# GREGG v. GEORGIA

**SUPREME COURT OF THE UNITED STATES**
**428 U.S. 153**
**July 2, 1976**
**[7 to 2]**

**OPINION:** Justice Stewart/Powell/Stevens...The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.

...Troy Gregg was charged with committing armed robbery and murder...[T]he trial was in two stages, a guilt stage and a sentencing stage. The evidence at the guilt trial established that...Gregg and...Allen, while hitchhiking north in Florida, were picked up by Simmons and Moore. Their car broke down, but they continued north after Simmons purchased another vehicle with some of the cash he was carrying. While still in Florida, they picked up another hitchhiker, Weaver, who rode with them to Atlanta, where he was let out about 11 p.m. A short time later the four men interrupted their journey for a rest stop along the highway. The next morning the bodies of Simmons and Moore were discovered in a ditch nearby...

After reading about the shootings in an Atlanta newspaper, Weaver communicated with the Gwinnett County police and related information concerning the journey with the victims, including a description of the car. The next afternoon, Gregg and Allen, while in Simmons' car, were arrested in Asheville, N.C. In the search incident to the arrest a .25-caliber pistol, later shown to be that used to kill Simmons and Moore, was found in [Gregg's] pocket. After receiving the [Miranda warnings]

and signing a written waiver of his rights, [Gregg] signed a statement in which he admitted shooting, then robbing Simmons and Moore. He justified the slayings on grounds of self-defense. The next day,...Gregg and Allen were taken to the scene of the shootings. Upon arriving there, Allen recounted the events leading to the slayings. His version of these events was as follows: After Simmons and Moore left the car, Gregg stated that he intended to rob them. **Gregg then took his pistol in hand and positioned himself on the car to improve his aim. As Simmons and Moore came up an embankment toward the car, Gregg fired three shots and the two men fell near a ditch. Gregg, at close range, then fired a shot into the head of each. He robbed them of valuables and drove away with Allen...**

A police detective recounted the substance of Allen's statements about the slayings and indicated that directly after Allen had made these statements Gregg had admitted that Allen's account was accurate. Gregg testified in his own defense. He confirmed that Allen had made the statements described by the detective, but denied their truth or ever having admitted to their accuracy. He indicated that he had shot Simmons and Moore because of **fear and in self-defense**, testifying they had attacked Allen and him, one wielding a pipe and the other a knife...

The jury found Gregg guilty of <u>two counts of armed robbery</u> and <u>two counts of murder</u>.

At the penalty stage,...**the trial judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count**. The judge further charged the jury that in determining what sentence was appropriate the jury was **free to consider** the facts and circumstances, if any, presented by the parties in **<u>mitigation or aggravation</u>**.

Finally, **the judge instructed the jury that it "would not be authorized to consider imposing the penalty of death" unless it first found beyond a reasonable doubt <u>one</u> of these aggravating circumstances**:

> ...That...murder was committed while [Gregg] was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].
>
> ...That [Gregg] committed...murder for the purpose of receiving money and the automobile described in the indictment.
>
> ...The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they involved the depravity of the mind of the defendant.

Finding the **first and second** of these circumstances, the jury returned verdicts of death on each count. The Supreme Court of Georgia affirmed the convictions and...sentences...[and]...concluded that...the sentences...had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases. The death sentences imposed for armed robbery, however, were vacated on the grounds that the death penalty had rarely been imposed in Georgia for...[armed robbery]. **We granted...certiorari limited to [a] challenge to**

**the...death sentences...as "cruel and unusual" punishment...**

Just so you understand, the death penalty imposed for the armed robbery convictions was reversed by the Georgia Supreme Court. The death penalty imposed for the two murder convictions was affirmed by the Georgia Supreme Court.

