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S.B. 1: Ohio Enacts Death Penalty Statute

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LEGISLATION NOTES

S.B. 1: OHIO ENACTS DEATH PENALTY STATUTE

I. INTRODUCTION

> The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.[1]

With this mandate in mind, the Ohio General Assembly returned capital punishment to the state on October 19, 1981 with the signing of Senate Bill 1 by Governor Rhodes.[2] The bill represents Ohio's third attempt to enact a constitutionally permissible death penalty since the

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1. Furman v. Georgia, 408 U.S. 238, 256 (1972) (Douglas, J., concurring). The cruel and unusual punishment clause of the eighth amendment is applicable to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962).

The dissenters in *Furman* attacked an increase in the judicial role in eighth amendment cases. Justice Rehnquist stated,

> [t]he most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court.

408 U.S. at 467 (Rehnquist, J., dissenting).

Likewise, Chief Justice Burger noted,

> [t]he case against capital punishment is not the product of legal dialectic, but rests primarily on factual claims, the truth of which cannot be tested by conventional judicial processes. . . . Legislatures will have the opportunity to make a more penetrating study of these claims with the familiar and effective tools available to them as they are not to us. The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits.

Id. at 405 (Burger, C.J., dissenting).

Justice Brennan, concurring in the *Furman* decision, felt that legislation that impacted upon Bill of Rights guarantees could not avoid judicial scrutiny in the guise of judicial self-restraint.

> The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, 'may not be submitted to vote; [it] depend[s] on the outcome of no elections.' 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'

Id. at 268-69 (Brennan, J., concurring) (quoting Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

2. Am. Sub. S.B. 1 amends OHIO REV. CODE ANN. § 2313.37 (Page 1981); §§ 2903.01, 2929.02-.04 (Page 1975); § 2929.41 (Page Supp. 1980); § 2941.14 (Page 1975); §§ 2945.06, .21, .25 (Page 1975); § 2945.24 (Page Supp. 1980); § 2953.02 (Page 1975); §§ 2967.13, .19 (Page 1975); § 2967.26 (Page Supp. 1980); § 2967.27 (Page 1975). The bill repeals OHIO REV. CODE ANN. § 2945.22 (Page 1975), and enacts §§ 2929.021-.024, .05-.06 (Page 1982); §§ 2945.18-.19 (Page 1982).

1788. "Marietta Code" provided the penalty for treason and murder.[3] This note will analyze the background and procedural content of S.B. 1, outline the reasons for change in light of modern United States Supreme Court standards, and review the practical application of the penalty to Ohio defendants.

II. THE BACKGROUND OF S.B. 1

A. The Substantive and Procedural Challenges to Capital Punishment

In 1972, the United States Supreme Court faced the question whether the sentence of death violated the eighth and fourteenth amendments as an infliction of cruel and unusual punishment. In *Furman v. Georgia,*[4] a *per curiam* opinion, the Court held that the death penalty constituted cruel and unusual punishment where, as in the cases at bar, the sentencing procedures created a substantial risk that the penalty would be inflicted in an arbitrary and capricious manner.[5] The reasoning behind the decision is gleaned from the separate opinions of five justices concurring in the decision and four justices dissenting.[6]

While objecting to the procedural infirmities of the legislation, Justices Brennan and Marshall also sought to strike down the Georgia law on substantive grounds. To them, the eighth amendment prohibited the infliction of capital punishment *per se.* Justice Brennan articulated four principles by which a particular punishment would be deemed

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3. Ohio Legislative Service Commission, *Capital Punishment,* Staff Research Report No. 46 (1961). A history of capital punishment in Ohio from 1788 to 1978, including legislative attempts to abolish the penalty is contained in Ohio Legislative Service Commission, *History of Capital Punishment in Ohio,* Staff Research Report No. 113-1134 (1979).

4. 408 U.S. 238 (1972). *Furman* was decided with *Jackson v. Georgia* and *Branch v. Texas.* Defendant Furman had been convicted of murder, Jackson and Branch of rape. Extensive commentary followed the *Furman* decision. *See* Goldberg, *The Death Penalty and the Supreme Court,* 15 ARIZ. L. REV. 355 (1973); Junker, *The Death Penalty Cases: A Preliminary Comment,* 48 WASH. L. REV. 95 (1972); Tao, *Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment,* 51 NOTRE DAME LAW. 722 (1976); Vance, *The Death Penalty After Furman,* 48 NOTRE DAME LAW. 850 (1973); Comment, *Furman v. Georgia: A Postmortem on the Death Penalty,* 18 VILL. L. REV. 678 (1973); Note, *The Death Penalty — The Alternatives Left After Furman v. Georgia,* 37 ALB. L. REV. 344 (1973); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes,* 87 HARV. L. REV. 1690 (1974).

5. Although the *Furman* decision did not obtain a majority support on the Supreme Court, subsequent cases relying on the decision reasserted the *Furman* holding. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

6. Justices Brennan, Douglas, Marshall, Stewart, and White concurred in separate opinions without being joined. Justices Blackmun, Powell, Rehnquist, and Chief Justice Burger filed separate dissenting opinions, in which, except for the opinion of Justice Blackmun, all the dissenting justices joined.

"cruel and unusual."[7] Using the elements of the test, Justice Brennan concluded the infliction of the death penalty was an arbitrary subjection of an unusually severe punishment that denied a person human dignity, was not accepted by society, and was no more effective than a less drastic punishment.[8] Justice Brennan premised his contentions on the theory that concepts embodied in the eighth and fourteenth amendments evolve; he concluded that prevailing standards of human decency had progressed to the point where the Court was bound to hold capital punishment unconstitutional for all cases and for all time.[9]

Justice Douglas, while not subscribing to the view that the death penalty in all cases violated the eighth and fourteenth amendments, nevertheless found the legislation in *Furman* unconstitutional based upon its discriminatory impact on minorities.[10] Citing empirical evidence, Justice Douglas concluded that capital punishment statutes allowing for unhampered discretion in the sentencing process invited punishment determinations based on race and economic status.[11] In effect,

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7. 408 U.S. at 281. First, and foremost, a punishment must not by its severity be degrading to human dignity. *Id.* at 271. Second, the State must not arbitrarily inflict a severe punishment. *Id.* at 274. Third, the punishment imposed must not be unacceptable to contemporary society. *Id.* at 277. Fourth, a severe punishment must not be excessive. *Id.* at 279.

8. *Id.* at 286.

9. *Id.* at 305. The "objective indicators" which the petitioners listed as evidencing the contemporary standards of decency include (1) a domestic and worldwide trend against the use of the death penalty; (2) expansive modern literature opposing the infliction of the penalty on moral grounds; (3) the decreasing number of death sentences rendered and actually carried out in the last decade, and; (4) the abolition of public executions once thought to deter crime. *Id.* at 434-36 (Powell, J., dissenting).

Justice Powell did not agree that the evolution of the eighth and fourteenth amendment protections had suddenly come to an end in the *Furman* decision. *Id.* at 430-31. *See* Goldberg, *supra* note 4.

Justice Marshall followed the reasoning that the death penalty was "morally unacceptable to the people of the United States at this time in their history." 408 U.S. at 360. Justice Marshall believed any penalty inflicted was unconstitutional if a less severe punishment, validly serving the legislative wants, was not chosen over the more severe. *Id.* at 342. Justice Marshall went on to discuss "persuasive" evidence supporting his view that death is an impermissibly excessive sanction because it does not satisfy valid legislative purposes better than other less severe punishments. *Id.* at 342-59.

10. In a nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement. Yet, we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. . . .

Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatable with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.

Id. at 255-57 (Douglas, J., concurring).

11. *Id.* at 250 n.15 (Douglas, J., concurring).

he found such an impact violated the concept of equal protection he believed to be implicit in the cruel and unusual punishments clause of the Constitution.[12]

The substantive challenges to the death penalty in *Furman,* however, have not been relied upon as the bases of constitutional infirmity in capital punishment legislation. Indeed, the United States Supreme Court has clearly held that the death penalty does not invariably violate the Constitution.[13] The *Furman* decision was anchored in misgivings about the procedural aspects of Georgia's death law. State legislatures drafting capital punishment statutes since *Furman* have attempted to use the procedural underpinnings of that decision to cure their suspect statutes.[14]

Georgia's death penalty scheme presented one flagrant flaw to the concurring justices in *Furman.* Simply, death could be imposed for any reason or for no reason. The sentencing authority provided no rationale for their decisions nor were they guided by any standards for choosing between life or death for the convicted defendant.[15] In *Furman,* Jus-

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Application of the death penalty is unequal: most of those executed were poor, young, and ignorant.

Seventy-five of the 460 cases involved co-defendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.

Id. at 250-51 (quoting Koeninger, *Capital Punishment in Texas, 1924-1968,* 15 CRIME & DELIN. 132, 141 (1969)).

Ohio's post-*Furman* death penalty statute "through 1977 shows that, of 173 black persons who killed white persons, thirty-seven of them (21.4%) were sentenced to death. Of forty-seven whites who killed blacks, none were sentenced to death." District Attorney v. Watson, _ Mass. _, _, 411 N.E.2d 1274, 1286 (1980).

12. *See* Goldberg, *supra* note 4. *See* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 HARV. L. REV. 1773, 1790 (1970).

13. Gregg v. Georgia, 428 U.S. 153, 169 (1976). When the Ohio General Assembly first took up the issue of a new capital punishment statute, the philosophy of imposing capital punishment became the focal point of debate. Substantive religious and moral arguments were aired for many months resulting in the defeat of any death penalty measure. In its recent session, however, the lawmakers turned from substantive challenges to state mandated death and clearly emphasized the compilation of a procedurally constitutional bill. Senate Bill 1 resulted. Notes from a Speech by Senator Richard H. Finan [hereinafter cited as Finan Speech] (On file at University of Dayton Law Review). *Contra,* District Attorney v. Watson, _ Mass. _, 411 N.E.2d 1274 (1980). The Massachusetts Supreme Judicial Court found the state's death penalty, under the state's Declaration of Rights, unconstitutional *per se.* The court dismantled the law because it frustrated justice. It deprived the executed person of humanity and dehumanized the society imposing it. The court deemed the death penalty unacceptable under contemporary standards of decency.

14. *See* note 13 *supra.*

15. *But see* McGautha v. California, 402 U.S. 183 (1971), holding that the due process clause of the fourteenth amendment is not violated when the decision whether the defendant should live or die is left to the *absolute* discretion of the jury. (emphasis added).

