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Comments

The Evolution of the Capital Punishment Jurisprudence of the United States Supreme Court and the Impact of *Tuilaepa v. California* on that Evolution*

By choosing to make capital punishment a sentencing option, state legislatures assume the responsibility of creating a capital punishment sentencing scheme. This ensures that the death penalty is imposed in a manner that comports with the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. In 1972, due to the protection afforded by the Eighth Amendment, the United States Supreme Court began to analyze how much discretion was granted to the sentencing bodies responsible for determining whether a capital offender is sentenced to death or life imprisonment. This began an evolution in this country's capital punishment jurisprudence which has continued through the present term of the Supreme Court. The focus of each stage of this evolution has been the aggravating factor and the manner in which it guides the discretion of the capital punishment sentencing bodies, thus ensuring that the death penalty is imposed in a constitutional

* Special thanks to Justice Richard Huffman for his thought provoking suggestions, as well as his valuable insight and guidance. Thank you also to Katherine Hunsaker for her constant support and understanding.
manner. This Comment argues that in its 1994 decision of Tuilaepa v. California, the Supreme Court began a new era in capital punishment jurisprudence. There now exists a two-step process for sentencing a capital offender to death. In addition, requirements placed upon an aggravating factor depend upon the step in which the factor is being considered.

INTRODUCTION

The capital punishment jurisprudence of the United States Supreme Court is based upon the principles and ideas embodied in the Eighth Amendment to the United States Constitution.1 Long ago, however, the Court announced that the protection provided by the Cruel and Unusual Punishment Clause of the Eighth Amendment is not susceptible to precise definition.2 Therefore, the Court has struggled to develop a definitive standard that establishes what must be included in a constitutional capital punishment sentencing scheme. As a result, what is constitutionally required of a capital punishment statute has undergone a dramatic evolution over the past twenty-five years.3

This evolution began during the 1970’s when the Supreme Court announced that the death penalty is a very unique form of punishment,

1. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. CONST. amend. VIII (emphasis added).

By using the Due Process Clause of the Fourteenth Amendment, the Eighth Amendment was construed to restrict the states’ authority to inflict punishment in Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); see also Robinson v. California, 370 U.S. 660 (1962) (Douglas, J., concurring). In pertinent part, the Fourteenth Amendment provides, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

2. Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring); see also Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) (stating that “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted”).

3. This Comment will only discuss the death penalty as a punishment for the crime of murder. The United States Supreme Court has ruled that the death penalty is a “grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.” Coker v. Georgia, 433 U.S. 584, 592 (1977). In the Coker decision, the Supreme Court implied that no state may invoke the death penalty as a punishment for a crime in which no life is taken. See Michael W. Combs, The Supreme Court and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control, 7 S.U. L. REV. at 1, 33 (1980). However, some states still have statutes which designate crimes other than murder as capital offenses, such as aggravated kidnapping, aggravated rape, treason, skyjacking, and some drug offenses. See Raymond J. Pascucci, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency, 69 CORNELL L. REV. 1129, 1222-24 (1984). The federal government also has a statute which designates a crime other than murder as a capital offense. See 18 U.S.C. § 794 (1982) (punishing espionage as a capital offense).
in both its severity and irrevocability. As such, it requires a correspondingly unique method of determining whether it is the appropriate punishment in each case in which it is imposed.

Before this evolution began, the death penalty was assumed to be a constitutionally permissible form of punishment. The only constitutional challenges to the death penalty were to the means by which the offender was put to death. However, as a result of its announcement, the Court began to closely scrutinize the capital punishment statutes which were employed by the states. In particular, the Court examined the amount of guidance and discretion the states provided to their sentencing authority when directing the authority to determine which offenders would be sentenced to death and which to life imprisonment. This examination began the dramatic evolution of the Court's capital punishment jurisprudence and left the states unclear as to what was required of a constitutional death penalty statute.

By 1978, the decisions of the Supreme Court had begun to develop a framework that provided the states with some greatly needed direction. The guiding principle of these decisions was that a capital punishment sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Through several convoluted decisions, the Supreme Court suggested that a state must adhere to this guiding principle by directing its sentencing authority to consider, in each case, the circumstances that justified executing the offender and those that

4. Furman, 408 U.S. at 287 (Brennan, J., concurring); Id. at 306 (Stewart, J., concurring); see also Gregg v. Georgia, 428 U.S. 153, 187 (1976).

5. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (explaining that "death is qualitatively different from a sentence of imprisonment, however long ... [and] [b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

6. See Furman, 408 U.S. at 282-84 (Brennan, J., concurring).


8. Furman v. Georgia (1972) was a 5-4 decision with the Justices writing nine separate opinions totaling 233 pages. Furman, 408 U.S. at 238-470. The "1976 cases" (Gregg v. Georgia, Proffitt v. Florida, Jurek v. Texas, Woodson v. North Carolina and Roberts v. Louisiana) were all sharply divided decisions which totaled 211 pages.

might mitigate against such a sentence. This was in contrast to the previous practices of permitting the sentencing authority to arbitrarily sentence the offender to death or mandating it to do so if the offender is found guilty of any enumerated offense. With this rough framework in place, state legislatures began to modify their death penalty statutes in an effort to comply with the Supreme Court's ambiguous mandates. Gradually, many of these state statutes were brought before the Supreme Court. The Court has slowly provided more and more guidance as the evolution of the constitutional death penalty statute has continued.

Presently, thirty-eight states have death penalty statutes. Although the details of each state's statute differ, they all generally employ some form of guided discretion. A guided discretion statute is one in which the sentencing authority's discretion to impose the death penalty is

11. For a discussion of this practice, see Furman, 408 U.S. at 256 (Douglas, J., concurring); id. at 305 (Brennan, J., concurring); id. at 310 (Stewart, J., concurring).
12. For a discussion of this practice, see Woodson, 428 U.S. 280, 301-05 (1976).
13. For example, California's death penalty statute was either ruled unconstitutional or changed dramatically six times during the 1970's alone. See John W. Poulos, Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California, 23 U.C. Davis L. Rev 157, 169-97 (1990).
First, in February of 1972, in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), the California Supreme Court held that the death penalty was invalid per se under the California Constitution. Poulos, supra, at 169-70. Second, in November of 1972, Proposition 17 was passed as part of the general ballot and the California Constitution was amended to make the death penalty constitutionally valid. Id. at 171. Third, in 1973, the California Legislature enacted a mandatory death penalty statute following the United States Supreme Court's decision in Furman. Id. at 172-73. Fourth, in 1976, in Rockwell v. Superior Court, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976), the California Supreme Court held that California's mandatory death penalty was unconstitutional under the Eighth and Fourteenth Amendments. Poulos, supra, at 176-77. Fifth, in 1977, the California Legislature enacted another death penalty statute in an attempt to comply with the decisions of the California and U.S. Supreme Courts. Id. at 177-83. Finally, in 1978, Proposition 7 was passed during the general election, making dramatic changes to the 1977 death penalty statute and making California's death penalty law much "stronger." Id. at 183-95.

14. See Patricia Mitchell, Executions In America, L.A. Times, May 11, 1994, at A5 (chart). The article cited actually indicates that there are only 37 states with the death penalty, however, in March of 1995, New York added a death penalty statute to its books which went into effect on September 1, 1995. 1995 N.Y. Laws ch. 1, §§ 20, 38 (codified at N.Y. Penal Law § 60.06).
guided by its consideration of the factors in the case that aggravate in favor of the death penalty and those that mitigate against it. Under a guided discretion statute, aggravating factors perform a constitutionally essential function in that the sentencing authority is required to find at least one aggravating factor present in a case before the death penalty is even an option. Due to the central role that aggravating factors play in a constitutional death penalty statute, it is critical that the aggravating factors utilized are defined in a constitutionally permissible fashion and perform the necessary function.

In the recent United States Supreme Court decision of Tuilaepa v. California, the Court for the first time suggested that the amount of precision with which an aggravating factor must be defined, as well as the exact function an aggravating factor must perform, depends upon the stage of the capital sentencing process in which the factor is utilized. This Comment will trace the evolution of the requirements which the Constitution places upon the process utilized to sentence an offender to death and analyze the impact of the Court’s decision in Tuilaepa upon sentencing authority with three of the remaining seven allowing a judge to override a jury’s recommendation of life imprisonment. In Spaziano, the Supreme Court ruled that jury sentencing is not constitutionally required. Id. at 464.

16. See Gregg v. Georgia, 428 U.S. 153, 193-95 (1976). These factors are termed “aggravating factors,” or aggravating circumstances, and are those facts about the capital offender’s particular record or the offense which warrant the offender being sentenced to death instead of life imprisonment. They include such things as a previous murder conviction, the murder being committed to prevent a lawful arrest, or the murder being committed for pecuniary gain. Typically, the factors are referred to as statutory aggravating factors, or circumstances, because they are enumerated in a state’s death penalty statute. See infra note 63 for a discussion of whether it is a constitutional requirement that only statutory aggravating factors, as opposed to non-statutory aggravating factors, are utilized to sentence a capital offender to death.