The Georgia statute, **as amended after our decision in *Furman v. Georgia*[1],** retains the death penalty for six categories of crime: murder, kidnaping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking...[G]uilt or innocence is determined...either by a trial judge or a jury, in the first stage of a bifurcated trial...At the [pre-sentencing] hearing:

> "The judge or jury shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions ...or the absence of [same]...The judge or jury shall also hear argument by the defendant or his counsel and the prosecuting attorney...regarding the punishment to be imposed."

...The judge is also required to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [the] statutory aggravating circumstances which may be supported by the evidence...." The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. Before a convicted defendant may be sentenced to death, however, except in cases of treason or aircraft hijacking, the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable doubt **one of the 10** aggravating circumstances specified in the statute. The sentence of death may be imposed only if the jury (or judge) finds one of the statutory aggravating circumstances and then elects to impose that sentence. If the verdict is death, the jury or judge must specify the aggravating circumstance(s) found. **In jury cases, the trial judge is bound by the jury's recommended sentence**...

Provision is made for...review...of the appropriateness of imposing the sentence of death...The [Supreme Court of Georgia] is directed to...determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance..., and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

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[1]Case 8A-CUP-10 on this website.

If the court affirms a death sentence, it is required to include in its decision reference to similar cases that it has taken into consideration...The report...requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality of sentence. Included in the report are responses to detailed questions concerning the quality of the defendant's representation, whether race played a role in the trial, and, whether, in the trial court's judgment, there was any doubt about the defendant's guilt or the appropriateness of the sentence...Under its special review authority, the court may either affirm the death sentence or remand the case for re-sentencing. In cases in which the death sentence is affirmed there remains the possibility of executive clemency...

**[Gregg contends] that the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution...**

Until *Furman v. Georgia*, the Court never confronted squarely the fundamental claim that the punishment of death [is] **always**...cruel and unusual punishment in violation of the Constitution... Four Justices...held that capital punishment is not unconstitutional *per se;* two Justices...reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed.

So, **that** issue was not resolved in *Furman* **by a majority**, but **it is** resolved here...

**We now hold that the punishment of death does not invariably violate the Constitution...As Mr. Chief Justice Warren said,..."The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*[2]. Thus, an assessment of contemporary values concerning...[punishment] is relevant to the application of the Eighth Amendment...This assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude...**

**Our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop*. This means, at least, that the punishment not be "excessive."...First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.**

**Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power**...But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators. "Courts are not representative bodies...History teaches that the

[2]Case 8A-CUP-5 on this website.

independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And **a heavy burden rests on those who would attack the judgment of the representatives of the people**.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Furman.* (Burger, C.J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system, (Rehnquist, J., dissenting), is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." Caution is necessary lest this Court become "...the ultimate arbiter of the standards of criminal responsibility... throughout the country." A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience. *Furman* (Powell, J., dissenting).

In other words, once found unconstitutional, "contemporary standards" would not likely thereafter be manifested legislatively to revive a given punishment — it would take a constitutional amendment.

In the discussion to this point we have sought to identify the principles and considerations that guide a court in addressing an Eighth Amendment claim. We now consider specifically whether the sentence of death for the crime of murder is a per se violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question...

[ELL: The lengthy history, having been previously stated, is deleted here.]

**Capital punishment was accepted by the Framers**...The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested...The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman.* The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in...death...And...Congress..., in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. These recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily (i) by specifying the **factors to be weighed** and the **procedures to be followed** in deciding when to

impose a capital sentence, or (ii) by making the death penalty **mandatory** for specified crimes. **But all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people**. In the only statewide referendum occurring since *Furman...*, the people of California adopted a constitutional amendment that authorized capital punishment...

**The jury also is a significant and reliable objective index** of contemporary values because it is so directly involved. The Court has said that "one of the most important functions any jury can perform in making...a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system." *Witherspoon*...[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases...**At the close of 1974 at least 254 persons had been sentenced to death since *Furman,* and by the end of March 1976, more than 460 persons were subject to death sentences.**

...The Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. *Trop*. Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," *Furman v. Georgia* (Powell, J., dissenting), the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.