The *McGautha* decision, decided only one year before *Furman,* indeed highlighted the Court's inconsistency. The *Furman* dissenters took this seriously. Chief Justice Burger wrote,

tices Stewart and White opposed the arbitrariness and infrequency with which the death penalty was imposed. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [16] [T]he 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. . . . [17] [T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[18]

In essence, the *Furman* decision told the states what was prohibited, but did not indicate what procedures would be acceptable. The *Furman* opinions, while affirmatively announcing to the states that capital punishment procedures which were either "discretionary", "arbitrary", "infrequent", or "discriminatory"[19] would not pass judicial scrutiny, at the same time implied that a death penalty statute must in some way guide the discretion of the sentencing authority. The delicate decision between life or death could not fall subject to any of the characterizations that the concurring justices made of prior capital punishment procedures.

Supplied with vague standards at best, legislatures soon after *Furman* went to work revamping their states' unconstitutional death laws.[20] In what seems like roughshod reaction, many states enacted mandatory death bills.[21] The lawmakers in these states removed all discretion from the sentencer in hope of providing a rigid application of

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It may be thought appropriate to subordinate principles of *stare decisis* where the subject is as sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year. This pattern of decisionmaking will do little to inspire confidence in the stability of the law.

408 U.S. at 400.

16. *Id.* at 309 (Stewart, J., concurring). Justice Stewart thought the sentences were cruel because they went excessively beyond the punishments that the state legislatures determined to be necessary. He thought the penalties unusual because in recent times death was infrequently imposed for murder.

17. *Id.* at 310.

18. *Id.* at 313.

19. While the concurring justices used different adjectives to characterize the Georgia sentencing procedures, the "discretionary" element existing in the law supplied the votes essential to the Court's plurality. Goldberg, *supra* note 4 at 366.

20. *See* note 4 *supra*. *See* Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651 (1974). Three weeks after the *Furman* decision, the Ohio Supreme Court handed down its decision in a pending death penalty case: "Under [the *Furman*] holding, which we are required to follow, the infliction of any death penalty under the existing law of Ohio is now unconstitutional." State v. Leigh, 31 Ohio St. 2d 97, 99, 285 N.E.2d 333, 334 (1972).

21. The states of Delaware, Idaho, Louisiana, Mississippi, Missouri, and North Carolina were among those enacting mandatory death bills. Comment, *The Constitutionality of Ohio's Death Penalty*, 38 OHIO ST. L.J. 617, 622 n.25 (1977) [hereinafter cited as *Ohio's Death Penalty*].

the death penalty to all persons committing certain crimes, regardless of wealth, social status, race, and sometimes, age. On the other hand, many states enacted statutes that provided guidelines to the sentencing authority to aid in its life or death decision.[22] These state legislatures appeared to better understand the *Furman* mandate, even though the Supreme Court guidelines were subtle.

B. Ohio Responds to Furman — The First Failure

When the *Furman* decision was handed down, Ohio House Bill 511 was pending before the Senate Judiciary Committee.[23] As proposed, the legislation would have limited the imposition of the death penalty to three types of murder.[24] The bill also provided for imprisonment as an alternative to death in every case and attempted to introduce the "bifurcated" proceeding into Ohio law.[25] Without awaiting analysis or guidance from authorities and commentators after *Furman*, the Judiciary Committee refined the House version by retaining the death penalty but removing as much discretion as possible from the sentencer in the punishment determination procedure.[26]

Ohio's post-*Furman* death penalty legislation was codified in sections 2929.02 through 2929.04 of the Ohio Revised Code.[27] Under the statute, the crime of aggravated murder was punishable by death or by

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22. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1981); ARK. STAT. ANN. §§ 41-1301 to -1304, 41-4706 (Ark. Crim. Code 1977); CAL. PENAL CODE § 190.1, (West Supp. 1981); CONN. GEN. STAT. ANN. § 53a-46a, (Cum. Supp. 1981); FLA. STAT. ANN. § 921.141 (Cum. Supp. 1981); GA. CODE ANN. §§ 26-3102, 27-2528, 27-2534.1, 27-2537 (1978); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Cum. Supp. 1982).

23. Lehman & Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEV. ST. L. REV. 8, 18 (1974).

24. Proposed § 2903.01 listed premeditated murder, intentional killing using an illegally concealed firearm or other dangerous weapon and felony murder as those crimes where the sentence of death could be imposed on those convicted.

25. *See* Lehman & Norris, *supra* note 23, at 15-16. A "bifurcated" proceeding consists of a two-tier hearing. One stage determines the defendant's guilt or innocence and the other determines the penalty to be imposed upon conviction.

26. *See* Lehman & Norris, *supra* note 23, at 19-20. The committee, working from models prepared by the Legislative Service Commission viewed three alternatives to their death penalty proposal in addition to the plan adopted.

(1) abolish the death penalty.
(2) retain the death penalty, but make its imposition mandatory in specified cases.
(3) retain the death penalty and permit the jury or judge to decide if it is to be imposed in a given case, but provide criteria to guide the jury or judge in making the decision. This was the House of Representatives' position.

Id.

27. OHIO REV. CODE ANN. §§ 2929.02-.04 (Page 1975). A defendant convicted of aggravated murder could be sentenced to death if in the indictment or count in the indictment it was proved beyond a reasonable doubt that one or more aggravating circumstances attenuated the aggravated murder. *See* notes 134-36 *infra*.

life imprisonment.[28] The death penalty could be imposed upon a defendant only if it was found beyond a reasonable doubt that the defendant was guilty of aggravated murder and at least one of seven aggravating circumstances.[29] Under the law, guilt first had to be determined for the charge of aggravated murder.[30] If the indictment also charged the defendant with one or more aggravating circumstances, a separate finding of guilt had to be determined for those circumstances.[31] If the verdict returned found the defendant guilty of both aggravated murder and one or more aggravating circumstances, the death penalty became an alternative. If the defendant was found guilty of only aggravated murder, the sentence was life imprisonment.[32] If the defendant was found guilty of aggravated murder and one or more aggravating circumstances, the trial judge chose between life and death for the defendant, if the trial was by jury.[33] If the defendant waived his right to a jury trial, a three-judge panel decided the defendant's fate.[34] Under the then existing law, the convicted defendant could save his own life by proving by a preponderance of the evidence that at least one of a series of three statutorily defined mitigating circumstances were present in the case. If one or more mitigating circumstances were proven by the defendant, he could not be sentenced to death regardless of proof beyond a reasonable doubt that one or more aggravating circumstances existed.[35] In an effort to guide the sentencing authority's discretion, the

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28. OHIO REV. CODE ANN. § 2903.01 (Page 1982) defines aggravated murder as follows:

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

The language of this statute is not changed by S.B. 1.

29. *See* note 27 *supra.*

30. OHIO REV. CODE ANN. § 2929.03(B) (Page 1975).

31. *Id.*

32. *Id.* § 2929.03(C).

33. OHIO REV. CODE ANN. § 2945.17 (Page 1975) provides for the accused a right to a trial by jury for the violation of any statute of the state where the penalty involved exceeds a fine of one hundred dollars. In imposing the sentence for a capital crime the statutory mandate for judicial sentencing is found in §§ 2929.03(C)(1)&(2).

34. *Id.* § 2929.03(C)(1).

35. *Id.* § 2929.04(B). Senate Bill 1 has made a significant change in this procedure. If one or more mitigating factors are found to exist, newly enacted § 2929.024(D)(3) requires the factors to be weighed against the aggravating circumstances. If found beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, a sentence of death shall be imposed.

This change may very well invoke one of the constitutional challenges to the new death bill. See notes 102-05 and accompanying text *infra.*

mitigating circumstances were limited to a consideration of whether

(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.[36]

In making a determination of the existence of mitigating circumstances, the sentencer had to consider the nature and circumstances of the offense and the history, character and condition of the offender.[37] To help in making its decision, the court received reports of a pre-sentence investigation and psychiatric examination.[38] The court was also required to take the reports, testimony, other evidence, statement of the offender and arguments of counsel into consideration when determining whether mitigating circumstances existed.[39] Finally, all defendants sentenced to death had a right of appeal to the Ohio Supreme Court.[40]

Enacted on January 1, 1974, the post-*Furman* Ohio death penalty statute received constitutional sanction by the Ohio Supreme Court in *State v. Bayless*.[41] The court determined that Ohio's statute did not result in "capricious, arbitrary, and discriminatory death sentences."[42] The court noted that the statutes provided for a bifurcated proceeding, that the mitigating circumstances guided the sentencer's discretion, and that appeal to the state supreme court was available.[43] The court conceded a possibility existed that jurors might vote on the aggravating circumstances according to whether they believed the defendant deserved death. However, the court did not assign much weight to that possibility.[44]

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36. OHIO REV. CODE ANN. § 2929.04(B) (Page 1975).

37. These extrinsic factors were important only to the extent they shed light on the existence of one or more of the three statutorily defined mitigating circumstances. *See* notes 74 & 75 and accompanying text *infra*.

38. OHIO REV. CODE ANN. § 2929.03(D) (Page 1975).

39. *Id.* § 2929.03(E).

40. OHIO CONST. art. IV, § 2(B)(2)(a)(ii). For detailed discussion of the post-*Furman* statute *see generally* Comment, *Capital Punishment in Ohio: The Constitutionality of the Death Penalty Statute*, 3 U. DAY. L. REV. 169 (1978)[hereinafter cited as *Capital Punishment in Ohio*]; *Ohio's Death Penalty, supra* note 21.

41. 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976), *vacated*, 438 U.S. 911 (1978). Commentary on the *Bayless* decision is found in Note, *State v. Bayless: Discretionary Defects May Still Remain in Ohio's Death Penalty Statute*, 4 OHIO NORTH. L. REV. 701 (1977); *Ohio's Death Penalty, supra* note 21.

42. 48 Ohio St. 2d at 84-85, 357 N.E.2d at 1045.

43. *Id.* at 86, 357 N.E.2d at 1045.

44. *Id.* at 85, 357 N.E.2d at 1045.

C. *The United States Supreme Court Responds to Ohio Law — The Second Failure*

On July 3, 1978, the Supreme Court of the United States foreclosed on Ohio's post-*Furman* death penalty. In *Lockett v. Ohio,*[45] the Court proclaimed an obligation to reconcile its previously differing views on capital punishment and purported to provide guidance to states drafting new laws.[46] The plurality of the Court held the Ohio statute unconstitutional because it precluded the sentencing authority from considering the defendant's character, record, or the circumstances of the crime.

