentence must be guided. If this is the rationale, it has its own set of problems as Justice Scalia has explained.\textsuperscript{57} However, \textit{Furman} can be read to require states to narrow the classes of persons eligible for the death penalty. On any other reading of \textit{Furman}, it is difficult to quarrel with Justice White's observation that \textit{Lockett} is an "about-face" from \textit{Furman}.\textsuperscript{58} By insisting that a state specify the aggravating conduct that the prosecution must prove before the offense is raised to a capital crime, \textit{Furman} strikes for a more evenhanded sentencing. But once the state has done so, the resulting instruction to the jury at the penalty phase will look or at least will function very much like the instruction originally approved in \textit{McGautha}, even if hedged about with admonitions to consider all mitigating evidence.

Even so, the vision of states narrowing the range of offenses while furnishing required individualized sentencing is clouded by two difficulties. First, these narrowing factors may themselves be questions for the jury at the sentencing phase. However, submitting them to the jury works against \textit{Furman}'s concern that jury determination of "death eligibles" is so case specific and lacking in evenhandedness that it is unacceptably "arbitrary." Significantly, when the guiding factors are largely common sense relevancies, telling the jury to consider them is little more than ritual—not unimportant, but still ritual. Guided discretion may be preferred to unguided discretion, but it is discretion nonetheless. This oxymoronic approach is an inevitable by-product of \textit{Lockett}'s insistence on individualized sentencing; it is a natural offspring of \textit{Woodson}'s rejection of mandatory death sentences. The first response of states to mandatory death laws was not open acceptance of discretion, rather it was to introduce degrees of murder. This legal pretense led Justice Cardozo to observe:

What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given them directly and not in a mystifying cloud of words.\textsuperscript{59}

\textsuperscript{57} Walton, 110 S. Ct. at 3061-64 (Scalia, J., concurring).
\textsuperscript{58} Lockett, 438 U.S. at 622 (White, J., concurring in part and dissenting in part).
\textsuperscript{59} B. CARDozo, What Medicine Can Do For Law, in Law and Literature at 70,
Second, it not always easy to sort the elements of the sentence from elements defining the offense, resolution of which by the jury is secured by the sixth amendment. We should not underestimate this difficulty. To the contrary, it is not surprising that those not familiar with the "twin" objectives established in Woodson, Lockett, and Furman may be puzzled by the Court's understanding of the scope of the constitutionally secured right to trial by jury in these cases. I turn then to the interplay of article III section 2, the sixth amendment, and state efforts to guide jury decision.

III

In Duncan v. Louisiana, the Supreme Court concluded that the sixth amendment assurance of trial by jury is "basic in our system of jurisprudence," and is protected from state action by the fourteenth amendment. Thirteen years after Duncan, the Supreme Court concluded that "[t]he 'embarrassment, expense and ordeal' . . . faced by a defendant at the penalty phase of a . . . capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial," and that the double-jeopardy clause bars multiple efforts to persuade that the death penalty should be imposed. The Court has also repeatedly recognized the uniqueness of the death penalty. Nonetheless, albeit by a divided vote, the Court has rejected contentions that due process and the sixth amendment secure a defendant's right to be sentenced by a jury. Spaziano v. Florida dealt with Florida's use of an advisory jury. Spaziano was convicted by a jury of first degree murder. The jury then recommended life imprisonment. Under Florida law, "[t]he trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, 'notwithstanding the recommendation of a majority of the jury, is to enter a sentence of life imprisonment or death.' Spaziano did not argue that Duncan v. Louisiana secured his right to have a jury determine his sentence. Rather, he argued that the judge's override of the jury recommendation of life imprisonment denied

100 (1931), quoted in McGautha, 402 U.S. at 199.
60. 391 U.S. 145 (1968).
61. Id. at 149.
63. Id. at 446-47.
65. Id. at 451.
him due process, given the country's nearly unanimous recognition that juries are better equipped than judges to make these decisions. He pointed out that the primary functions of the death penalty are retribution and expression of community outrage, a function that places capital sentencing uniquely within the province of the jury. It follows, Spaziano argued, that the jury's recommendation should stand.  

Justice Blackmun's opinion for the Court responded that "the sentence in individual cases is not the sole or even the primary vehicle through which the community's voice can be expressed." At the same time, he conceded that thirty out of thirty-seven jurisdictions with death penalty statutes leave the decisions to the jury, and only three of the remaining seven allow judicial override. Justice Stevens pointed out that eighty-three times between 1972, when Florida created this procedure in response to Furman, and his writing in 1984, trial judges imposed death sentences following a jury recommendation of life imprisonment. Stevens argued that there is a constitutional right to a sentencing jury in capital cases. He reminded the Court, in words reminiscent of McGautha, that "in the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of what we called in Enmund the 'moral guilt' of the defendant."  