17. These factors are termed “mitigating factors,” or mitigating circumstances, and are “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Lockett v. Ohio, 438 U.S. 586, 604 (1978). Elements typically used as mitigating factors include age, lack of prior criminal activity, and extreme mental deficiency.

18. Id. at 2634. In Tuilaepa, the Court, for the first time, stated that the process of sentencing a capital offender to death is comprised of two steps. During the first step, or the eligibility stage, the group of all offenders convicted of murder is narrowed down to a smaller group of all offenders who are deemed to be eligible for the death penalty based upon the facts of their particular case. During the second step, or the selection stage, the individuals that will receive the death penalty are selected from the group of capital offenders that were deemed to be eligible for that punishment. Id. at 2634-35; see also supra notes 167-70 and accompanying text.
that evolution. Section I will provide important background information regarding the standards used by the Court to decide which punishments comport with the Eighth Amendment's mandates. Section II will trace the evolution of the death penalty statute in the decisions of the Supreme Court. The emergence of guided discretion statutes as the preferred means of satisfying the requirements of the Eighth Amendment will then be discussed. Section III will focus specifically on the role of aggravating factors in a guided discretion statute, as well as the requirement that an aggravating factor not be unconstitutionally vague. Section IV will discuss and analyze the Tuilaepa decision. Section V will discuss the effect that the Tuilaepa decision has had on the evolution of the constitutional requirements placed upon a capital punishment statute. Finally, Section VI will provide a brief conclusion on the evolutionary nature of the requirements of a constitutional death penalty statute.

I. MEANING OF "NOR CRUEL AND UNUSUAL PUNISHMENTS" 20

Most of the early decisions of the Supreme Court which contemplated the protection provided by the Eighth Amendment simply assumed that if a punishment was similar to one that was deemed to be cruel and unusual at the time that the Bill of Rights was adopted, then it was itself cruel and unusual. 21 Therefore, in 1890, the Court adopted the circular standard that if a punishment was "manifestly cruel and unusual" it fell within the prohibitions of the Eighth Amendment. 22 Twenty years later, in Weems v. United States, 23 the Supreme Court renounced this antiquated standard when it recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." 24 Thus, in Weems the Court recognized that the standard which should be used to decide if a punishment is indeed cruel and unusual must be a fluid standard that has the ability to change with the times.

In Trop v. Dulles, 25 the Court again renounced the "manifestly cruel and unusual" standard and recognized the evolutionary nature of the Cruel and Unusual Punishment Clause. It acknowledged that the Clause

22. Id. at 264-65 (quoting In re Kemmler, 136 U.S. 436, 446 (1890)).
24. Id. at 373.
"must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 26 Accordingly, the Court announced that "[t]he basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards." 27 The Court thereby interpreted the Cruel and Unusual Punishment Clause of the Eighth Amendment as prohibiting the infliction of any punishment that is beneath human dignity. 28 The standard to be used to determine which punishments are beneath human dignity is that established by contemporary societal values. 29

While a standard based on contemporary societal values may seem to be as vague and imprecise as the Clause itself, the Court's application of this standard has provided meaningful guidance and made this standard a viable one. Chief Justice Burger noted that "in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society." 30 The Court has expanded on this proposition and now determines contemporary societal values by examining "objective indicia that reflect the public attitude toward a given sanction." 31 First among these indicia are the decisions of state legislatures. "[L]egislative judgment weighs heavily in ascertaining" contemporary societal values. 32 Second, the sentencing decisions of juries are examined. The jury "is a significant and reliable objective index of contemporary values because it is so directly involved" in the process of sentencing an offender to death. 33 Through this two-part examination, the Court ensures that a particular punishment comports with contemporary societal values and thus with the Cruel and Unusual Punishment Clause of the Eighth Amendment.

26. Id. at 100-01. See also Weems, 217 U.S. at 378 (stating that the Clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice").
27. Trop, 356 U.S. at 100.
28. Id.; see also Weems, 217 U.S. at 378; Robinson v. California, 370 U.S. 660, 666 (1962).
29. Id. at 101.
30. Furman v. Georgia, 408 U.S. 238, 384 (1972) (Burger, C.J.; dissenting); cf. id. at 279 (Brennan, J., concurring) (stating that "[t]he acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use").
32. Id. at 175.
33. Id. at 181.
II. CONSTITUTIONAL EVOLUTION OF THE CAPITAL PUNISHMENT STATUTE

A. The Fall of Unfettered Sentencing Discretion

Prior to 1972, there was no need to apply the guarantee of the contemporary societal values standard to the death penalty because death was simply assumed to be a constitutionally permissible form of punishment. That assumption was not at that point challenged. As a result, the state legislatures were given carte blanche to adopt any death penalty statute which they saw fit. Taking advantage of this unlimited authority, the legislatures granted their sentencing authorities unrestrained and unguided discretion in determining which capital offenders received the death penalty and which received life imprisonment.

However, in 1972, this practice of giving the sentencing authority unfettered discretion was challenged in the landmark case of Furman v. Georgia. In Furman, the Supreme Court heard the appeal of three defendants who had been sentenced to death, two of whom were sentenced under the Georgia capital punishment sentencing scheme and one under the Texas scheme. The Court granted certiorari to determine whether "the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of

34. Furman, 408 U.S. at 285 (Brennan, J., concurring); id. at 241 (Douglas, J., concurring) (stating that "[i]t has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous" (construing In re Kemmler, 136 U.S. 436, 447 (1890)).


At the time the Eighth Amendment was adopted in 1791, all of the states had mandatory death penalty statutes; if the offender was convicted of an enumerated offense, he was automatically sentenced to death. However, juries began to react unfavorably to the mandatory nature of these statutes and often refused to convict an offender of the enumerated offenses. In an effort to eliminate this problem, the legislatures made several modifications to their death penalty statutes (including splitting the offense of murder into first and second degree murder), but none of these efforts were successful. Consequently, in Tennessee in 1838, the mandatory death penalty statute was abandoned in favor of a discretionary death penalty statute which permitted the jury (or sentencing authority) to choose between the death penalty and life imprisonment, based upon whichever criterion it chose. See Woodson v. North Carolina, 428 U.S. 280, 289-95 (1976) (relating the history of mandatory death penalty statutes in the United States).


37. Id. at 239. One of the Georgia defendants was sentenced to death based upon his conviction for the crime of first-degree murder. The other Georgia defendant and the Texas defendant were sentenced to death based upon their convictions for the crime of rape. Id.
the Eighth and Fourteenth Amendments. Not surprisingly, the case resulted in a sharply divided five to four decision by the Court with nine separate opinions being written. Two of the concurring Justices adopted the view that the death penalty was per se unconstitutional and violated the Eighth and Fourteenth Amendments in all cases. However, the other three concurring Justices were unwilling to hold that the death penalty was per se unconstitutional. Instead, these three Justices ruled strictly on the constitutionality of the defendants' death sentences, holding that the procedures used to impose these particular sentences were constitutionally deficient. The view espoused by these three concurrences is generally considered to be the holding of Furman.

Although no one rationale can be cited as the basis for the Court's decision in Furman, there is at least one principle which is common

38. *Id.* (alteration in original).
39. *Id.* at 238-470.
41. See Furman, 408 U.S. at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).
42. *Id.* at 239-40 (per curiam).
44. Justice Douglas held that the death penalty was applied in a discriminatory fashion and thus violated the defendants' right of equal protection, which he believed to be "implicit in the ban on 'cruel and unusual' punishments." *Furman*, 408 U.S. at 257 (Douglas, J., concurring).
Justice Brennan held that the death penalty was "inflicted arbitrarily" and that because it violated the four factors that he had developed in order to determine whether a given punishment was cruel and unusual if it was unconstitutional per se. *Id.* at 305 (Brennan, J., concurring).
Justice Stewart held that the death penalty was applied in a "capricious" and "random" manner and therefore violated the Eighth and Fourteenth Amendments. *Id.* at 309-10 (Stewart, J., concurring).
Justice White held that the death penalty statutes before the Court were unconstitution- al because they were applied so infrequently that they actually undermined the social purposes (incapacitation, deterrence, and retribution) that justified their enactment. *Id.* at 311-13 (White, J., concurring).
to all five concurring opinions. That principle is that the broad and unguided discretion which the states gave to their sentencing authorities prior to *Furman* allowed the death penalty to be imposed in an arbitrary and capricious manner. The concurring opinions all held that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Thus, what *Furman* was construed to prohibit was the unguided and unrestrained exercise of discretion in choosing which capital offenders received the death penalty and which received life imprisonment.