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . .[47] The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases.[48]

In essence, the Court did an about-face from its *Furman* decision. In Ohio's attempt to limit the amount of the sentencing authority's discretion, the state had gone too far. In light of the Court's concern for individualized sentencing,[49] the Ohio scheme was fatally defective because the mitigating factors available for the sentencer's consideration were exclusive. No catch-all phrase existed that would have allowed the

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45. 438 U.S. 586 (1978). The *Lockett* case was heard together with Bell v. Ohio, 438 U.S. 637 (1978). Sandra Lockett participated in the robbery of a pawn shop. Lockett never entered the pawn shop during which time the owner was shot and killed, but instead waited outside with a get-a-way car's engine running. She was charged with aggravated murder as an accomplice equal to that of the principal offender. Once the jury returned a verdict of aggravated murder with specifications, the trial judge, finding no mitigating circumstances proved by a preponderance of the evidence, sentenced Lockett to death.

For commentary on the *Lockett* decision see Note, *New Direction for Capital Sentencing or an About-Face for the Supreme Court?*, 16 AM. CRIM. L. REV. 317 (1979), Note, *Sentencer Must Have Some Discretion in Imposing Capital Punishment: Another Retreat From Furman v. Georgia*, 44 MO. L. REV. 359 (1979); Note, *Criminal Law — Death Penalty — Right of a Defendant to Have Any Relevant Aspect of His Character and Circumstances of Offense Used as Factors Mitigating a Death Sentence*, 25 WAYNE L. REV. 1147 (1979); Note *Criminal Law — Death Penalty — Cruel and Unusual Punishment — Individualized Sentencing Determination*, 12 AKRON L. REV. 360 (1978); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 5, 99 (1978); Note, *Constitutional Criminal Law — The Role of Mitigating Circumstances in Considering the Death Penalty*, 53 TUL. L. REV. 608 (1979).

46. 438 U.S. at 602.

47. *Id.* at 605.

48. *Id.* at 606.

49. *Id.* at 602.

sentencer to take into account a wide range of factors.

Significantly, Chief Justice Burger rested his decision to strike down the legislation solely on the ground that Ohio's narrow range of mitigating circumstances precluded individualized consideration of other circumstances that could serve to mitigate a defendant's sentence.[50] It was only in the concurring opinions of Justices Blackmun and White that other constitutional issues in the case were addressed.

Justice Blackmun found the penalty unconstitutional because the statute did not permit consideration of the defendant's participation in the acts leading up to a crime punishable by death, nor the character of the defendant's *mens rea* in regard to the commission of the crime.[51] He also asserted that Ohio's legislation unconstitutionally burdened the defendant's exercise of the sixth amendment right to trial by jury and the fifth amendment right to plead not guilty.[52] In Ohio, if a defendant pleads guilty or no contest to both a charge of aggravated murder and one or more aggravating circumstances, the court may dismiss the specifications *in the interests of justice.*[53] Such dismissal absolutely precludes imposition of the death penalty on the defendant. However, if the defendant opts for a jury trial and a plea of not guilty, such a reduction in sentence by the jury is not possible. Justice Blackmun believed this scheme impacted too heavily on the defendant's right to plead not guilty. In addition, Ohio procedure required the sentence in a

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50. *Id.* at 606.

51. *Id.* at 616. Justice Blackmun did not intend to interfere with Ohio's statutory categories for assessing guilt. He merely required that the sentencer be permitted to hear evidence of the defendant's minor role in the course of events leading up to the crime. *Id.*

52. *Id.* at 617-19. In United States v. Jackson, 390 U.S. 570 (1968), the defendant attacked the constitutionality of the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1964). Under the Act, the death penalty could be imposed only upon recommendation of a jury verdict. Defendants who pled guilty or no contest or those who waived trial by jury could not be sentenced to death. The Court found the statute impermissibly burdened the defendant's assertion of a constitutional right. 390 U.S. at 583. "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *Id.* at 582.

53. OHIO R. CRIM. P. 11(C)(3) (Page Supp. 1980) (emphasis added). The Supreme Court of Ohio distinguished the rule from the law in *Jackson.* The court stated that even if a defendant pleads guilty or no contest, he is not assured that the trial judge will dismiss the specifications, since the decision of the judge is discretionary. On the other hand, the legislation struck down in *Jackson* absolutely prohibited a judge from imposing death. State v. Weind, 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977), *vacated,* 438 U.S. 911 (1978).

Justice Blackmun provided a guideline and warning to Ohio in his opinion: "I mention it against the possibility that any further revision of the Ohio death penalty statutes, prompted by the Court's decision today, contemplates as well, and cure, the *Jackson* deficiency." 438 U.S. at 617.

Notwithstanding the Court's mandate, the Ohio rule of procedure remains in effect under Am. Sub. S.B. 1. Even though the sentencing jury under the new bill has the authority to spare the life of a defendant convicted of aggravated murder with aggravating circumstances, only the trial judge can dismiss the specifications *in the interests of justice.*

death penalty case to be ultimately set by the trial judge alone if the defendant was tried by a jury.[54] If, on the other hand, the defendant chose not to exercise his right to a jury trial, a three-judge panel imposed the penalty upon conviction.[55] Consequently, the defendant who asserted his constitutional right to a jury trial faced the life or death decision of one person. The defendant who waived this right would have three chances to escape death.[56]

Justice White invalidated the statute because the death penalty could be imposed on a defendant without a finding that he or she possessed a purpose to cause the death of the victim.[57] Such an imposition, thought Justice White, constituted cruel and unusual punishment in that the penalty was excessive in relation to the crime committed.[58] In *Lockett*, the jury was instructed as follows:

> A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise. . . . If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide. . . . An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances.[59]

Justice White characterized imposition of the death penalty where there was no intent to cause the death of another as "grossly out of proportion to the seriousness of the crime."[60] Justice White further noted, "society has made a judgment, which has deep roots in the history of the criminal law, . . . distinguishing at least for purpose of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy human life."[61]

Like Justice White, Justice Marshall believed the imposition of the

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54. OHIO REV. CODE ANN. § 2929.03(C)(2) (Page 1975).

55. *Id.* § 2929.03(C)(1).

56. Even though Am. Sub. S.B. 1 provides for jury participation in sentencing, the trial judge in a case tried by jury continues to possess the final sentencing determination should the jury recommend death. OHIO REV. CODE ANN. § 2929.03(D)(3) (Page 1982).

57. 438 U.S. at 624.

58. *Id.* The new Ohio legislation prohibits a conviction of aggravated murder unless the defendant is specifically found to have intended to cause the death of another. OHIO REV. CODE ANN. § 2929.01(D) (Page 1982). *See* notes 110-12 and accompanying text *infra.*

59. 438 U.S. at 626-27.

60. *Id.* at 625. Justice White also concluded that imposing death where there had been no intent to kill serves little, if any, deterrent function. *Id.* Thus, capital punishment under these circumstances "fails to contribute significantly to acceptable, or indeed, any perceptible goals of punishment." *Id.* at 626.

61. *Id.* at 626 (citation omitted).

death penalty without a specific intent by the offender to cause the death of another "violates the principle of proportionality embodied in the Eighth Amendment's prohibition. . . . "[62] Justice Marshall also noted that imposing the death penalty on proof of felony murder leads to the kind of " 'lightning bolt,' 'freakish,' and 'wanton' executions" which were declared unconstitutional in *Furman*.[63]

In effect, Ohio law went well beyond allowing jurors to draw inferences that a defendant did in fact intend the death of his victim. The law permitted a conclusive inference that a defendant purposely caused the death of another if the defendant engaged in a common design with others.[64]

III. ANALYSIS OF S.B. 1

A. The Third Attempt—Direct Response to Lockett

If Chief Justice Burger's holding in *Lockett* can be relied upon as evidencing the clearest guidance the United States Supreme Court can provide, Ohio went a long way in 1981 to cure the constitutional deficiencies of its statute by adding a catch-all phrase to its list of mitigating factors. The sentencer in a capital case, in addition to six statutorily defined mitigating factors,[65] now must also consider "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death."[66] The availability to the sentencer of the consideration of all mitigating factors is primarily what allowed statutes in other states to pass constitutional muster. In the three post-*Furman* companion cases of *Gregg v. Georgia*,[67] *Proffitt v. Florida*,[68] and *Jurek v. Texas*,[69] the sentencing authority was authorized to consider any aspect of the defendant's character and record, or any other factors in

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62. *Id.* at 620.

63. *Id.*

64. State v. Clark, 55 Ohio St. 2d 257, 379 N.E.2d 597 (1978); State v. Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976). *See* note 111 and accompanying text *infra*.

65. OHIO REV. CODE ANN. § 2929.04(B)(1)-(6) (Page 1982). *See* notes 75-99 and accompanying text *infra*.

66. OHIO REV. CODE ANN. § 2929.04(B)(7) (Page 1982). *See* notes 47-50 and accompanying text *supra*. The U.S. Supreme Court recently reversed and remanded an Oklahoma death penalty case where the state court refused to consider a 16-year old murder defendant's family history as a mitigating factor (citing *Lockett v. Ohio*). The Court considered this refusal a violation of the eighth amendment's requirement that the sentencing authority in a capital case must consider any relevant mitigating factors. Eddings v. Oklahoma, 102 S.Ct. 869 (1982).

Under S.B. 1, a 16-year old murder defendant could not receive the death penalty, even if convicted. OHIO REV. CODE ANN. §§ 2929.02(A), .03(D)(1). *See* notes 171-81 and accompanying text *infra* for a discussion of the treatment of the youthful offender under S.B. 1.

67. 428 U.S. 153 (1976).

68. 428 U.S. 242 (1976).

69. 428 U.S. 262 (1976).

mitigation of imposition of the death sentence. All three statutes provided guidance but were flexible enough to encompass individual considerations in determining the sentence.[70]

Justice Blackmun's concurrence in *Lockett* spurred another legislative change present in S.B. 1.[71] Another mitigating factor the sentencer is now required to consider is "[i]f the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim."[72] Thus, if a defendant is convicted of aggravated murder, the sentencer is required to analyze the offender's degree of participation in the offense and the acts that led up to the offense even though the defendant was found to have purposely caused the death of another. This procedure addresses Justice Blackmun's concern over inflicting death on a defendant who may have had little or no reason to anticipate that a gun would be fired or who played only a minor role in the events leading up to the use of fatal force.[73]

The statute struck down by the United States Supreme Court in *Lockett* allowed for the sentencer's consideration of the nature and circumstances of the offense, the history, character and condition of the offender.[74] However, those considerations were only allowed to be evaluated in relation to any light they may have shed on the three mitigating circumstances. For instance, if a defendant attempted to prove he was under duress at the time of the offense in order to gain the protection of the second mitigating circumstance, the fact that the defendant was young may have reflected upon whether he could be coerced or placed under duress more easily than an adult. However, the youth of the offender, *per se,* had no bearing on whether a death sentence was appropriate. Senate Bill 1 makes a significant change in requiring the sentencer to consider the defendant's history, character and background, in addition to the nature and circumstances of the offense *independently* of the statutorily defined factors.[75]

Senate Bill 1 leaves intact the first two mitigating factors present in the earlier legislation. The sentencer must consider and weigh against the aggravating circumstances, the nature and circumstances of

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70. Chief Justice Burger stated in *Lockett* "that the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country." 438 U.S. at 602.