Broadly stated, Spaziano holds to the traditional dichotomy between the jury's role in sentencing and its role in determining guilt in capital cases. Elements of an offense must be submitted to the jury. On the other hand, factors that only enhance the punishment after a determination of guilt are for the sentencer, who need not necessarily be a jury. The conclusion of Spaziano that a state can leave sentencing to judges in capital cases yields a host of difficult problems. Many states responded to Furman's condemnation of arbitrary punishment by reducing the number of offenses punishable by death. This narrowing often took the form of inquiries and processes for sorting death-eligibles, as they came to be called, such as whether or not one or more statutorily defined aggravating factors were present. Spaziano complicates the traditional guilt-sentence dichotomy when this narrowing approach is

66. Id. at 461.
67. Id. at 462.
68. Id. at 463.
69. Id. at 467 (Stevens, J., concurring in part and dissenting in part).
70. Id. at 481 (Stevens, J., concurring in part and dissenting in part).
used, because it widens the choice of who decides eligibility for death to include trial judges, juries, and even appellate courts.

Accepting for the moment that the findings entailed by these Furman-induced processes need not be made by a jury, the extent to which these determinations can be made by someone other than the sentencer, whether judge or jury, is not answered easily. The Supreme Court's answer now seems to be that the states are not obliged to assign these tasks as a unit; but for now, I am not as interested in this conclusion as I am in the Court's rationale.

That story begins with Enmund v. Florida71 and leads to Cabana v. Bullock.72 In Enmund, the Court held that the eighth amendment forbids the death penalty for "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."73

In Cabana, the trial court was confronted with a Mississippi statute providing that "[t]he killing of a human being without the authority of law by any means or in any manner [is] capital murder."74 Mississippi law allowed a death sentence for felony murder even if the defendant did not intend to kill. The trial court in Cabana accordingly instructed the jury that it could convict Bullock for capital murder if it found that he had aided and abetted a robbery and killing.75 In federal habeas proceedings, the United States Court of Appeals for the Fifth Circuit vacated the death penalty, concluding that it could not be imposed under Enmund.76 The Supreme Court observed that "the jury may well have sentenced Bullock to death despite concluding that he had neither killed nor intended to kill."77 To the suggestion that the jury as the judge of moral culpability should decide if the defendant had the requisite disregard for human life, the Supreme Court replied that as long as an "appropriate tribunal" made the requisite findings, whether it be an appellate court or trial judge, the death sentence would stand.78 That is, the sentencing jury need not

73. 458 U.S. at 797.
75. Cabana, 474 U.S. at 380.
76. Id. at 381.
77. Id. at 384.
make that finding itself.

Justice Stevens's dissent was direct and brief. He observed that "the finding of moral culpability required by Enmund is but one part of a judgment that 'is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live.'"79 The majority had no answer.

The Court has in the Woodson-Lockett line of cases insisted that a defendant has a constitutional right to individualized sentencing—a right to present all mitigating evidence to the sentencer. While this makes sense, the jury should be told that its verdict of moral culpability may not rest on a level of culpability lower than the bare intent to kill—the floor of culpability under the eighth amendment. This proportionality ruling of Enmund requires that the sentencer focus upon the personal culpability of the defendant. The question is, after all, whether the defendant's personal participation was sufficient to trigger the requisite moral condemnation. To allow that determination to be made in the sterile environment of an appellate court raises problems both of due process and of faithfulness to Enmund itself. Cabana requires that a state make the finding at some point before execution, but if a jury is to decide the death question, it must also know the permissible limits. Why do we choose at this critical juncture to leave the jury "unguided"? We have after all a developed jurisprudence condemning efforts by a state to ease the jury's sense of its own responsibility in deciding the death question.80

The issue in Cabana reflects the pressure of the "twin objectives" of Furman and the Woodson-Lockett line of cases. The death-eligibility requirement of Enmund was constitutionally compelled; it was not just the state's choice. This only makes the problem more acute. On the one hand, we want to leave it to the jury to make the individualized and tailored judgment. On the other hand, we want to limit the jury's discretion. This ambivalence creates an incentive to withhold such death-eligible inquiries from juries, despite the undeniable force of the argument that these inquiries are integral to a jury's individualized and tailored sentencing tasks.

Whether to treat aggravating factors as a unit has also cre-

79. Id. at 408 (Stevens, J., concurring in part and dissenting in part) (quoting Spazi-ano v. Florida, 468 U.S. 447, 469 (1984)).
ated problems where an aggravating factor found by the jury is later found to be flawed. Where death-eligibles are defined by required findings of aggravating factors, a failure on appeal of a qualifier found by the jury will not necessarily upset the sentence. Justice Stevens, writing for the Court in Zant, explained that

statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

Under the Georgia system, an aggravating circumstance did not guide the exercise of the sentencing discretion beyond narrowing the class of persons eligible for the death penalty. Because one of the aggravating factors found was untainted, the Court was persuaded that the task of the sentencer had not been compromised.