The holding of *Furman* was expressly confined to the Georgia and Texas death penalty statutes which were at issue in the consolidated cases before the Supreme Court. In reality though, *Furman* implicitly rendered all death penalty statutes then in existence unconstitutional because each of those statutes provided the particular sentencing authority the same broad and unguided discretion that the Georgia and Texas statutes provided to their sentencing authorities. The Court's *Furman* decision, however, failed to provide the states with any meaningful guidance with regard to the procedures that might make a capital punishment statute constitutional. The significance and the impact of the *Furman* decision therefore blindly cast the United States into a new era of capital punishment jurisprudence.

### B. The State Legislatures' Responses to Furman

In response to the vague pronouncements of *Furman*, many state legislatures sought to rewrite death penalty statutes which had been

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Justice Marshall held that the death penalty was *per se* unconstitutional because it "is morally unacceptable to the people of the United States at this time in their history." *Id.* at 360 (Marshall, J., concurring).

45. *See Gregg*, 428 U.S. at 188 (explaining that "*Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner").

46. *Furman*, 408 U.S. at 310 (Stewart, J., concurring). Justice Stewart compared the chances of being sentenced to death to that of being struck by lightning. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309.

47. *See id.* at 239-40 (per curiam).

48. *Id.* at 417 (Powell, J. dissenting). At the time of the *Furman* decision, 40 states and the District of Columbia had death penalty statutes and 39 of these statutes were rendered unconstitutional by the Court's decision. The only statute surviving the *Furman* decision was that of Rhode Island (which provided for the death penalty for the offense of murder by a life term prisoner) because it was a mandatory statute and the *Furman* decision did not speak to mandatory statutes. Furthermore, the *Furman* decision "remove[d] the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country." *Id.*
effectively, although not expressly, ruled unconstitutional by the decision in that case. 49 However, it was unclear whether Furman’s prohibition of unguided and unchanneled sentencing discretion required the elimination of all sentencing discretion or just that the discretion be guided. Consequently, the state legislatures were left to sift through Furman’s nine separate opinions in their efforts to create a constitutionally valid capital punishment sentencing scheme.

As a result of this ambiguity, two very different schools of thought emerged, each with its own distinct interpretation of Furman. 50 The majority view interpreted Furman as holding that the Constitution did not permit a capital sentencing authority to have any discretion at all. This school of thought asserted that the statute which was most likely to withstand a constitutional attack was one that imposed a mandatory death sentence if the offender was convicted of an enumerated offense. Twenty-two states adopted this view and removed all discretion from the capital punishment sentencing process by adopting mandatory death penalty statutes. 51

The minority view focused on the type and amount of discretion that was afforded the sentencing authorities in the pre-Furman death penalty statutes. This school of thought asserted that the unguided nature of the discretion produced the constitutional flaw rather than the simple fact that the sentencing authority was granted the discretion to make its own decision. Consequently, this minority believed that as long as the sentencing authorities’ discretion was suitably guided, a death penalty statute would withstand a constitutional attack. Twelve states adopted this view and enacted statutes which were modeled after the American Law Institute’s Model Penal Code Section 210.6. 52 Section 210.6 set

49. Between June 29, 1972, the date on which Furman was decided, and July 2, 1976, the date the next significant capital punishment decision was announced by the Supreme Court, 44 states redrafted their death penalty statutes in an effort to comply with the mandates of Furman. See Poulos, supra note 13, at 172.


52. See Poulos, supra note 13, at 172.
forth a guided discretion statute which utilized aggravating and mitigating circumstances to guide the sentencing authority's discretion.53

C. The "1976 Cases" and the Emergence of Guided Discretion

By 1976, several of the statutes which had been enacted in response to Furman had been the subject of constitutional attacks, and thus, had begun to work their way through the nation’s court system. By July 2, 1976, five of these statutes had made their way to the Supreme Court.54 On that date, the Court announced five death penalty decisions which have become known collectively as the “76 Cases".55 These five cases provided the Supreme Court with its first opportunity to clarify its enigmatic Furman decision and to identify constitutionally acceptable capital punishment sentencing procedures.

The first of the “76 Cases" was Gregg v. Georgia.56 In Gregg, the Court examined the Georgia state legislature’s use of a guided discretion statute57 in an effort to comply with the dictates of Furman. However, before it could do so, the Court had to clarify what in fact the Furman decision required of a capital punishment sentencing scheme. The Court clarified its Furman decision by stating that “Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."58 Using this as the Furman standard, the Court held that Georgia’s use of a guided discretion statute did in fact comply with the dictates of Furman. In particular, the Court stated that Georgia’s use of aggravating factors

53. For a list of the aggravating and mitigating circumstances used by the Model Penal Code, see Gregg, 428 U.S. at 193 n.44.
54. Of the five statutes which were challenged on that date, two were guided discretion statutes, see Gregg, 428 U.S. at 162-66; Proffitt v. Florida, 428 U.S. 242, 247-50 (1976), two were mandatory death penalty statutes, see Woodson v. North Carolina, 428 U.S. 280, 286 (1976); Roberts v. Louisiana, 428 U.S. 325, 329-31 (1976), and the final statute could not be categorized as either, see Jurek v. Texas, 428 U.S. 262, 268-69 (1976).
55. The “76 cases" are: Gregg, 428 U.S. 153; Proffitt, 428 U.S. 242; Jurek, 428 U.S. 262; Woodson, 428 U.S. 280; Roberts, 428 U.S. 325.
57. The statute challenged in Gregg required that the sentencing authority find beyond a reasonable doubt that at least one of the ten statutory aggravating factors exists before the sentencing authority was even permitted to consider the death penalty. Then, once the sentencing authority had found at least one statutory aggravating factor, it was directed to consider all evidence in aggravation and mitigation of the sentence of death when deciding if the particular capital offender will be sentenced to death. Gregg, 428 U.S. at 164-66.
58. Id. at 189.
guided and channeled the sentencing authority’s discretion, and thereby controlled, if not eliminated, the arbitrary and capricious infliction of the death penalty which existed prior to Furman. In Gregg, the Court went on to announce that the concerns expressed in Furman could best be “met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance . . . and provided with standards to guide its use of the information.” The Court’s decision in Gregg represents the first expressed recognition of what makes a constitutional death penalty statute and suggests that a guided discretion statute which utilizes aggravating factors may well be the preferred form of capital punishment statute.

Following Gregg, the Court next decided Proffitt v. Florida. In Proffitt, the Court used much of the same rationale that it employed in Gregg to hold that the Florida guided discretion statute’s use of aggravating factors sufficiently guided and channeled the sentencing authority’s discretion. What the Court’s decision in Proffitt added to the Gregg decision was a statement of what the Constitution did not require:

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.

59. Id. at 206-07.
60. Id. at 195.
62. Id. at 259-60.
63. Id. at 258. Proffitt is an important decision for another reason. In a footnote, the Court suggests the possibility that a death sentence based entirely upon non-statutory aggravating factors may be constitutionally flawed. Id. at 250 n.8. However, after raising this issue the Court leaves it unresolved by relying upon Florida’s statutory language, which expressly limits the aggravating factors to those enumerated in the statute. Id.

The Court returned to the issue of the constitutionality of using non-statutory aggravating factors to sentence an offender to death in Barclay v. Florida, 463 U.S. 939 (1983). The Court stated that its above-referenced statement in Proffitt questioned the constitutionality of a sentence based entirely upon non-statutory aggravating factors. Barclay, 463 U.S. at 956-57. However, the Court held that its statement in Proffitt saw no constitutional defect in a death sentence that is based upon both statutory and non-statutory aggravating factors. The Court then concluded that although the Florida death penalty statute expressly prohibits the use of non-statutory aggravating factors, the Constitution places no such requirement upon a death penalty statute. Id. Therefore the
Thus, the Court's decision in *Proffitt* reinforces the proposition that a
guided discretion statute provides a constitutionally adequate, if not the
preferred, response to the concerns addressed by the Court in *Furman*.

In *Jurek v. Texas*, the third of the “‘76 Cases” to be decided, the
Court examined a statute that did not expressly use aggravating factors
in an attempt to comply with the dictates of *Furman*. However, in
holding that the Texas statute did satisfy the dictates of *Furman*, the
Court construed the statute as if it had used aggravating factors. The
Court stated that “[b]y narrowing its definition of capital murder, Texas
has essentially said that there must be at least one statutory aggravating
circumstance in a first-degree murder case before a death sentence may
even be considered.” Through this holding, the Court further
confirmed the importance of the role of aggravating factors in a
constitutional death penalty statute. By using the paradigm of aggravat­ing
factors to analyze and explain why a statute which did not expressly
contain aggravating factors satisfied the mandates of *Furman*, the Court
implicitly endorsed them as possibly the best means available to guide
and channel a sentencing authority’s discretion, and thus, comply with
the mandates of *Furman*.

In the final two “‘76 Cases”, *Woodson v. North Carolina* and
*Roberts v. Louisiana*, the Court ruled that mandatory death penalty
use of non-statutory aggravating factors in conjunction with statutory aggravating factors
does not violate the Constitution.