71. *See* notes 51-56 and accompanying text *supra.*

72. OHIO REV. CODE ANN. § 2929.04(B)(6) (Page 1982). *See* notes 57-61 and accompanying text *supra.*

73. *See* note 51 and accompanying text *supra.*

74. OHIO REV. CODE ANN. § 2929.04(B) (Page 1975).

75. OHIO REV. CODE ANN. § 2929.04(B) (Page 1982) (emphasis added).

the offense, the history, character, and background of the offender, and

(1) Whether the victim of the offense induced or facilitated it;
(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.[76]

Although the Supreme Court opinion in *Lockett* did not discuss the substance of the mitigating circumstances of the Ohio statute, the meaning of the first two provisions are less than clear. The Ohio Supreme Court has not had the opportunity to interpret the meaning of the first mitigating factor.[77] If the meaning of "induced or facilitated" suggests the victim provoked the defendant into committing the crime, then the Ohio legislature's inclusion of "strong provocation" in the second mitigating circumstance appears to duplicate the first mitigating circumstance.[78] If the terms indicate the victim asked to be killed, the applicability of the provision to any criminal case would be extremely rare. Since a mercy killing may be the only instance in which a victim asks to be killed, the applicability of this mitigating factor appears farfetched.[79] Under the facts of mercy killing, it is unlikely a defendant would be convicted of aggravated murder with one or more aggravating circumstances. Thus, it is unlikely any defendant under these circumstances would even reach a death sentencing proceeding, much less bring forth evidence of mitigation based on this first factor.

An inconsistency with the second mitigating factor under section 2929.04 is also apparent. Under Ohio law, voluntary manslaughter is defined as causing the death of another while under extreme emotional stress brought on by serious *provocation* reasonably sufficient to incite the defendant into using deadly force.[80] The presence of serious provocation therefore can serve to reduce a charge of aggravated murder to voluntary manslaughter.[81] The inconsistency arises when a defendant, convicted beyond a reasonable doubt of aggravated murder and one or more aggravating circumstances, attempts to use provocation as a mitigating factor. In essence, if it is proved beyond a reasonable doubt at the guilt stage that the defendant was not seriously provoked in a man-

76. *Id.* § 2929.04(B)(1) & (2).

77. *See Ohio's Death Penalty, supra* note 21. The meaning of these circumstances has not been raised as an issue in any case appealed to the Ohio Supreme Court. *Id.*

78. *Id.*

79. *Id.*

80. OHIO REV. CODE ANN. § 2903.03 (Page 1982) (emphasis added).

81. In a recent United States Supreme Court death penalty case, the Court held that a sentence of death could not be imposed when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense where the evidence would have supported such a verdict. Beck v. Alabama, 447 U.S. 625 (1980).

ner reasonably sufficient to incite him into using deadly force, how then could the existence of strong provocation serve as a factor in mitigation in the sentencing stage?[82] So, too, with duress and coercion, the mitigating factor remains cloudy. The statute does not make clear what level of duress or coercion will serve in mitigation. If the lawmakers had the defense of duress in mind, the use of this factor would be precluded at the sentencing stage since the absence of duress would already have been proved beyond a reasonable doubt not to exist at the guilt stage.[83] While S.B. 1 no longer requires a defendant to prove factors in mitigation of his sentence by a preponderance of the evidence,[84] the burden on the sentencer to weigh these factors is not lessened.

A third mitigating factor to be viewed by the sentencer under S.B. 1 is

> (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.[85]

This factor is an amendment to the previous statutory language requiring the defendant to establish that "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.*"[86] What is similarly peculiar about this factor is its application in light of Ohio law which provides a defense of insanity.[87] Such a defense, when established, absolutely absolves the defendant from criminal liability.[88] While the former third mitigating circumstance was the most clear of all in delineating the fact that its application was not the equivalent of

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82. Although the terms "serious provocation reasonably sufficient" and "strong provocation" are not synonomous, the existence of even unreasonable provocation may impact on a defendant's ability to premeditate. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 76 at 581 (1972). *See Ohio's Death Penalty, supra* note 21. If there exists a reasonable doubt as to the defendant's premeditation, then arguably a charge of aggravated murder would be reduced to a lesser non-capital offense. Thus, the defendant would not pass to the death sentencing stage and would not require the introduction of strong provocation as a mitigating factor.

83. The Ohio Supreme Court in State v. Woods, 48 Ohio St. 2d 127, 357 N.E.2d 1059 (1976), recognized that duress would reduce a charge of felony murder to murder.

For an excellent discussion of the use of duress and coercion as reductive factors under Ohio law *see Ohio's Death Penalty, supra* note 21, at 639-44.

84. *See* notes 102-05 and accompanying text *infra*.

85. OHIO REV. CODE ANN. § 2929.04(B)(3) (Page 1982).

86. OHIO REV. CODE ANN. § 2929.04(B)(3) (Page 1975) (emphasis added).

87. OHIO REV. CODE ANN. §§ 2943.03(E), 2945.37-.40 (Page 1982). Ohio uses language identical to that of the mitigating factor in defining the defense of insanity. State v. Staten, 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969). Ohio's provision aligns itself with the version set forth in the MODEL PENAL CODE § 4.01(1) (1962).

88. OHIO REV. CODE ANN. §§ 2945.37-.40 (Page 1982); *see also* §§ 2901.05, 2943.03(E) (Page 1982).

an affirmative defense or reductive factor to guilt,[89] S.B. 1 clearly equates the mitigating factor with the defense. Thus, it is difficult to imagine an instance where the defense of insanity was unable to be established at trial yet would still retain vitality to serve as a factor in mitigation in the sentencing stage.[90] Again, while it is true the defendant need not establish the mitigating factor by a preponderance of the evidence, the utility of this factor is doubtful.

In response to *Furman's* call for channeled discretion in the sentencing procedure, S.B. 1 also implements the fourth and fifth mitigating factors. The sentencing authority must now consider,

(4) the youth of the offender;
(5) the offender's lack of a significant history of prior criminal convictions and delinquency adjudications.[91]

These two factors widen the informed discretion of the sentencer to allow for considerations of youth, *per se,* which were not allowed under the old law.[92] What appears on its face to better enable defense attorneys to go forward with evidence in mitigation, may nevertheless cut severely against defendants in the fifth mitigating circumstance. While it is not clear from the statute what type of evidence "is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing",[93] it is clear that the sentencer will have to receive some evidence at the sentencing hearing pertaining to the defendant's past criminal record.[94] The question left to be an-

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89. State v. Bayless, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976).
Mental deficiency is consistently defined to mean a low or defective state of intelligence. Construing the term broadly, a deficiency may be severe or mild, and may be hereditary or caused by a brain defect, disease, or injury, or by whatever other condition might cause subnormal intelligence. But it does not include the emotional and behavioral abnormalities claimed to exist by the defense.
Id. at 96, 357 N.E.2d at 1050-51.

90. Prior to 1978, Ohio law placed the burden of going forward with evidence of an affirmative defense on the accused. The burden of proof, however, was left up to the interpretation of the courts. *See* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977). In 1978, Ohio General Assembly H.B. 1168 clarified the law by firmly placing the burden of proving an affirmative defense upon the accused. *See* Note, *H.B. 1168: The Burden of Proving an Affirmative Defense,* 5 U. DAY. L. REV. 441 (1980).

91. OHIO REV. CODE ANN. § 2929.04(B)(4) & (5) (Page 1982).

92. *See* notes 74 & 75 and accompanying text *supra.*

93. OHIO REV. CODE ANN. § 2929.03(D)(2) (Page 1982).

94. The bill's sponsor, Senator Richard Finan, expressed concern over what types of evidence will become admissible at the sentencing hearing relative to past offenses of the defendant. Letter from Senator Richard Finan, September 24, 1981 [hereinafter cited as Finan Letter] (On file at University of Dayton Law Review).

Florida law also lists a separate mitigating circumstance of the defendant's lack of a significant history of prior criminal activity. FLA. STAT. ANN. § 921.141(6)(a) (West Supp. 1981). Georgia law provides for the judge and jury to hear additional evidence in extenuation, mitigation,

swered is whether the prosecution under S.B. 1 will be able to introduce evidence pertaining to the defendant's *significant* history of prior criminal convictions and delinquency adjudications into the sentencing stage that would otherwise be inadmissible at the guilt stage. While the defendant is given great latitude in the presentation of evidence in mitigation,[95] the defendant who possesses a significant history of criminal convictions will not be able to pursue the fifth mitigating factor, and will arguably be faced instead with the presence of another circumstance in aggravation.

In addition to evidence and testimony relevant to the aggravating circumstances the offender was found guilty of committing and any factors in mitigation, the sentencer, before determining a penalty, must also consider the arguments of counsel and any applicable reports submitted.[96] Upon the request of the defendant, a pre-sentence investigation and mental examination must be conducted.[97] These reports are furnished only to the court, the trial jury, the prosecutor and the defendant or his counsel.[98] Statements made or information provided by the defendant in any investigation are not permitted to be used in evidence against the defendant on the issue of guilt in any retrial.[99]

The new bill significantly alters the existing standards of the burden of proof. Under S.B. 1 the defendant has the burden of going forward with the evidence of factors of mitigation[100] and is given "great latitude" in the presentation of such evidence.[101] Under the prior law, the defendant had the burden of establishing mitigating factors by a preponderance of the evidence.[102] If he succeeded, the death penalty

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and aggravation including the record of any prior criminal convictions and pleas of guilty, or the absence of any prior convictions and pleas, provided that the state's evidence in aggravation is made known to the defendant prior to his trial. GA. CODE ANN. § 27-2503(a) (1978).

95. OHIO REV. CODE ANN. § 2929.03(D)(1) (Page 1982).

96. *Id.*

97. *Id.* In enacting the provision the Ohio General Assembly took into account the recent United States Supreme Court decision of Estelle v. Smith, 451 U.S. 454 (1981). The Court held the admission of the testimony of the psychiatrist who conducted a pre-trial competency examination in violation of the defendant's fifth amendment privilege against self-incrimination and sixth amendment right to counsel.

The prosecution in *Estelle* used the defendant's own statements made in the competency examination to assist it in obtaining the death penalty. The Court stressed that the defendant was not made aware that his statements were aiding the state. *Id.* at 467. Chief Justice Burger thought such a tactic was in violation of the defendant's fifth amendment right not to testify against his will. *Id.* at 468. The Court concluded by stating "[a] defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty." *Id.* at 472.