In Clemons v. Mississippi, the Court faced the issue it expressly declined to reach in Zant—the effect of a failure of one aggravating condition where the sentencing system contemplates that the sentencer will weigh the aggravating and mitigating factors. Justice White, writing for a majority of five, declined to upset Clemons’s death sentence. Justice White first pointed out that the Supreme Court of Mississippi had, itself, concluded that the remaining aggravating factors outweighed mitigating evidence and that under Cabana, such findings by an appellate court did not offend the sixth amendment right to trial by jury. He pointed out that under Spaziano, no constitutional provision gave a defendant the right to a jury determination of the appropriateness of a capital sentence. Clemons argued that under Mississippi law, only the jury could impose a death sentence and he, therefore, had a liberty interest in the jury determination of sentence. Finding the case “analogous” to Cabana, the Court rejected the due process argument because “state law created no entitlement

82. Id. at 879 (emphasis in original).
84. Id. at 1444-47.
to have a jury make findings that an appellate court also could make. 85

The Court rejected the argument that appellate courts cannot weigh aggravating and mitigating circumstances, at least sufficiently to satisfy the eighth amendment requirement that the sentencing decision rest on the facts and circumstances of the defendant's background and crime. 86 Finally, the majority rejected Clemons's argument that the Supreme Court of Mississippi had not in fact engaged in a reweighing and concluded that in any event the Mississippi court was free to find, as it did, that any error was harmless. 87 Justice Blackmun's dissenting opinion disagreed sharply with the holding that the appellate court could itself reweigh aggravating and mitigating circumstances. Justice Blackmun argued:

If a jury's verdict rests in part upon a constitutionally impermissible aggravating factor, and the State's appellate court upholds the death sentence based upon its own reweighing of legitimate aggravating and mitigating circumstances, the appellate court, in any real sense, has not approved or affirmed the verdict of the jury. Rather, the reviewing court in that situation has assumed for itself the role of sentencer. 88

He argued that the Court was traveling far beyond its holding in Cabana. The Cabana Court's approval of appellate findings under Enmund was based on a summary judgment standard, accepting the evidence most favorable to defendant. Nothing in Cabana, the dissent urged, contemplated the appellate resolution of disputed facts. He concluded finally that "a capital defendant's right to present mitigating evidence cannot be fully realized if that evidence can be submitted only through the medium of a paper record." 89

IV

I have argued that a jury's decision between life and death ultimately rests on an irreducible core of discretion, that there are practical limits on the extent to which the jury's discretion can be "controlled." However, I also maintain that, in my experience, ju-

85. Id. at 1448.
86. Id. at 1448-49.
87. Id. at 1449-51.
88. Id. at 1456 (Blackmun, J., dissenting).
89. Id. at 1460 (Blackmun, J., dissenting).
ries are faithful to realistic instructions. Many of our legal rules operate on the necessary presumption that a jury follows a judge's instructions. So, what is my point? Instructions to juries, such as to consider all mitigating circumstances and weigh them against aggravating circumstances, are important as ritualistic reminders of the jury's responsibility, but I would not overload their mission.

I have also suggested that submitting to the jury questions intended to identify death eligibles may not be the preferred course. Indeed, the complexities they introduce in review of death sentences such as in *Cabana* demonstrates that they might best be made by the trial judge as threshold determinants to the submission of the ultimate question to the jury. In any event, we should submit the capital sentencing decision either to the judge or to the jury but not to both, and we should not permit it to be made independently by an appellate court.

The California Appellate Project filed an amicus curiae brief in *Boyde v. California*. That brief included a separate table reflecting the outcome of death cases in Alameda County, California, in which juries were given four alternative verdict forms. The brief identified nineteen such trials in Alameda County from 1983 to 1988. Of the fifteen cases in which a jury, under this form of submission, found that aggravating circumstances outweighed mitigating circumstances, seven resulted in death sentences. Thus, at least in the eight cases in which the jury found that aggravation outweighed mitigation, it nonetheless opted for life. That is, "in a substantial number of cases, juries find that aggravation outweighs mitigation but their reasoned moral response to the overall import of the evidence is that a life-without-parole sentence is appropriate." This was part of a larger argument, ultimately rejected by the Court, that a state requirement that death be imposed when aggravating circumstances outweighed mitigating circumstances was contrary to *Lockett v. Ohio*.

Interestingly, the court in *Boyde* emphasized the "commonsense understanding of the instructions." The *Boyde* Court shifted the standard of review of an ambiguous jury instruction to whether "there is a reasonable likelihood that the jury has applied

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93. *Boyde*, 110 S.Ct. at 1198.
the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.\textsuperscript{94} This treatment of an ambiguous jury instruction ultimately rests on a confidence in the jury's ability to avoid technical traps lurking in jury instructions. I agree, but I go farther. Finally, I suggest that the most effective means of guiding a jury rests with efforts to sequence its decisional process, such as by the method employed in \textit{Zant v Stephens},\textsuperscript{95} or narrowing the definition of capital murder.

\textsuperscript{94} Id.
\textsuperscript{95} 462 U.S. 862 (1983).