64. 428 U.S. 262 (1976).
65. Id. at 268-69. The Texas statute’s attempt to comply with *Furman* was a two
step process. First, the offenses for which the death penalty was a possible punishment
were narrowed. Second, prior to sentencing a capital offender to death, the sentencing
authority had to respond to the following three statutory questions with an affirmative
answer:

(1) whether the conduct of the defendant that caused the death of the deceased
was committed deliberately and with the reasonable expectation that the death
of the deceased or another would result;
(2) whether there is a probability that the defendant would commit criminal
acts of violence that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing
the deceased was unreasonable in response to the provocation, if any, by the
deceased.

66. Id. at 276. The Court further stated that the state’s “action in narrowing the
categories of murders for which a death sentence may ever be imposed serves much the
same purpose” as the aggravating factors used in the Georgia and Florida statutes. *Id.*
at 270. “In fact, each of the five classes of murders made capital by the Texas statute
is encompassed in Georgia and Florida by one or more of their statutory aggravating
circumstances.” *Id.*

statutes were unconstitutional. These rulings were based upon three
grounds. First, a mandatory death penalty statute failed to comport with
contemporary societal values and thus violated the Eighth and Fourteenth
Amendments.69 Second, a mandatory death penalty statute failed to
provide an adequate response to the mandates of Furman.70 Third, a
mandatory death penalty statute failed to provide for individualized
sentencing, which the Court now considered to be a constitutional
requirement in a capital punishment sentencing scheme. Woodson and
Roberts mark the first time that the Supreme Court held that individual­
ized sentencing is a constitutional mandate rather than merely an
"enlightened policy."71 Thus, through its unequivocal rejection of
mandatory death penalty statutes, the Court further increased the
significance of the role that aggravating factors play in contemporary
dead penalty jurisprudence.

Although none of these five "'76 Cases" clearly articulates what
components a constitutional death penalty statute is required to have,
when the cases are read together several important hints are given by the
Court as to what might be needed. First, the sentencing authority must
be directed to examine specific factors that argue in favor of or against

In Woodson, the Court stated:
The history of mandatory death penalty statutes in the United States thus
reveals that the practice of sentencing to death all persons convicted of a
particular offense has been rejected as unduly harsh and unworkably rigid.
The two crucial indicators of evolving standards of decency respecting the
imposition of punishment in our society — jury determinations and legislative
enactments — both point conclusively to the repudiation of automatic death
sentences.

70. See Woodson, 428 U.S. at 302-03 (due to the fact that throughout history
juries have repeatedly refused to convict on crimes that carry a mandatory death
sentence, North Carolina's mandatory death penalty statute merely "papers over" the
problem of unfettered jury discretion and the arbitrary and capricious infliction of the
death penalty which existed prior to Furman); Roberts, 428 U.S. at 334-36.

71. In Woodson, the Court stated:
While the prevailing practice of individualizing sentencing determinations
generally reflects simply enlightened policy rather than a constitutional
imperative, we believe that in capital cases the fundamental respect for
humanity underlying the Eighth Amendment requires consideration of the
character and record of the individual offender and the circumstances of the
particular offense as a constitutionally indispensable part of the process of
inflicting the penalty of death.

Woodson, 428 U.S. at 304 (internal citation omitted); see also Roberts, 428 U.S. at 333.
the imposition of the death penalty.\textsuperscript{72} Second, the sentencing authority's discretion to impose the death penalty must be limited or narrowed so that the sentence of death is possible only for a subclass of all offenders convicted of murder.\textsuperscript{73} Third, the sentencing authority must be permitted to consider the individual circumstances of both the offender and the offense when exercising its discretion.\textsuperscript{74} Finally, although the ""76 Cases" did not expressly state that aggravating factors must be used to perform these functions, the cases did state that if a legislature used aggravating factors to perform these functions, their death penalty statute would be deemed constitutional.\textsuperscript{75} Therefore, as a practical matter, the Supreme Court's decisions in the ""76 Cases" forced most states to enact some form of guided discretion statute if they wished to retain the death penalty as a sentencing option.\textsuperscript{76} This was because the inclusion of aggravating factors was the only constitutional means which the states had developed, to date,\textsuperscript{77} to impose the death penalty.\textsuperscript{78}

\textsuperscript{73} See Gregg, 428 U.S. at 188-95; Jurek v. Texas, 428 U.S. 262, 270-74 (1976).
\textsuperscript{74} See Woodson, 428 U.S. at 303-04.
\textsuperscript{75} See Gregg, 428 U.S. at 206-07; Proffitt, 428 U.S. at 258-60; Jurek, 428 U.S. at 276-77.
\textsuperscript{76} See, e.g., N.C. GEN. STAT. § 15A-2000 (1988); LA. CODE CRIM. PROC. ANN. art. 905-905.9 (West 1984 & Supp. 1994). Both North Carolina and Louisiana drafted guided discretion statutes in response to their mandatory death penalty statutes being rendered unconstitutional in Woodson and Roberts, respectively.
\textsuperscript{77} It is important to note that in the ""76 Cases" the Supreme Court expressed that a guided discretion statute was not necessarily the only procedure which was permissible under Furman and its dictates, but was just the only one that had been developed to date. Gregg, 428 U.S. at 195.

The Court has reiterated this sentiment several times in subsequent cases. For example, in Lockett v. Ohio, the Court made the often-quoted statement that there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." 438 U.S. 586, 605 (1978). Furthermore, the Court has stated that "in the context of capital punishment, the Constitution does not place totally unrealistic conditions on its use." McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (quoting Gregg, 428 U.S. at 199 n.50).

\textsuperscript{78} In the ""76 Cases" the Supreme Court decided the constitutionality of five post-Furman death penalty statutes. Of the three statutes which the Supreme Court ruled constitutional, two expressly utilized aggravating factors to comply with the dictates of Furman. See Gregg, 428 U.S. at 164-65; Proffitt, 428 U.S. at 246-50. The third constitutional statute, although it did not expressly utilize aggravating factors, was construed as though it did, and was thus held to be constitutional. See Jurek, 428 U.S. at 269-71. In ruling that the remaining two statutes were unconstitutional the Supreme Court held that mandatory death penalty statutes were not a constitutionally adequate response to Furman. See Woodson, 428 U.S. at 303-05; Roberts v. Louisiana, 428 U.S. 325, 334-36 (1976). Therefore, following the ""76 Cases,"" the only way to ensure that a death penalty statute was constitutionally adequate was to make it a guided discretion statute which utilized aggravating factors.
III. AGGRAVATING FACTORS AND THE REFINEMENT OF THEIR ROLE IN A CONSTITUTIONAL DEATH PENALTY STATUTE

Having established the foundation of modern capital punishment jurisprudence in Furman and the "76 Cases," the Supreme Court set out to build upon that foundation. The Court sought to do this by defining the role which aggravating factors must play in a constitutional death penalty statute, as well as placing requirements on the manner in which the factors themselves are defined. Consequently, the Court has developed an extensive body of law establishing (1) the function which aggravating factors are constitutionally mandated to perform and (2) the amount of precision that must be utilized in defining each aggravating factor. All of this acts to further ensure that each statute genuinely provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not"79 and that the imposition of the death penalty in each case complies with contemporary societal values.80

A. Aggravating Factors Must Genuinely Narrow the Class of Persons Eligible for the Death Penalty

As previously noted, in the "76 Cases," the Supreme Court held that the sentencing authority's discretion to impose the death penalty "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."81 In those cases the Court also endorsed guided discretion statutes that utilized aggravating factors as the preferred means to direct and limit the sentencing authority's discretion. However, the Court did not clearly indicate the function which aggravating factors perform, so as to enable the guided discretion statutes to achieve that constitutional mandate. The exact function an

79. Gregg, 428 U.S. at 188 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)).
80. Whether a challenged punishment comports with contemporary societal values is the standard utilized to determine if that punishment is a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. See supra notes 20-33 and accompanying text.
81. Gregg, 428 U.S. at 189.
aggravating factor is required to perform in a constitutional capital punishment statute was therefore something the Court needed to clarify. The Court first clearly addressed this issue in *Zant v. Stephens.* In *Zant,* the capital offender appealed his death sentence on several grounds, one of which was that Georgia's capital punishment sentencing scheme was unconstitutional because of the role which aggravating factors played in that scheme. Prior to deciding this case, the Supreme Court certified a question to the Georgia Supreme Court requesting an explanation of the role of the state's aggravating factors. Based upon the Georgia court's response, the Supreme Court concluded that in the Georgia system the finding of an aggravating factor "does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." The respondent argued that the limited function performed by Georgia's aggravating factors violated the dictates of *Furman* and thus rendered the Georgia system unconstitutional. However, the Supreme Court did not agree and held that Georgia's use of aggravating factors was constitutional.