98. OHIO REV. CODE ANN. § 2929.03(D)(1) (Page 1982).

99. *Id.*

100. *Id.*

101. *Id.* §§ 2929.03(D)(1), .04(C).

102. *See* note 35 *supra.*

could not be imposed.[103] Senate Bill 1 changes this burden by requiring the state to prove beyond a reasonable doubt that the mitigating factors are outweighed by the aggravating circumstances.[104] The establishment of a mitigating factor, by itself, no longer precludes imposition of the death sentence.[105]

The degree of uncertainty involved in weighing the mitigating factors and the aggravating circumstances is immediately apparent. What once was a clear-cut determination now becomes added discretion in the sentencing procedure. The defendant in *Proffitt* argued "that it is not possible to make a rational determination whether there are 'sufficient' aggravating circumstances that are not outweighed by the mitigating circumstances, since the state law assigns no specific weight to any of the various circumstances to be considered."[106]

Although the United States Supreme Court recognized that these jury decisions would indeed be difficult, the majority discounted any assertion of unconstitutionality on that basis.[107] The Court found the weighing procedure involved no more line drawing than any juror must ordinarily make in deciding on the facts of a lawsuit.[108]

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.[109]

Under Ohio law (both S.B. 1 and the earlier law), a sentence of death can be imposed on an offender only if he is convicted of aggravated murder with aggravating circumstances found to be present.[110] Under the old law, the trier of fact was permitted to presume the existence of the offender's intent to kill from his involvement in the particular offense.[111] The new law invalidates this presumption of intent and

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103. *Id.*
104. OHIO REV. CODE ANN. § 2929.03(D)(1) (Page 1982).
105. *Id.* § 2929.04(C).
106. Proffitt v. Florida, 428 U.S. 242, 257 (1976).
107. *Id.*
108. *Id.*
109. *Id.* at 258.
110. OHIO REV. CODE ANN. §§ 2929.03(A), (C)(2) (Page 1982).
111. Prior to the enactment of S.B. 1, the Ohio courts altered the statutory requirements of purpose to cause the death of another by permitting the trier of fact to *presume* that a defendant purposely caused the death of another if the defendant engaged in common design with others to commit an offense by force and violence and a person was killed during the commission, attempt to commit, or flight from the commission or attempt to commit the offense, or if the defendant engaged in an offense, the nature of which and the manner of its commission would be likely to cause death and a person was killed during the commission of the offense. State v. Clark, 55 Ohio

prohibits convicting a person of aggravated murder unless the person is specifically found to have intended to cause the death of another.[112]

In instructing the jury on how to find such intent, the court is expressly prohibited from charging the jury in such a manner that the jurors would conclusively infer that a person who participated in a particular offense intended to cause the death of another.[113] If the jury is instructed that an inference may be made regarding intent, the jury must also be instructed that the inference is nonconclusive.[114] The inference may be considered in determining intent, but the jury is required to consider all evidence of intent, or lack of intent, to determine whether the offender intended to cause the death of another.[115] As Justice White stated in *Lockett*,

> there is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill. . . .[116]

The new bill's limitations on inferring intent exhibit a recognition of *Sandstrom v. Montana*,[117] where the Court found jury instructions which constituted the finding of a conclusive presumption of intent to be unconstitutional.[118] The prosecution now must prove the offender intended to cause the death of the victim by proof beyond a reasonable doubt.[119]

Since death can be imposed only for a conviction of aggravated murder with aggravating circumstances present, and a conviction of aggravated murder requires a specific finding of intent to kill, the death penalty can now be imposed in Ohio only if, among other necessary criteria,[120] the offender was found to have intended to cause the death of the victim. This directly responds to and cures the concerns of proportionality under the eighth amendment as expressed by Justices White and Marshall in *Lockett*.

In further response to Justice White's concerns of intent and Justice Marshall's concerns of felony murder death sentences in the *Lock-*

St. 2d 257, 379 N.E.2d 597 (1978); State v. Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976).

112. OHIO REV. CODE ANN. § 2903.01(D) (Page 1982).
113. *Id.*
114. *Id.*
115. *Id.*
116. Lockett v. Ohio, 438 U.S. 586, 627 (1978).
117. 442 U.S. 510 (1979).
118. *Id.* at 523.
119. OHIO REV. CODE ANN. § 2903.01(D) (Page 1982).
120. *Id.* § 2929.03 & .04.

ett case, S.B. 1 eliminates felony murder as an aggravating circumstance for aiders and abettors who do not commit aggravated murder with prior calculation and design. The amended aggravating circumstance now reads,

> [t]he offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.[121]

Under former law, if a defendant was charged with committing aggravated murder with a specification of an aggravating circumstance, he was tried on both the charge of aggravated murder and the specification at his trial. Section 2929.022 creates an exception to this general rule. It permits a defendant who is charged with aggravated murder and a specification of the aggravating circumstance of prior conviction[122] to elect to have the existence of this specification determined at the sentencing hearing.[123]

When this option is exercised the defendant is first tried by a jury (or a panel of three judges if the defendant waives his right to a jury trial) to determine if he is guilty of aggravated murder and any specifications of other aggravating circumstances.[124] Following a trial verdict of guilty of at least the charge of aggravated murder, the court[125] at the sentencing hearing determines whether the specification of the aggravating circumstance of prior conviction has been proved beyond a reasonable doubt.[126] If the court finds the specification has been proved beyond a reasonable doubt, or if it has not but the defendant was convicted at trial of a specification of any other aggravating circumstance, the court (and the trial jury if appropriate)[127] will sentence the offender

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121. *Id.* § 2929.04(A)(7).

122. *Id.* § 2929.04(A)(5), which establishes an aggravating circumstance if:

> [P]rior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

123. *Id.* § 2929.022(A). *See* OHIO REV. CODE ANN. §§ 2929.03(C), (D) (Page 1982) and notes 140-49 and accompanying text *infra*, for a discussion of the sentencing process.

124. OHIO REV. CODE ANN. § 2929.022(A)(2) (Page 1982).

125. The court is actually composed of the trial judge if the defendant was tried by a jury or a panel of three judges if the defendant waived his right to a jury trial. *Id.* § 2929.022(A).

126. *Id.* § 2929.022(B).

127. The trial jury will also be involved in the sentencing process should the defendant be convicted by a jury. *Id.*

according to sections 2929.03(D)[128] and 2929.04.[129] However, if the defendant at trial was found to have been less than eighteen years old when the offense was committed the court must sentence the offender according to section 2929.03(E).[130]

If the court finds the specification of the aggravating circumstance of prior conviction has not been proved beyond a reasonable doubt, and the defendant was not convicted at trial of a specification of any other aggravating circumstance, the court must terminate the sentence hearing and sentence the offender to life imprisonment with parole eligibility after serving twenty years of imprisonment.[131] This sentence would also be imposed on an offender who was not at least eighteen years old at the time the offense was committed.[132]

If the defendant does not elect to have the existence of the aggravating circumstance of prior conviction determined at the sentencing hearing, he will be tried on the charge of aggravated murder and any specification of aggravating circumstances (including prior conviction) in a single trial.[133]

In enacting this provision, the Ohio legislature was apparently concerned that a defendant's history of a prior conviction might unduly prejudice the jury in making the determination of guilt or the finding of other aggravating circumstances. Although the jury would not determine the existence of the aggravating circumstance, it would still have to weigh the circumstance against any mitigating factors before imposing the death sentence. The effect of the defendant's prior conviction would come into play only in the determination of whether to impose the death sentence.

Other changes in aggravating circumstances include the killing of a peace officer[134] and the killing of a witness to another offense.[135] Sen-

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128. *Id.* § 2929.03(D). *See* notes 141-49 and accompanying text *infra* for a discussion of the sentencing procedures under this section.

129. OHIO REV. CODE ANN. § 2929.04 (Page 1982). *See* notes 141-49 and accompanying text *infra* for a discussion of the sentencing procedure under this section.

130. OHIO REV. CODE ANN. § 2929.022(A)(2)(b)(i) (Page 1982). In this instance, § 2929.03(E) compels the court to sentence the offender to life imprisonment with parole eligibility after serving twenty full years or thirty full years of imprisonment. *Id.* § 2929.03(E).

131. *Id.* § 2929.022(B).

132. *Id.* § 2929.022(A)(2)(b)(ii).

133. *Id.* § 2929.022(A)(1).

134. *Id.* § 2929.04(A)(6). The prior aggravating circumstance was for the killing of a law enforcement officer who the defendant *knew* to be a law enforcement officer and either the victim was engaged in his duties or it was the defendant's specific purpose to kill a law enforcement officer. OHIO REV. CODE ANN. § 2929.04(A)(6) (Page 1975) (emphasis added). The new bill changes "law enforcement officer" to "peace officer"; requires only that the defendant had *reasonable cause to know* the victim was a peace officer; and at the time of the commission of the offense the peace officer was engaged in his duties or it was the defendant's specific purpose to kill a peace officer. OHIO REV. CODE ANN. § 2929.04(A)(6) (Page 1982) (emphasis added).

ate Bill 1 leaves intact the first four aggravating circumstances of the prior legislation.[136]

B. *The Third Attempt—Jury Participation in Sentencing*

The defendant in *Lockett* raised the contention that Ohio's procedure for imposing the death sentence was unconstitutional because the jury was not required to participate in the sentencing process.[137] In his opinion, Chief Justice Burger specifically declined to deal with the issue

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A peace officer includes a sheriff, deputy sheriff, marshal, deputy marshal, a member of the organized police department of any municipal corporation, state university law enforcement officers, township police constables, and the superintendent and patrolmen of the state highway patrol. *Id.* § 2935.01(B).

135. *Id.* § 2929.04(A)(8). The new bill establishes an aggravating circumstance if,

> [t]he victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

Id.

The goal of this aggravating circumstance seems to be to maintain a smoothly functioning system of justice by deterring those who are inclined to kill witnesses before or after they testify in a criminal proceeding. The significant feature of this aggravating circumstance is that, with it, the witness killer can potentially receive the death penalty, whereas, without it he will potentially receive only life imprisonment with eligibility of parole. Presumably, if a witness' life may be in danger for testifying in a particular criminal case he will at least know that his death will serve as the basis of an aggravating circumstance which could lead to the death of his killer.

Other goals notwithstanding, there may also be potential problems of proof in finding that the witness was specifically killed to prevent, or in retaliation for, his testimony. Arguably an inference to that effect can be made by the connection between the witness and the criminal case. However, it would seem the inference could not be conclusive for the same reasons mentioned by Justice White in his concurrence in *Lockett*, and as reflected in the changes in S.B. 1. *See* notes 57-51, 110-21 and accompanying text *supra* for a discussion of Justice White's positions in *Lockett* and the corresponding changes in S.B. 1.