The death penalty is said to serve two principal social purposes: **retribution** and **deterrence** of capital crimes by prospective offenders.

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs...Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

...Attempts to evaluate the worth of the death penalty as a deterrent...[are] inconclusive...We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect...For many others, the death penalty undoubtedly is a significant deterrent...The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts...

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be

necessary in some cases is clearly wrong. Considerations of **federalism**, as well as **respect** for the ability of a legislature to evaluate, **in terms of its particular State**, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe...

**When a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime...We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.**

We now consider whether Georgia may impose the death penalty on the petitioner **in this case**...

The 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. As a general proposition these concerns are best 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...

In the wake of *Furman*, Georgia amended its capital punishment statute, but chose not to narrow the scope of its murder provisions. Thus, now as before *Furman*, in Georgia "a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." All persons convicted of murder "shall be punished by death or by imprisonment for life."

Georgia did act, however, to narrow the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. In addition, **the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, but it must find a statutory aggravating circumstance before recommending a sentence of death...**

No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (*e.g.,* his youth,

the extent of his cooperation with the police, his emotional state at the time of the crime). As a result, while some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application."

As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases...

On their face these procedures seem to satisfy the concerns of *Furman*...The petitioner contends, however, that the changes in the Georgia sentencing procedures are only cosmetic, that the arbitrariness and capriciousness condemned by *Furman* continue to exist in Georgia...

First,...[h]e notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor...

**Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.** *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant...The petitioner next argues that the requirements of *Furman* are not met...because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present...This contention misinterprets *Furman.* Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness...Finally, the Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." In performing its sentence-review function, the Georgia court has held that "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive."...

It is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously... Although armed robbery is a capital offense under Georgia law, the Georgia court concluded that the death sentences imposed in this case for that crime were "unusual in that they are rarely imposed for armed robbery. Thus, under the test provided by statute,...they must be considered to be excessive or disproportionate to the penalties imposed in similar cases." The court therefore vacated Gregg's death sentences for armed robbery and has followed a similar course in every other armed robbery death penalty case to come before it. The provision for appellate review in the Georgia capital-sentencing system serves as a check against the...arbitrary imposition of the death penalty...

(1) Death sentences for armed robbery are "unusual" because they are rarely imposed. (2) Therefore, the armed robbery charge was vacated and "has been vacated in **every other** armed robbery death penalty case" since. Q: Does a death sentence for armed robbery in Georgia ever again have a chance to become "**usual**"?

The concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here...[Affirmed.]...

Repeating, the death sentences imposed for the murder convictions were affirmed.

**CONCURRENCE:** JUSTICE WHITE/CHIEF JUSTICE BURGER/REHNQUIST...[Not Provided.]

**CONCURRENCE:** JUSTICE BLACKMUN...[Not Provided.]

**DISSENT:** JUSTICE BRENNAN...The punishment of death...**under all circumstances is "cruel and unusual"...**

**DISSENT:** Justice Marshall...In *Furman* I concluded that the death penalty is constitutionally invalid for two reasons. First, the death penalty is excessive. And second, the American people, fully informed as to the purposes of the death penalty and its liabilities, would **in my view** reject it as morally unacceptable.

Since the decision in *Furman*, the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes, and Congress has enacted a law providing the death penalty for air piracy resulting in death. I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people. But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an ***informed* citizenry**, then even the enactment of new death statutes cannot be viewed as conclusive...A recent study, conducted after the enactment of the post-*Furman* statutes, has confirmed that...the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty...

Isn't this jurisprudence out of control? In spite of legislation based upon representative government, Justice Marshall has the audacity to assume that "if" the citizens were only informed, he knows they (as opposed to their representatives) would agree with him. He's not even looking for a consensus. He bases his decision, not on an interpretation of the Constitution, but, rather on what he thinks is "right," regardless of what the Constitution says and with no consideration for democracy.