In denying the capital offender's claim, the Court stated that it had already approved the Georgia system on its face in *Gregg,* but emphasized that its holding in *Gregg* rested upon "the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional

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83. *Id.* at 874.
84. The Georgia Supreme Court responded by analogizing its body of law governing homicides to a pyramid. The base of the pyramid is formed by all cases in which any form of homicide is charged. In the first plane above the base is the group of all homicides which fall into the category of murder. The second plane separates from all murder cases those particular cases in which capital punishment is a sentencing option for the sentencing authority. This second plane is established by a list of ten aggravating factors. Before a murder case can pass beyond this plane the sentencing authority must find beyond a reasonable doubt that at least one of the ten aggravating factors exists. If this finding is not made, a murder case may not move past this plane and the death penalty is then not a sentencing option. The final plane is that one which separates all cases in which the death penalty is a sentencing option from those cases in which it is actually imposed. "There is an absolute discretion in the factfinder to place any given case below the [final] plane and not impose death. The plane itself is established by the factfinder. In establishing the plane, the factfinder considers all evidence in extenuation, mitigation and aggravation of punishment." *Id.* at 871. Aggravating factors are not employed in making this final determination. As a final limitation, all sentences of death are automatically reviewed by the Georgia Supreme Court to ensure the sentence is not the product of prejudice or caprice. *Id.* at 870-72.

85. *Id.* at 874.
86. *Id.*
87. *Id.* at 879-80.
standard derived from the principles of Furman itself. That standard was not clearly articulated in any of the "76 Cases", but the Court now announced it to be that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Therefore, after Zant, the only function that the Constitution required an aggravating factor to perform was to "genuinely narrow the class of persons eligible for the death penalty." The Constitution did not require an aggravating factor to do any more.

The Zant holding was reiterated by the Supreme Court in Lowenfield v. Phelps. In Lowenfield, the offender was sentenced to death under the capital sentencing scheme of Louisiana. The petitioner appealed

88. Id. at 876.
89. Id. at 877. The Court went on to note that "[o]ur cases indicate ... that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." Id. at 878.
90. Id. at 877. The Court has reiterated that the role of aggravating factors is to narrow the class of offenders who are eligible for the death penalty. In the 1987 case, McCleskey v. Kemp, the Court summarized its holdings to date on the death penalty and concluded:

[O]ur decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.

91. It is important to note that the sentencing authority must still be permitted to consider all aspects of the defendant's record and the particular offense mitigating against the imposition of the death penalty, as part of the individualized sentencing mandated by Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976). However, the Supreme Court's decisions have not required aggravating factors to perform any function during that portion of the capital sentencing process.
92. 484 U.S. 231, 244 (1988) ("To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" (quoting Zant, 462 U.S. at 877)).
93. Lowenfield, 484 U.S. at 241-43. In response to its mandatory death penalty statute being held unconstitutional in Roberts v. Louisiana, 428 U.S. 325, 335 (1976), the Louisiana legislature redrafted its statute. It began by redefining homicide. It established five categories of homicide and made the death penalty a sentencing option in only its narrowly defined crime of first-degree murder. In order for the sentencing authority to be permitted to convict an offender of first-degree murder, it must find that
his death sentence on the grounds that the sole aggravating factor found by the jury was identical to an element of the capital offense for which he was convicted, namely that "the offender knowingly created a risk of death or great bodily harm to more than one person." The Supreme Court denied the petitioner's appeal and affirmed his death sentence.

In denying the petitioner's claims, the Court held that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." Therefore, it was constitutionally irrelevant to the Lowenfield Court whether the narrowing function performed by aggravating factors was accomplished by the jury during the sentencing phase or the guilt phase of the trial, as long as it was performed during some phase. All that the Constitution required was that the class of persons eligible for the death penalty was genuinely narrowed. The Court noted that in order to satisfy this constitutional dictate the capital sentencing laws of most states require the sentencing authority to find at least one aggravating factor before it may impose a sentence of death.

The fact that all the Constitution requires of aggravating factors is that they narrow the class of persons eligible for the death penalty was further reinforced by the Court's holding in Blystone v. Pennsylvania. In Blystone, the petitioner was sentenced to death based upon the jury's finding of one aggravating factor, and the petitioner appealed. The petitioner claimed that his sentence was unconstitutional because he did not receive the sort of individualized sentencing that was constitutionally mandated. This claim was premised on the idea that because the aggravating circumstances were not assigned weights, the jury was "precluded from considering whether the severity of his aggravating

the facts of the offender's crime place it in one of five narrowly defined groups which comprise the crime of first-degree murder. In Lowenfield, the jury found the petitioner guilty of first-degree murder based upon the finding that he had "a specific intent to kill or to inflict great bodily harm upon more than one person." Lowenfield, 484 U.S. at 243. Once an offender is convicted of first-degree murder, he is then sentenced by the same jury in a separate proceeding. Before this jury can sentence an offender to death, it must find at least one of Louisiana's ten statutory aggravating factors. Id. at 241-43.

94. Lowenfield, 484 U.S. at 243.
95. Id. at 246.
96. Id. at 244.
97. Id. at 244-45. As support for this statement the Court cited its approval of the Texas capital sentencing scheme in Jurek v. Texas, 428 U.S. 262 (1976). Id. See supra notes 64-66 and accompanying text for a discussion of the Jurek decision.
98. See supra notes 90-91 and accompanying text.
99. Lowenfield, 484 U.S. at 244.
The Supreme Court rejected the petitioner’s argument, holding that there was no constitutional requirement that the aggravating factors be assigned weights. The Court’s reasoning was exemplified by its statement that “[t]he presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury.” In reaching this holding, the Court firmly reinforced that the only function the Constitution requires an aggravating factor to perform is that it genuinely narrows the class of persons eligible for the death penalty.

B. Aggravating Factors Must Not Be Unconstitutionally Vague

In order to further ensure that the constitutionally mandated narrowing function is properly performed by an aggravating factor, the Supreme Court has imposed an additional requirement on the use of aggravating factors: they may not be defined in a constitutionally vague manner. All guided discretion statutes are based upon the assumption that the aggravating factors utilized are defined in a constitutionally permissible fashion. If an aggravating factor is not defined in a constitutionally permissible fashion, then the class of persons eligible for the death penalty cannot be said to be genuinely narrowed. The sentencing authority would not be provided with sufficient guidance for determining whether the factor is present in a particular case. In the “‘76 Cases,” which approved of the use of aggravating factors to comply with the dictates of the Constitution, the Court expressly placed no requirement upon the manner in which the factors were defined, other than that the factors not be too vague. In a footnote in its Gregg decision, the Court stated that “[a] system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing

101. Id. at 306.
102. Id. at 306-08.
103. Id. at 306-07.
like that found unconstitutional in \textit{Furman} could occur.\textsuperscript{107} Other than this token requirement, the Court made no other mention of how definitively each aggravating factor must be defined. Consequently, the Court set out to clarify this aspect of the guided discretion statute.

The first case to truly address the manner in which an aggravating factor was defined was \textit{Godfrey v. Georgia}.\textsuperscript{108} In \textit{Godfrey}, the petitioner was sentenced to death under the Georgia capital punishment sentencing scheme approved by the Supreme Court in \textit{Gregg}.\textsuperscript{109} The jury had sentenced the petitioner to death based upon its finding of one aggravating factor, namely "that the offense of murder was outrageously or wantonly vile, horrible and inhuman."\textsuperscript{110} The petitioner, seizing upon the Court's above-referenced language from \textit{Gregg},\textsuperscript{111} appealed and challenged this aggravating factor as being so vague that it failed to suitably direct and limit the sentencing authority's discretion, as the \textit{Furman} decision required.\textsuperscript{112}

The Supreme Court agreed with the petitioner and held that in this particular case the construction which the Georgia courts had given to this aggravating factor did in fact make the factor unconstitutionally vague. It did not suitably direct or limit the sentencing authority's discretion.\textsuperscript{113} The Court found that "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman'" and therefore, "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence."\textsuperscript{114}

In arriving at this holding, the Court revealed two important requirements that the Constitution places upon the manner in which aggravating factors are defined. First, the Court essentially applied the requirement that was placed on the entire capital punishment sentencing scheme in the "'76 Cases," namely that the sentencing authority's discretion be

\textsuperscript{107} \textit{Gregg}, 428 U.S. at 195 n.46.
\textsuperscript{108} 446 U.S. 420 (1980).
\textsuperscript{109} \textit{Id.} at 422-23.
\textsuperscript{110} \textit{Id.} at 426. The aggravating factor actually read that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," \textit{Id.} at 422. The jury was instructed in this language. \textit{Id.} at 426. However, the jury returned the death sentence stating only that "the offense of murder was outrageously or wantonly vile, horrible and inhuman." \textit{Id.} at 426. The Georgia Supreme Court affirmed the sentence stating that the language used by the jury was "not objectionable" and that the evidence supported the finding. \textit{Id.} at 427.
\textsuperscript{111} \textit{See supra} note 107 and accompanying text.
\textsuperscript{112} \textit{Godfrey}, 446 U.S. at 423.
\textsuperscript{113} \textit{Id.} at 432-33.
\textsuperscript{114} \textit{Id.} at 428-29.
suitably directed and limited to each aggravating factor that is utilized by the scheme. The Court noted that if a state wished to authorize the death penalty as a sentencing option it has a constitutional responsibility not only to “tailor” its law, but also to “apply” its law in each case, so as to avoid the arbitrary and capricious imposition of the death penalty. 115 As part of this responsibility the state must “define the crimes for which death may be the sentence in a way that obviates ‘standardless [sentencing] discretion.’” 116 Therefore, in defining each aggravating factor, the states must provide the sentencing authority with “‘clear and objective standards’ that provide ‘specific and detailed guidance’” to the sentencing authority in the exercise of its discretion. 117 The state’s failure to do so will result in the noncomplying factor being deemed unconstitutionally vague.