136. OHIO REV. CODE ANN. § 2929.04(A)(1)-(4) (Page 1982) establishes aggravating circumstances if:

> (1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
>
> (2) The offense was committed for hire.
>
> (3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
>
> (4) The offense was committed while the offender was a prisoner in a detention facility as defined in § 2921.01 of the Revised Code.

137. 438 U.S. at 609 n.16.

of jury participation in the sentencing process.[138] Justice Rehnquist, concurring in part and dissenting in part, noted Lockett's contention, but summarily "dismissed [it] with little comment."[139] Nonetheless, under the new bill, if the defendant elects to be tried by a jury, the jury also is involved in the sentencing procedure.[140] The significant function of the jury in the sentencing process is to determine whether the aggravating circumstances[141] of the offense outweigh[142] the mitigating factors[143] present in the case.[144] If the jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors it must recommend a sentence of death.[145] When the jury recommends the death sentence, it can be imposed only if the judge also finds, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors.[146] If the judge does not make such a finding, the defendant can only be sentenced to life imprisonment with eligibility for parole after serving twenty or thirty full years.[147] If the jury does not recommend the death sentence, it is required to sentence the defendant to life imprisonment with eligibility for parole after serving either twenty or thirty full years.[148] The judge must then impose the sentence as recommended by the jury.[149]

If the defendant waives his right to a jury trial he will be tried and

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138. *Id.* Other contentions made by defendant Lockett which the Court declined to address were that the death penalty is constitutionally disproportionate for one who has not been proven to have taken life, attempted to take life or intended to take life; that Ohio's statutory procedures burden a defendant's rights to plead not guilty and be tried by a jury; and that the defendant should not be required to bear the burden of persuasion as to the existence of mitigating factors. *Id.*

139. *Id.* at 633. Justice Rehnquist relied on *Proffitt*, where the Court stated that while "jury sentencing in a capital case can perform an important societal function . . . [the Court] has never suggested that jury sentencing is constitutionally required." 428 U.S. at 252 (citations omitted).

140. OHIO REV. CODE ANN. § 2929.03(C)(2)(b) (Page 1982).

141. *See* notes 121, 122, 134, 135 and accompanying text *supra* for listings and discussions of the aggravating circumstances. *See* OHIO REV. CODE ANN. § 2929.04(A) (Page 1982) for a listing of the aggravating circumstances.

142. The weighing process involves consideration of the relevant evidence raised at trial, testimony, other evidence, statement of the offender, arguments of counsel and pre-sentence reports. OHIO REV. CODE ANN. § 2929.03(D)(2) (Page 1982). *See* notes 106-09 and accompanying text *supra* for a discussion of some problems associated with this weighing process.

143. *See* notes 75-99 and accompanying text *supra* for a detailed discussion of the mitigating factors.

144. OHIO REV. CODE ANN. § 2929.03(D)(2) (Page 1982).

145. *Id.*

146. *Id.* § 2929.03(D)(3).

147. *Id.*

148. *Id.* § 2929.03(D)(2).

149. *Id.*

sentenced by a three-judge panel.[150] It is interesting to note that, unlike the trial jury and trial judge, the new bill does not specifically require the three-judge panel to find, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors to impose a sentence of death.[151] The prosecution, however, does have the burden of establishing, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors.[152] Perhaps, this standard should be controlling, requiring the three-judge panel to make the finding by proof beyond a reasonable doubt.

Commensurate with the added importance of the jury in the sentencing process, S.B. 1 creates new procedures for jury selection in capital cases, selection of alternate jurors, peremptory challenges and challenges for cause. When a person who is indicted for a capital offense pleads not guilty or not guilty by reason of insanity, the clerk of the court must draw between fifty and seventy-five names for jury duty.[153] The selection of alternate jurors is to be made according to Ohio Rule of Criminal Procedure 24.[154] Alternate jurors are to be treated in the same manner as regular jurors, so that if a regular juror becomes unable to perform his duties before the case is submitted to the jury he can be replaced with an alternate juror.[155]

The new bill specifies that a lawful jury for the trial of a person charged with a capital offense is to consist of:

(1) those jurors summoned through the initial selection process[156] who are not set aside on challenge,[157] together with the number of bystanders[158] necessary to constitute a jury of twelve,[159] or
(2) if all jurors summoned through the initial selection process are set aside, twelve bystanders having the qualifications of jurors and not set aside on challenge.[160]

Senate Bill 1 expands the number of peremptory challenges available to a defendant in capital cases to twelve jurors.[161] This section of

150. *Id.* § 2929.03(C)(2)(a).

151. Section 2929.03(D)(3) only requires the three-judge panel to unanimously find that the aggravating circumstances outweigh the mitigating factors to impose the death sentence. *Id.* § 2929.03(D)(3).

152. *Id.* § 2929.03(D)(1).

153. *Id.* § 2945.18.

154. *Id.* § 2313.37(B). *See* OHIO R. CRIM. P. 24(F) (Page 1982).

155. OHIO REV. CODE ANN. § 2313.37(C), (D) (Page Supp. 1981). *See* note 225 *infra.*

156. *See* note 153 and accompanying text *supra.*

157. *See* notes 161-70 and accompanying text *infra.*

158. Bystanders will not be selected without the consent of both parties. OHIO REV. CODE ANN. § 2945.19 (Page 1982).

159. *Id.*

160. *Id.*

161. *Id.* § 2945.21(A)(2). If there is more than one defendant, each defendant has twelve

the new bill is meant to override criminal rule 24(C) which provides for only six peremptory challenges.[162] Additions and amendments have been made to challenges for cause also.[163]

A challenge for cause specifically for capital cases was addressed by the Court in *Lockett*. Lockett had claimed that four prospective jurors were excluded from the venire in violation of her sixth and fourteenth amendment rights.[164] Her contention was based on *Witherspoon v. Illinois*[165] where the Court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[166]

However, the *Witherspoon* Court noted that potential jurors could be excluded for cause when they made it unmistakably clear:

(1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or
(2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.[167]

The four prospective jurors in *Lockett* expressed more than general objections to the death penalty. Each specifically stated that he would not be able to take an oath to "well and truely" [sic] try the case and follow the law.[168] Therefore, the *Lockett* Court decided the prospective jurors were properly excluded.[169]

For further clarification, the Ohio legislature amended the capital offense challenge for cause to exclude a prospective juror if:

(c) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a

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peremptory challenges. *Id.* Correspondingly the prosecution may peremptorily challenge the number of jurors equal to the total number of peremptory challenges available to all the defendants. *Id.* § 2945.21(A)(3). *See* notes 222-24 and accompanying text *infra*, for potential problems associated with these additional challenges.

162. *See* OHIO R. CRIM. P. 24(C) (Page 1975).

163. OHIO REV. CODE ANN. § 2945.25 (Page 1982). The additions and amendments to the challenges for cause in the earlier bill were made to correspond to the challenges for cause set out in OHIO R. CRIM. P. 24(B) (Page 1975), except for § 2945.25(C) which is discussed in notes 164-70 and accompanying text *infra*.

164. 438 U.S. at 595.

165. 391 U.S. 510 (1968).

166. *Id.* at 522.

167. *Id.* at 522-23 n.21 (emphasis original).

168. 438 U.S. at 595-96.

169. *Id.*

particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.[170]

C. *The Third Attempt—The Youthful Offender*

An exclusive exception to the death penalty arises in the matter of age. The new bill provides that a person who is under eighteen years old when the offense was committed shall not be sentenced to death.[171] At trial, the defendant has the burden of raising the matter of age and of presenting the relevant evidence that he was not eighteen or older at the time of the alleged commission of the offense.[172] When the defendant does raise the matter of age at trial the prosecution has the burden of proving beyond a reasonable doubt that the defendant was eighteen or older when the offense occurred.[173] If the defendant is found to have been under eighteen years old when the offense occurred, and he is convicted of aggravated murder with aggravating circumstances, he will be sentenced to life imprisonment with parole eligibility after serving either twenty or thirty full years.[174]

For additional security that no one under eighteen at the time the offense was committed will be put to death, the sentence can be vacated if certain criteria are met.[175] Upon a motion of the defendant and after a hearing on the motion, the sentencing court must vacate the sentence of death if:

(1) [t]he defendant alleges in his motion and presents evidence at the hearing that he was not eighteen or older when the offense was committed;[176] [and]
(2) [t]he defendant did not present evidence at trial relating to his age at the time of the offense;[177] [and]
(3) [t]he motion was filed any time after the sentence was imposed and prior to execution of the sentence;[178] [and]
(4) [a]t the hearing on the motion, the prosecution fails to prove be-

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170. OHIO REV. CODE ANN. § 2945.25(C) (Page 1982).

171. *Id.* §§ 2929.02(A), 2929.03(D)(1). In a recent case involving the application of the death penalty to a sixteen year old, the United States Supreme Court did "not reach the question of whether — in light of contemporary standards — the Eighth Amendment forbids the execution of a defendant who was 16 at the time of the offense." Eddings v. Oklahoma, 102 S.Ct. 869, 874 n.5 (1982). *See also* note 66 *supra.*

172. OHIO REV. CODE ANN. § 2929.023 (Page 1982).

173. *Id.*

174. *Id.* § 2929.03(E).

175. *Id.* § 2929.05(C).

176. *Id.* § 2929.05(C)(1).

177. *Id.* § 2929.05(C)(2).

178. *Id.* § 2929.05(C)(3).

yond a reasonable doubt that the defendant was eighteen or older when the offense was committed.[179]

The earlier bill did not contain a similar age provision. Under present Ohio law (which is not changed by S.B. 1), however, a person who is not eighteen or older is subject to the jurisdiction of the juvenile courts.[180] Minors who were not fifteen or older at the time of the offense cannot be transferred for adult criminal prosecution.[181]

D. The Third Attempt—S.B. 1 and Appellate Review

In holding the death penalty legislation constitutional in *Gregg, Proffitt,* and *Jurek,* the United States Supreme Court stressed the importance of appellate review in cases where the penalty was imposed. For example, in Georgia, a special automatic and expedited direct review by the state's supreme court is provided.[182] The procedures were principally enacted to ensure that the death penalty was not arbitrarily imposed on a selected group of defendants. The review was also intended to serve as a check on racially discriminatory application of the penalty and to guard against excessive or disproportionate death sentences. In Florida, the state supreme court, while not required to conduct a specific form of review, requires the trial judge to justify the sentence of death with written findings.[183] Thus, the goal of appellate review in capital cases is to guarantee that similar results are reached in similar cases to guard against excessive and arbitrary punishment.[184]

Prior to the enactment of S.B. 1, the Ohio Supreme Court was committed to reviewing death punishments imposed by the lower courts. In *State v. Bayless,*[185] the court stated that in all capital cases

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179. *Id.* § 2929.05(C)(4).