Second, the Court suggested that even if the state did not adequately define an aggravating factor, its deficient legislative definition could be saved from being deemed unconstitutional if the state’s courts applied a sufficiently limiting construction to the factor. 118 The Court did not expressly state that this was a method to “save” an unconstitutional factor, but the means utilized by the Court to analyze the relevant aggravating factor suggests this conclusion. Rather than merely analyzing the amount of guidance provided by the legislature’s definition of the aggravating factor, the Court delved into the Georgia state courts’ application of the challenged factor. The Court found that in past capital punishment cases, the Georgia Supreme Court had required additional facts to be found in regards to this factor before it would permit a death sentence to be based upon this aggravating factor. 119 However, in the

115. Id. at 428.
116. Id. at 428 (alteration in original) (citations omitted).
117. Id. (footnote omitted).
118. Id. at 422.
119. The Supreme Court found that all Georgia death sentences that had been based upon this aggravating factor and had been affirmed by the Georgia Supreme Court, through its automatic appeal process, had one if not all three of the following findings in addition to the finding of this aggravating factor:

   1) “[T]hat the evidence that the offense was ‘outrageously or wantonly vile, horrible or inhuman’ had to demonstrate ‘torture, depravity of mind, or an aggravated battery to the victim’;
   2) “[T]he phrase, ‘depravity of mind,’ comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim”; and
petitioner's case, the Court found that neither the Georgia Supreme Court, nor any other Georgia state court, had required any such additional finding. Therefore, although the factor may have been constitutionally applied in other cases, it was not constitutionally applied in Godfrey because the construction applied provided no more guidance than the vague language of the statute. The Court therefore concluded that the factor was unconstitutionally vague as applied in this case, but made no express pronouncement on the possibility of a limiting construction "saving" an unconstitutionally vague factor.

In Maynard v. Cartwright the Court invalidated another aggravating factor on the ground that the factor was unconstitutionally vague. In Maynard, one of the two aggravating factors upon which the offender's death sentence was based was that the murder was "especially heinous, atrocious, or cruel." The respondent challenged this factor as unconstitutionally vague and the Supreme Court affirmed a lower court's ruling by holding that the factor was indeed invalid because it was unconstitutionally vague.

In Maynard, the Court conducted essentially the same analysis as it had in Godfrey before arriving at the conclusion that this aggravating factor was unconstitutionally vague, at least as it was applied in this case, because there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." As in Godfrey, the aggravating factor in Maynard failed to channel the sentencing authority's discretion by clear and objective standards which provided specific and detailed guidance. However, the Court's conclusion that the aggravating factor was unconstitutionally vague is not the only important holding in Maynard.

(3) "[T]hat the word, 'torture,' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death."

Id. at 431.
120. Id. at 432. The Court stated:

[T]he validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman . . . ." We conclude that the answer must be no.

Id. (footnote omitted).
122. Id. at 359. The other aggravating factor was that the offender "knowingly created a great risk of death to more than one person." Id. at 358-59.
123. Id. at 360.
124. Id. at 363 (quoting Godfrey, 446 U.S. at 433).
125. Maynard, 486 U.S. at 364.

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The Court also expressly recognized that a limiting construction could
cure an unconstitutionally vague aggravating factor. 126 While the
Court's analysis in Godfrey suggested this rule, 127 Maynard is the first
time that the Court explicitly recognized it. Thus, after Maynard, the
appropriate constitutional test involved the manner in which the
aggravating factor is applied by the courts, not the manner in which the
factor is defined by the legislature. Although the Court refused to state
what sort of limiting construction would be required to cure a deficient
factor, deferring that task to the Oklahoma state courts or legislature, 128
it is reasonable to assume that the limiting construction must meet the
same standard as the aggravating factor itself.

With these various standards in mind, the Court in Walton v.
Arizona 129 established the inquiry that a federal court must undertake
when it is determining whether a particular aggravating factor is
unconstitutionally vague. First, the court must "determine whether the
statutory language defining the circumstance is itself too vague to
provide any guidance to the sentencer." 130 Second, if the language is
too vague the court must "attempt to determine whether the state courts
have further defined the vague terms and, if they have done so, whether
those definitions are constitutionally sufficient, i.e., whether they provide
some guidance to the sentencer." 131 If the court determines that the
aggravating factor fails both of these inquiries then it is deemed to be
unconstitutionally vague.

Thus, in addition to using their aggravating factors in a manner that
genuinely narrows the class of persons eligible for the death penalty, the
states must also define their aggravating factors in a manner that is not

126. Id. at 362. The Court stated that because the challenged aggravating factor
was unconstitutionally vague on its face and the state courts had not "adopted a limiting
construction that cured the infirmity," the challenged aggravating factor violated the
Eighth Amendment. Id. at 360.
127. See supra notes 118-20 and accompanying text.
130. Id. at 654. If the sentencer's discretion is channeled by clear and objective
standards that provide specific and detailed guidance, then the sentencer is provided with
sufficient guidance and this constitutional requirement is met. See Godfrey v. Georgia,
446 U.S. 420, 428 (1980); see also supra notes 108-17 and accompanying text.
131. Walton, 497 U.S. at 654.
unconstitutionally vague. 132 In respect to this requirement, the Court has recognized that the "proper degree of definition" of most aggravating factors is "not susceptible of mathematical precision," 133 however, what is essentially required is that the description of the factor not be "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." 134 If the sentencing authority is provided with "'clear and objective standards' that provide 'specific and detailed guidance'" in the exercise of its discretion, the factor will pass constitutional muster. 135 However, it is important to note that the true test is not necessarily that the legislature's definition meets this standard, but that the state courts' application of the factor meets this standard. Regardless of the adequacy of the legislative definition, if the application of an aggravating factor does not meet this standard it will be deemed to be unconstitutionally vague. 136

IV. **Tuilaepa v. California: Aggravating Factors and the Selection Phase of Capital Sentencing**

As the aforesaid cases demonstrate, the Supreme Court has spent a great deal of time developing the requirements which the Constitution places upon a capital punishment statute. After analyzing the entire process utilized to sentence an offender to death in the "76 Cases," the Court switched its focus to the individual aspects of the capital sentencing process and has not returned to examine the process as a whole. As a result, the requirements the Court has developed for these individual aspects have not been placed in the broader context of the entire capital sentencing process. However, if the Court's decisions are read in conjunction with one another, they reveal that the capital sentencing process is in fact comprised of two distinct phases: the eligibility phase and the selection phase. 137 The Court's decisions have not truly recognized or developed this distinction because of their focus on the components instead of the entire process.

The essence of the process revealed by the Court's decisions is that there are two very different determinations which must be made before the death penalty can be imposed upon an offender. First, the Court's
opinions suggest that the sentencing authority must determine that the offender is in fact part of a narrow class of murderers\textsuperscript{138} eligible for the death penalty.\textsuperscript{139} This determination entails a decision by the sentencing authority whether at least one of a statutory list of aggravating factors exists in the particular case and thus sets it apart from the many cases in which the death penalty is not imposed.\textsuperscript{140} Second, the Court's opinions suggest that some specific aspect of the offender's crime or character must warrant him being sentenced to death as opposed to imprisoned for life. The Court has stated that "the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."\textsuperscript{141} However, the Court's decisions have not clearly addressed the relationship between these two determinations.\textsuperscript{142}

In fact, the Court's opinions have focused almost exclusively on the eligibility determination and whether it was properly made in a particular case.\textsuperscript{143} Consequently, the requirements developed by the Court for a constitutional capital punishment statute have focused on the eligibility decision, ensuring that the constitutionally mandated narrowing function is performed.\textsuperscript{144} These cases have not expressly limited their holdings

\textsuperscript{138} Again, this Comment only deals with the death penalty as a punishment for the crime of murder.


\textsuperscript{140} Godfrey v. Georgia, 446 U.S. 420, 433 (1980). The Court stated that there must be a "principled way to distinguish [the cases] in which the death penalty [is] imposed, from the many cases in which it [is] not." \textit{Id.}


\textsuperscript{142} In Zant v. Stephens, 462 U.S. 862 (1983), the Court suggested that there was an eligibility and a selection phase to the process of sentencing an offender to death. However in Zant, the Court did not expand on this suggestion and it did not return to this suggestion until its Tuilaepa decision. The extent of the Court's discussion of this distinction in Zant is as follows:

\begin{quote}
Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. ... What is important at the selection stage is an \textit{individualized} determination on the basis of the character of the individual and the circumstances of the crime.
\end{quote}

\textit{Id.} at 878-79.

\textsuperscript{143} See supra notes 79-136 and accompanying text for a discussion of the requirements which the Constitution places upon aggravating factors as they are utilized in the eligibility phase of capital sentencing.

\textsuperscript{144} See supra notes 79-136 and accompanying text for the discussion of those requirements.
to the eligibility phase, but as this Comment indicates, that was the clear implication. Some of the Court’s decisions do mention the selection decision, but this is typically only in passing and do not develop requirements on how that decision is to be made.\textsuperscript{145}

However, in the recent case of \textit{Tuilaepa v. California}\textsuperscript{146} the Supreme Court was faced with a constitutional challenge to a death sentence that forced the Court to analyze and develop the distinction between these two phases and what each requires of an aggravating factor. In \textit{Tuilaepa}, the defendant was sentenced to death pursuant to the California capital sentencing scheme.\textsuperscript{147} The defendant appealed his death sentence claiming that three of the aggravating factors used in the California capital punishment statute were unconstitutionally vague.\textsuperscript{148}

Under California law, the process of sentencing an offender to death is comprised of two parts: the trial and the sentencing hearing. At the trial, the trier of fact\textsuperscript{149} is required to make two separate findings

\begin{quote}
The Court’s emphasis on the eligibility phase is due in large part to the fact that nearly all of the Court’s decisions analyzing aggravating factors have dealt with challenges to capital punishment statutes that utilized the same set of aggravating factors in both the eligibility and the selection phase of capital sentencing. See, e.g., \textit{Proffitt v. Florida}, 428 U.S. 242 (1976); \textit{Maynard v. Cartwright}, 486 U.S. 356 (1988); \textit{Clemons v. Mississippi}, 494 U.S. 738 (1990). Therefore, the Court has had no real need to develop a set of requirements for each phase of the capital sentencing process that utilized aggravating factors.\textsuperscript{145}

The cases that speak of the selection phase of sentencing do not discuss the role that aggravating factors must perform in that stage. Instead, they discuss what the Constitution requires of that phase in general. In particular, those cases discuss the constitutional requirement that the offender must receive individualized sentencing and that during that process the sentencing authority must not be prohibited from considering all relevant mitigating factors. See, e.g., \textit{Woodson}, at 303-05; \textit{Lockett v. Ohio}, 438 U.S. 586, 604-05 (1978); \textit{Zant}, 481 U.S. 279, 305-06 (1987). In \textit{Blystone v. Pennsylvania}, the Court went so far as to state that “[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence.” 494 U.S. 299, 307 (1990). Thus, none of the Supreme Court cases discussing the selection phase of capital sentencing have made any mention of the function aggravating factors must perform during that phase.\textsuperscript{146}

\textit{Tuilaepa} is actually a consolidated case. \textit{Tuilaepa v. California}, 114 S. Ct. 598 (1993). The Supreme Court consolidated \textit{Tuilaepa v. California}, docket number 93-5131, and \textit{Proctor v. California}, docket number 93-5161, because the two cases presented the identical constitutional question: are the specified aggravating factors used by the California sentencing authority to sentence the defendant to death unconstitutionally vague. This Comment will only discuss the defendant in \textit{Tuilaepa} because he challenged three of California’s factors, while the defendant in \textit{Proctor} only challenged one factor and that factor is one that the defendant in \textit{Tuilaepa} also challenged.\textsuperscript{147}

\textit{Tuilaepa}, 114 S. Ct. at 2632.\textsuperscript{148}

The trier of fact shall be a jury unless the defendant has voluntarily waived this right. CAL. PENAL CODE § 190.4 (West 1988).\textsuperscript{149}
\end{quote}
before the offender can even be eligible for the death penalty. First, the trier of fact must convict the offender of first-degree murder. Second, the trier of fact must find beyond a reasonable doubt that at least one of the statutorily enumerated “special circumstances” exists in the case. If the offender is found guilty of first-degree murder, but the trier of fact does not find at least one “special circumstance,” the offender is not eligible for the death penalty.

The case then proceeds to the sentencing hearing, provided that both of the requisite findings were made during the trial stage. At the sentencing hearing, a separate proceeding is conducted and the trier of fact is presented with all evidence in aggravation and mitigation of the offender’s sentence. After hearing all of the evidence, the trier of fact is given another list of enumerated factors and instructed to weigh all of the relevant factors that aggravate in favor of the death penalty.

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At the trial, the offender is charged with first-degree murder and any of the 19 “special circumstances” that the prosecution believes are present in the case. The prosecution and the defense then present evidence as to both the charge of first-degree murder and all of the “special circumstances” charged. If the trier of fact finds the offender guilty of first-degree murder, it must make a special finding in regards to each “special circumstance” charged in the case, stating whether the trier found each to be true or false. In order for a special circumstance to be deemed true, the trier of fact must find that it exists beyond a reasonable doubt. Id.

The 19 “special circumstances” are enumerated in § 190.2 and include such things as the murder was intentional and carried out for financial gain, the victim was a peace officer, or the murder was committed while the defendant was engaged in any one of a list of nine felonies. CAL. PENAL CODE § 190.2 (West 1988 & Supp. 1994).

153. During the sentencing hearing, the trier of fact is a jury unless the offender and the prosecution waive the right to a jury. CAL. PENAL CODE § 190.4 (West 1988).
154. The fact that California requires its sentencing authority to “weigh” the aggravating factors against the mitigating factors, in order to determine which offenders shall be sentenced to death, makes California a weighing state.

In general, there are two types of guided discretion statutes: weighing and non-weighing. The sentencing authority in a state that employs a weighing statute is required to weigh the aggravating factors against the mitigating factors and determine whether the evidence favors the offender being sentenced to death or life imprisonment. In essence, what each member of the sentencing authority is required to do is to “mentally balance” the aggravating and mitigating factors in a qualitative fashion. This is in contrast to a quantitative balancing in which the sentencing authority would simply say that the offender should be sentenced to death because there are three aggravating factors and only two mitigating factors. People v. Howard, 1 Cal. 4th 1132, 1188, 824 P.2d 1315, 1348, 5 Cal. Rptr. 2d 268, 301 (1992).
The sentencing authority in a state that employs a non-weighing statute is not required to perform this analysis. Instead, the sentencing authority is only required to find aggravating factors as a threshold matter to determine which offenders are eligible for the death penalty. If at least one aggravating factor is found to exist, the offender is deemed to be eligible for the death penalty and the sentencing authority then "considers all evidence in extenuation, mitigation and aggravation of punishment" when determining which offenders will be sentenced to death. Zant v. Stephens, 462 U.S. 862, 870-73 (1983). Once an offender is deemed to be eligible for the death penalty, the sentencing authority is not required to perform any sort of weighing analysis. All that is required is that it considers all of the relevant evidence.

Presently 38 states have death penalty statutes on their books. Of those states, 23 employ weighing statutes while 13 employ non-weighing statutes. The statutes in the remaining two states can be categorized as neither weighing nor non-weighing.

The 23 states that employ a weighing statute and their statutory provisions establishing the procedure to be followed when sentencing an offender to death are set out below:

2. Arkansas, see ARK. CODE ANN. §§5-4-601 to 5-4-618 (Michie 1993).
8. Indiana, see Ind. CODE ANN. § 35-50-2-9 (Burns Supp. 1994).
10. Maryland, see MD. ANN. CODE art. 27, § 413 (Supp. 1993).
18. New York, see 1995 N.Y. Laws ch. 1, § 20 (codified at N.L. PENAL LAW § 60.06; N.Y. CRIM. PROC. LAW § 400.27).
20. Ohio, see OHIO REV. CODE ANN. §§2929.03-2929.05 (Baldwin 1992).

The 13 states that employ a non-weighing statute and their statutory provisions are as follows:

penalty against those factors that mitigate against the death penalty. 155

10. Utah, see UTAH CODE ANN. §§ 76-3-206 to 76-3-207, 76-5-202 (Supp. 1994).

The remaining two states, which can be categorized as neither weighing nor non-weighing, are as follows:
2. Texas, see TEX. CODE CRIM. PROC. ANN. art. 37.071-37.0711 (West Supp. 1994).