180. OHIO REV. CODE ANN. §§ 2151.23, 2151.011(B)(1) (Page 1975).

181. OHIO R. JUV. P. § 30(B)(1) (Page 1975). This rule prohibits a transfer from juvenile court if the child was not at least fifteen years or older when the alleged offense occurred.

182. The Georgia Supreme Court is required 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 as enumerated in section 27-2534.1(b), 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.

GA. CODE ANN. § 27-2537(c) (1978).

Should the court affirm a sentence of death, it must reference cases that it has taken into consideration. *Id.* § 27-2537(e). A report in the form of a 6½ page questionnaire as well as the transcript and complete record of the trial must be transmitted to the court for review. *Id.* § 27-2537(a).

183. FLA. STAT. ANN. § 921.141(3) (Supp. 1981).

184. *See Ohio's Death Penalty, supra* note 21.

185. 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976).

presented for review, an examination of the mitigating and aggravating circumstances based on the facts of each case would be completed.[186] However, the court refused to re-try issues of fact and confined the review process to a determination of whether there was sufficient evidence to support the death verdict.[187] In addition, the high court's review did not entail a comparison of facts of one given case with those of others where both cases imposed the death penalty.[188] In some cases, imposition of the death penalty was affirmed by the Ohio Supreme Court without discussion of aggravating or mitigating circumstances.[189] What was most glaring about the appellate review was the fact that the Ohio court had never held the imposition of death improper in a single case brought before it after the enactment of the post-*Furman* legislation.[190]

What impressed the United States Supreme Court justices upholding post-*Furman* legislation in Georgia, Texas and Florida was the simple fact that the appellate review procedures implemented in those states had a proven record of accomplishment. In both Georgia and Florida, a number of death sentences were reversed by the state's supreme court.[191] Death sentences were not affirmed unless imposed in similar cases throughout the state.

> [T]he proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.[192]

Senate Bill 1 enacted three new sections to Ohio's capital sentencing statutes that will substantially change the past role of appellate review. Under section 2929.021, if an indictment or count in an indictment charges the defendant with aggravated murder and one or more

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186. *Id.*

187. State v. Edwards, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976).

188. *See Ohio's Death Penalty supra* note 21, at 656.

189. *Id.* at 655. *See also* State v. Shelton, 51 Ohio St. 2d 68, 364 N.E.2d 1152 (1977); State v. Downs, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977).

190. In 24 cases brought before the Ohio Supreme Court, the imposition of the death penalty was not found to be disproportionate in a single case. *See Ohio's Death Penalty, supra* note 21, at 654.

191. Although the Florida statute does not require the state's supreme court to use an objective standard of review for all cases, the court had vacated 8 of 21 death sentences it reviewed at the time of the *Proffitt* decision. Messer v. State, 330 So. 2d 137 (1976); Thompson v. State, 328 So. 2d 1 (1976); Halliwell v. State, 323 So. 2d 557 (1975); Tedder v. State, 322 So. 2d 908 (1975); Swan v. State, 322 So. 2d 557 (1975); Seater v. State, 316 So. 2d 539 (1975); Laindline v. State, 303 So. 2d 17 (1974); Taylor v. State, 294 So. 2d 648 (1974).

192. Gregg v. Georgia, 428 U.S. 153, 206 (1976).

aggravating circumstances, the Ohio Supreme Court must be notified that such an indictment was filed.

> The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:
> (1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;
> (2) The docket number or numbers of the case or cases arising out of the charge, if available;
> (3) The court in which the case or cases will be heard;
> (4) The date on which the indictment was filed.[193]

Likewise, if the defendant pleads guilty or no contest to any offense in the case, or if the indictment or count in the indictment is dismissed, the Ohio Supreme Court must be notified as to what action was taken in the case.

> The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:
> (1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;
> (2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;
> (3) The sentence imposed on the offender in each case.[194]

The primary purpose of this new reporting feature is to provide the supreme court with an additional library of information when considering the applicability of the death sentence in cases brought before it. In addition to viewing the sentences pursuant to completed trials, the supreme court will now be able to examine all instances where the death penalty *could have* been imposed compared with those instances where it was or was not imposed. The new measure allows the supreme court to gauge forms of pre-trial discretion, such as plea bargaining and dismissals, in order to assure that prosecutorial decisions in those stages are not arbitrary or capricious.[195] This feature is designed to enhance the type of proportionality review that was found favorable in *Gregg*, *Proffitt*, and *Jurek*. Omitted from section 2929.021, however, is a reporting process that provides record keeping based on race or sex.

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193. OHIO REV. CODE ANN. § 2929.021(A) (Page 1982).

194. *Id.* § 2929.021(B).

195. Whether the new bill provides fair application to all defendants was a main constitutional concern of its sponsor, Sen. Finan. The provision for record keeping was an implement to aid in fair application. *See* Finan Letter, *supra* note 94.

Thus, while the state supreme court now has the tools to review decisions on a quantitative basis, the ability of the court to foreclose on discriminatory discretion before trial remains difficult.

Section 2929.05, unlike the automatic review provisions in Georgia, Florida and Texas, provides for court of appeals and supreme court review on appeal.[196] The reviewing courts must give top priority to cases in which the death sentence is imposed.[197] Unlike the prior legislation, however, S.B. 1 demands a review and independent weighing of all the facts and other evidence disclosed in the record of the case.[198] Considering the offense and the offender, the reviewing court must determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate.[199] In making the determinations, S.B. 1 requires the reviewing court to

> consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, [and] also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors.[200]

In proportionality review, the court of appeals and the supreme court are aided by another provision of S.B. 1. Section 2929.03(F) requires the capital sentencer to state certain findings of the lower court in a separate opinion. If the court or three-judge panel sentences a defendant to death, the opinion must state (1) the sentencer's finding regarding the statutorily defined mitigating factors required to be viewed, as well as any other mitigating factors that were viewed; (2) the aggravating circumstances the offender was found guilty of committing; and (3) the reason why those aggravating circumstances were found to outweigh the mitigating factors.[201] The detailed opinion provides a great deal of the necessary materials for a supreme court proportionality review in that it expresses the objective factors relied upon to impose a death sentence.

In addition to shedding light on why the death penalty was imposed in a particular case, the new section also seeks to provide infor-

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196. OHIO REV. CODE ANN. § 2929.05(A) (Page 1982).

197. *Id.* § 2929.05(B).

198. *Id.* § 2929.05(A).

199. *Id.*

200. *Id.* Senate Bill 1 follows closely with the proportionality review set out in the constitutionally proper Georgia legislation. *See* note 182 *supra.*

201. OHIO REV. CODE ANN. § 2929.05(A) (Page 1982).

mation relating to why a death sentence was *not* imposed. If the court or three-judge panel does not return a death verdict on the defendant, the opinion must state (1) what mitigating factors were found to exist; (2) what aggravating circumstances the offender was found guilty of committing; and (3) the reasons why the aggravating circumstances were insufficient to outweigh the mitigating factors.[202] This provision is of particular importance in a proportionality review because it provides a check on discriminatory, discretionary and arbitrary grants of mercy.[203]

Although the proportionality review appears clear in its application, the reviewing court's duty to determine whether the sentencer "properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors"[204] will present problems. Senate Bill 1 offers no guidance to the court of appeals and the supreme court on what standards should be used to determine whether the sentencer properly "weighed" the aggravating circumstances and the mitigating factors. Any "weighing" procedure is going to be difficult, if not impossible, to support with any kind of evidence. While the reviewing courts need not be convinced beyond a reasonable doubt that the record supports the imposition of death, S.B. 1 states that they shall affirm a sentence of death only when they are "persuaded" that the aggravating circumstances present outweigh the mitigating factors found to exist and the sentence is appropriate after a proportionality review.[205]

Of course, what remains most uncertain about the new appellate procedure is its untested track record. If reliance on past death penalty reviews by the Ohio Supreme Court is any indication of future trends, the outlook for cursory treatment of death cases could well continue. However, S.B. 1 forces the Ohio Supreme Court to mend its past record of insensitive, "rubber-stamp"[206] review of death penalty cases. While the new procedures may prove costly and burdensome, the statutory mandate is a giant leap forward in assuring that an unalterable

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202. *Id.*

203. In his dissent in Woodson v. North Carolina, 428 U.S. 280, 318 (1976), Justice Rehnquist believed the review procedures in Georgia, Texas, and Florida were defective because the sentencing authorities were free to recommend life imprisonment for no reason whatsoever. Thus, while the reviewing courts in those states could review factors relating to why death was imposed in certain cases, there were no standards available for judging why death was *not* imposed in other cases. Justice Rehnquist characterized the appellate review procedures as "[making] connections at one end of the spectrum, but [not] at the other." *Id.* at 319 (Rehnquist, J., dissenting).

204. OHIO REV. CODE ANN. § 2929.05(A) (Page 1982).

205. *Id.*

206. Proffitt v. Florida, 428 U.S. 242, 259 (1976).

penalty is not rendered arbitrarily.[207]

E. The Third Attempt—Alternatives to a Death Sentence

Due to the lack of mandatory appellate review prior to the enactment of S.B. 1, Ohio law did not provide for re-sentencing defendants whose death sentences were vacated due to reversal on constitutional or other grounds.[208] Section 2929.06 directs the final court to sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or after serving thirty full years of imprisonment, should the offender's death penalty be vacated based on a finding that the new statute is unconstitutional.[209] This same provision applies should the court of appeals or supreme court not affirm a sentence of death or the court of common pleas vacates a sentence under section 2929.05(C).[210]

Senate Bill 1's most significant sentencing provisions are included in sections 2929.022 and 2929.03. New to Ohio is jury sentencing.[211] If in a capital offense for which death may be imposed, the jury determines under S.B. 1 procedures that death cannot be imposed on the defendant, then that same jury must impose a sentence of life imprisonment with parole eligibility after twenty full years or thirty full years.[212] Nowhere in the sentencing statutes, however, are there stan-

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207. OHIO REV. CODE ANN. § 2929.05(C) (Page 1982) requires the court of common pleas to vacate a sentence of death if all of the following apply;

(1) The offender alleges in the motion and presents evidence at the hearing that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(2) The offender did not present evidence at trial pursuant to section 2929.023 of the Revised Code that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced.

Under § 2929.06, should a death sentence not be affirmed on appeal, or ruled unconstitutional, or vacated under § 2929.05(C), the trial court that sentenced the offender must re-sentence the offender to life imprisonment with parole eligibility after twenty or thirty full years.

208. A more realistic reason for the lack of re-sentencing standards lies in the fact that the Ohio courts never had the need to re-sentence a defendant. *See* notes 184-90 and accompanying text *supra*.

209. OHIO REV. CODE ANN. § 2929.06 (Page 1982).

210. *Id. See* note 207 *supra*.

211. *See* notes 137-49 and accompanying text *supra*.

212. OHIO REV. CODE ANN. § 2929.03(D)(2) (Page 1982). The jury's recommendation of life imprisonment is binding on the trial court. However, imposition of the death penalty by the jury must be reconsidered by the trial judge. This procedure is a hybrid of the scheme approved in Florida by the United States Supreme Court. In Florida, a jury renders an advisory sentence as to whether the defendant should be sentenced to life imprisonment or death. FLA. STAT. ANN. §

dards by which a jury can decide whether to imprison a defendant for a minimum of twenty full years or for a minimum period of thirty full years. The jury's determination is made harsher by virtue of S.B. 1 sections 2967.13(D) and (E), which prohibit a defendant from receiving any diminution of sentence for faithfully observing the rules of the prison if that defendant is convicted under sections 2929.022 or 2929.03 and is sentenced to a life term with parole eligibility after twenty full years or after thirty full years.[213] Significantly, under S.B. 1, it appears much of the arbitrary and capricious imposition of death sentences, struck down in *Furman,* could return in the form of life sentences with discretionary parole eligibility.

For those defendants convicted of aggravated murder under S.B. 1, but not of one or more aggravating circumstances, sections 2929.022 and 2929.03 prescribe a prison sentence of twenty years.[214] As compared with a sentence of twenty *full* years or thirty *full* years, a sentence of twenty years allows for a diminution of sentence for defendants who faithfully observe the rules of the prison.[215] Defendants confined to prison for life for an offense of first degree murder or aggravated murder before the enactment of S.B. 1 are not affected by the new provisions and become eligible for parole after serving only fifteen

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921.141 (Supp. 1981).

Under S.B. 1, the jury does not render sentence on an offender who raises the matter of age at trial and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense. OHIO REV. CODE ANN. § 2929.03(E) (Page 1982) provides for the trial judge or the three-judge panel to sentence a defendant in this category. The potential prison terms, however, are identical.

213. While newly enacted OHIO REV. CODE ANN. § 2967.19(C) (Page 1982) expressly proscribes time off for good behavior for defendants sentenced to life terms with parole eligibility in twenty full years or thirty full years under §§ 2929.022, .03, the statute makes no mention of diminution provisions for those sentenced to identical terms under § 2929.06. The plan appears to be similar to the drafting oversight of § 2929.03(D)(3) discussed in notes 151-52 and accompanying text *supra.*

214. Senate Bill 1 outlines three ways by which a defendant can be sentenced to a life term with parole eligibility after serving 20 years:

(1) Under § 2929.022, if a defendant indicted on a charge of aggravated murder with an aggravating circumstance of prior conviction elects to have the existence of that aggravating circumstance determined at the sentencing hearing, and at that hearing the aggravating circumstance of a prior conviction and any other aggravating circumstances are not proved beyond a reasonable doubt. This provision also applies to defendants who at trial have not been found to be 18 years of age or older at the time of the commission of the offense.

(2) Under § 2929.03(C)(1), if a defendant is indicted on a charge of aggravated murder with one or more aggravating circumstances, but is convicted only of the former crime.

(3) Under § 2929.03(A), if a defendant is indicted and convicted on a charge of aggravated murder.

215. OHIO REV. CODE ANN. § 2967.19(C) (Page 1982). Defendants serving life terms with parole eligibility after serving twenty years may receive six days off for good behavior for each month served. *Id.*

full years imprisonment.[216]

Senate Bill 1 also changes previous law for those defendants serving consecutive sentences of imprisonment. If a prisoner is serving a life term with parole eligibility after fifteen full years for a conviction of aggravated murder or first degree murder before the enactment of S.B. 1 consecutively to any other term of imprisonment, the prisoner is not eligible for parole before serving fifteen full years of imprisonment plus the diminished minimum number of years of another non-life term or the diminished number of years before parole of another life sentence.[217] This same provision applies to defendants convicted under S.B. 1 and sentenced to twenty full years or thirty full years of imprisonment consecutively to any other term of imprisonment, with the exception that the twenty or thirty full year terms are not subject to "good-time" diminution.[218]

Ohio law authorizes the Department of Rehabilitation and Correction to grant furloughs to trustworthy prisoners for the purpose of:

(1) Visiting a dying relative;
(2) Attending the funeral of a relative;
(3) Arranging for a suitable parole plan, or an educational or vocational furlough plan;
(4) Arranging for employment;
(5) Arranging for suitable residence;
(6) Visiting with family;
(7) Otherwise aiding in the rehabilitation of the inmate.[219]

Senate Bill 1 limits grants of furloughs for prisoners serving life imprisonment after the effective date of the bill to (1) visiting a dying relative; and (2) attending the funeral of a relative.[220]

As is evident, the Ohio General Assembly did more than draft a

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216. *Id.* §§ 2967.13(B), .19(C). A prisoner serving a sentence of life for an offense other than first degree murder or aggravated murder before the enactment of S.B. 1 becomes eligible for parole after serving 10 full years of imprisonment. *Id.* § 2967.13(F).

217. *Id.* § 2967.13(G). Former law limited the imposition of consecutive terms of imprisonment to 20 years when one or more of the terms were imposed for murder.

Senate Bill 1 places no such limit on consecutive imprisonment when one or more of the terms imposed are for aggravated murder. *Id.* § 2929.41(E)(1). However, in order to avoid the enactment of an unconstitutional ex post facto law, the 20 year limit continues to apply to those prisoners committed prior to the effective date of S.B. 1. *Id.* § 2967.19(C).

218. *Id.* §§ 2967.13(I) .13(J). *See* note 213 and accompanying text *supra*. Those convicted under S.B. 1 and sentenced to a life term with parole eligibility after 20 years consecutively to any other term fall under an identical sentencing scheme. However, minimum 20 year life terms are subject to diminution. OHIO REV. CODE ANN. § 2967.13(H) (Page 1982).

Section 2967.19(D) outlines the formula used to determine eligibility for parole under S.B. 1 should a defendant be sentenced to consecutive prison terms.

219. OHIO REV. CODE ANN. § 2967.27(A) (Page 1982).

220. *Id.*

death penalty bill that would be difficult to apply in most cases. Convicted criminals taking solace in the procedural safeguards to death will fare less well under S.B. 1's stiffened imprisonment provisions. Longer sentences with no time off for good behavior and restricted furloughs will serve as alternatives to death sentences.[221] However, the jury's unguided control over at least ten years of a defendant's life may well provide the grounds for a constitutional test of S.B. 1.

IV. CONCLUSION

The increased role of the jury in capital cases may create significant problems, one of which is the status of the jury between the trial and sentencing hearing. An obvious solution is to sequester the jury, but that creates problems too. One common pleas court judge has stated "[i]t's hard enough to get fourteen people [twelve jurors and two alternates] to serve on a jury in a capital case without undue hardship. Add the sequestering and it's near impossible."[222] Although the bill provides for a venire from fifty to seventy-five people,[223] it has been estimated that from one hundred and fifty to two hundred people would be needed merely to begin jury selection.[224] Serious problems could also arise if a juror became incapacitated between the trial and sentencing hearing.[225]

Moreover, the potential costs of a capital case could be enormous. Some experts predict a minimum of $50,000 in estimating the cost of the trial.[226] In addition the new bill requires the trial court in capital cases to authorize defense counsel to obtain investigative services, experts, and other services for indigent defendants.[227] An Ohio public defender has estimated an additional $30,000 as the cost of defending a person charged with a capital offense.[228] The probable difficulties and expenses related to the new death penalty can probably best be summed up by the bill's sponsor, Senator Richard H. Finan, who said,

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221. The chief sponsor of the bill wrote that if S.B. 1 accomplishes nothing else, the increased sentences will keep criminals off the street for a considerable period of time. *See* Finan Letter, *supra* note 94.

222. Dayton Journal Herald, Oct. 19, 1981, at 1, cont'd at 4, col. 1.

223. *See* note 153 and accompanying text *supra.*

224. Dayton Journal Herald, Oct. 19, 1981, at 1, cont'd at 4, col. 2.

225. *See* OHIO REV. CODE ANN. § 2313.37(C), (D) (Page Supp. 1981). Section 2313.37(D) intimates that, for capital cases, the final submission of the case to the jury does not occur until the sentencing hearing. This would allow replacements of regular jurors with alternate jurors after the trial but before the sentencing hearing. If so, this might prompt some judges to allow alternate jurors to sit in on the jury deliberations at trial, which some judges do not think is proper. *See* Dayton Journal Herald, Oct. 19, 1981, at 1, cont'd at 4, col. 2.

226. Dayton Journal Herald, Oct. 19, 1981, at 1, cont'd at 4, col. 1.

227. OHIO REV. CODE ANN. § 2929.024 (Page 1982).

228. Dayton Journal Herald, Oct. 19, 1981, at 1, cont'd at 4, col. 3.

"[n]obody ever said justice came cheap or easy."[229]

On paper, Ohio has tried to plug the constitutional holes in its old death bill by relying on earlier, but less than clear-cut, United States Supreme Court decisions. As a practical matter, it remains to be seen if Ohio's death penalty will be put into effect.

Prosecutors may tend to be selective in bringing death cases to trial because of the procedural complexities and the enormous expense. If the case does get to trial and makes it through the extensive procedural safeguards afforded the defendant, it will still face extensive, in-depth review by the Ohio Supreme Court. The Ohio Supreme Court is now required to make its own analysis of whether the death sentence is appropriate[230] instead of merely approving lower courts' findings. The United States Supreme Court has explicitly applauded the safeguard of extensive review by state supreme courts which have resulted in the reversal of some death sentences.[231] The Supreme Court views those reversals as an extra check to insure the death sentence is not being imposed arbitrarily or disproportionately for similarly situated defendants. This seems to raise a challenge to the Ohio Supreme Court to reverse some death sentences as a showing of its good faith in a strict review of the imposition of death sentences in Ohio.

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Scott Selbach

Code Sections Affected: 2313.37, 2903.01, 2929.02, .021, .022, .023, .024, .03, .04, .05, .06, .41, 2941.14, 2945.06, .18, .19, .21, .22, .24, .25, 2953.02, 2967.13, .19., .26, .27.
Effective Date: October 19, 1981.
Sponsor: Finan (S).
Committees: Judiciary (S)
Judiciary and Criminal Justice (H)

229. *Id.* at 4, col. 4.
230. *See* notes 198-200 and accompanying text *supra.*
231. *See* notes 182-92 and accompanying text *supra.*