The states which currently do not employ the death penalty are as follows: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The District of Columbia also does not currently employ capital punishment. See Patricia Mitchell, Executions in America, L.A. TIMES, May 11, 1994, at A5 (chart). The article cited lists New York as not having the death penalty. However, in March of 1995, New York enacted a capital punishment statute which is set to go into effect on September 1, 1995. 1995 N.Y. Laws ch. 1, sess. 2850, art. 4843, §§ 20, 38.

155. This list of 11 factors, which is contained in California Penal Code § 190.3, is as follows:
(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to section 190.1.
(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
(c) The presence or absence of any prior felony conviction.
(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(e) Whether or not the victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act.
(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
(i) The age of the defendant at the time of the crime.
(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
If the trier of fact finds that the factors which weigh in favor of the death penalty outweigh the factors which mitigate against it, then the trier is required to impose the death penalty.\(^{156}\) If the trier finds that the mitigating factors outweigh the aggravating factors, the trier is required to impose a sentence of life imprisonment.\(^{157}\) In making this determination, the sentencing authority is not required to specify which aggravating and mitigating factors it found, but only that the aggravating factors outweigh the mitigating factors or vice versa.\(^{158}\) Thus, under the California capital sentencing scheme the sentencing authority must consider two separate lists of aggravating factors before it is permitted to sentence the offender to death.\(^{159}\)

In *Tuilaepa*, the jury found at the trial that the defendant was guilty of first-degree murder and that the one "special circumstance" charged by the prosecution was true.\(^{160}\) At the sentencing hearing, the defendant was unanimously sentenced to death by the jury based upon its finding that the aggravating factors outweighed the mitigating factors.\(^{161}\) On automatic appeal to the California Supreme Court, the

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\(^{(k)}\) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

*CAL. PENAL CODE § 190.3* (West 1988).

\(^{156}\) *Boyde v. California*, 494 U.S. 370, 376-77 (1990). The Supreme Court has upheld the mandatory "shall impose" language of the California statute, holding that there is no constitutional requirement that the sentencing authority be given the freedom to decline to impose the death penalty when the sentencing authority decides that the aggravating circumstances outweigh the mitigating circumstances. *Id.*

\(^{157}\) California Penal Code Section 190.3 provides that:

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. *Id.*

\(^{158}\) See *CAL. PENAL CODE § 190.4* (West 1988).

\(^{159}\) One list of aggravating factors is considered during the trial and a separate list of aggravating factors is considered during the sentencing hearing. See *CAL. PENAL CODE §§ 190.2-190.4* (West 1988 & Supp. 1994).

\(^{160}\) *Tuilaepa v. California*, 114 S. Ct. 2630, 2634 (1994). The special circumstance that the jury found to be true in *Tuilaepa* was that the murder was committed during the commission of a robbery. *Id.*

In *Proctor* the jury found three special circumstances to be true. Those "special circumstances" were: (1) that the murder was committed during the commission of a rape, (2) that the murder was committed during the commission of a burglary, and (3) that the murder included the infliction of torture. *Id.*

\(^{161}\) *Id.* In *Proctor*, the jury also unanimously sentenced the defendant to death. *Id.*
defendant argued that three of the aggravating factors upon which the
jury was instructed during the sentencing hearing were unconstitutionally
vague.162 The three aggravating factors which the defendant chal­
 enged were enumerated in California Penal Code section 190.3,
subsections (a), (b) and (i).163 However, the California Supreme Court
affirmed the defendant’s death sentence, holding that the challenged
factors were not unconstitutionally vague because they “direct the
sentencer’s attention to specific, provable, and commonly understand­
able facts about the defendant and the capital crime that might bear on his
moral culpability.”164
Following the California Supreme Court’s decision, the defendant
petitioned the United States Supreme Court for writ of certiorari. It is
important to note that at no stage of his appeal did the defendant
challenge the “special circumstance” found at the trial stage which made
him eligible for the death penalty.165 Consequently, the only question

162. People v. Tuilaepa, 4 Cal. 4th 569, 594, 842 P.2d 1142, 1157, 15 Cal. Rptr.
2d 382, 397 (1992). On the automatic appeal to the California Supreme Court in
Proctor, the defendant challenged one of these aggravating factors as unconstitutionally
vague. People v. Proctor, 4 Cal. 4th 499, 550-51, 842 P.2d 1100, 1130, 15 Cal. Rptr.
These three factors were:
(a) The circumstances of the crime of which the defendant was convicted in
the present proceeding and the existence of any special circumstances found
to be true pursuant to Section 190.1.
(b) The presence or absence of criminal activity by the defendant which
involved the use or attempted use of force or violence or the express or
implied threat to use force or violence.

(i) The age of the defendant at the time of the crime.
CAL. PENAL CODE § 190.3 (West 1988).
The defendant in Proctor only challenged factor (a). Tuilaepa, 114 S. Ct. at 2637.
164. People v. Tuilaepa, 4 Cal. 4th 569, 595, 842 P.2d 1142, 1157-58, 15 Cal. Rptr.
2d 382, 397-98 (1992). The California Supreme Court went on to conclude that
“(h)aving met these standards of relevance and specificity, factors (a), (b), and (i) are not
‘illusory’ or otherwise impermissibly ‘vague.’” Id. at 595, 842 P.2d at 1158, 15 Cal.
Rptr. 2d at 398 (construing Stringer v. Black, 112 S. Ct. 1130, 1139 (1992)).
In Proctor, the defendant only challenged factor (a) and, in affirming the defendant’s
death sentence, the California Supreme Court held that “[t]he United States Supreme
Court itself has established that the circumstances surrounding a capital offense
constitute one of the criteria upon which the jury should base its penalty determination.”
People v. Proctor, 4 Cal. 4th 499, 551, 842 P.2d 1100, 1130, 15 Cal. Rptr. 2d 340, 370
which the Supreme Court agreed to hear was the defendant's claim that three of the aggravating factors used in California's sentencing hearing were unconstitutionally vague, and therefore, it was improper to instruct the sentencing authority as to those factors. 166

The defendant's case was unique because it presented a problem with which the Court had never dealt. The aggravating factors that the defendant challenged are utilized only to select which offenders will be sentenced to death. These factors do not determine which offenders are eligible for the death penalty. In fact, the challenged aggravating factors are not even considered until after a separate set of aggravating factors has been utilized to determine that the offender is indeed eligible. This was unique, because all of the previous challenges to aggravating factors that the Court has heard were concerned with aggravating factors that determined which offenders were eligible for the death penalty, in addition to which offenders would be selected to receive the death penalty. 167 Therefore, prior to examining the merits of the defendant's vagueness challenge, the Court had to examine the two-phase capital sentencing process in order to determine what is required of an aggravating factor used solely during the selection phase.

In order to distinguish between the two phases of the capital sentencing process, the Court had to finally place all of the requirements that it had developed over the past twenty years into the broader context of the capital sentencing process as a whole. The results of this examination were fourfold. First, the Court expressly recognized that its cases did in fact reveal this two-stage process of sentencing an offender to death, and that each of these two phases requires something different from an aggravating factor. 168 Second, during the eligibility phase of the capital sentencing process, an aggravating factor must genuinely narrow the class of offenders eligible for the death penalty. 169 Third, during the selection phase of the capital sentencing process, an aggravating factor must provide the sentencing authority with the means by which to make an individualized determination of which offenders will be

166. Id. at 2633. In delivering the opinion of the Court Justice Kennedy stated that this case presents "the question whether three of the § 190.3 penalty-phase factors are unconstitutionally vague under decisions of this Court construed the Cruel and Unusual Punishments Clause of the Eighth Amendment." Id.
168. Tuilaepa, 114 S. Ct. at 2634-36.
169. Id. at 2634-35.
sentenced to death and which will not. Finally, regardless of which phase of the capital sentencing process the sentencing authority considers an aggravating factor, that factor cannot be unconstitutionally vague. This requirement is imposed because the underlying principle of the Supreme Court’s death penalty jurisprudence is that the sentencing process must minimize the arbitrary and capricious imposition of the death penalty. Therefore, in addition to meeting the requirements placed upon an aggravating factor, a factor must also act to minimize the arbitrary and capricious imposition of the death penalty by not being unconstitutionally vague.

Thus, having established what was required of an aggravating factor in each phase of the capital sentencing process, the Court’s next task was to determine what standards would be used to decide if these requirements were met. In particular, the Court needed to determine the appropriate standard to be used to decide if an eligibility or selection phase factor is unconstitutionally vague. The Court completed this task very quickly by simply announcing the standard it was going to use, without analysis or discussion as to how the standard was developed. The standard which the Court announced was that “a factor is not unconstitutional if it has some ‘common-sense core of meaning . . . that criminal juries should be capable of understanding.’”

After announcing this broadly-stated standard, the Court used it to examine the defendant’s vagueness challenge to the three California selection phase aggravating factors. The Court’s application of its newly stated standard was comprised of little more than simply restating the three challenged factors and concluding that the factors were not unconstitutionally vague because they were “phrased in conventional and understandable terms.” As support for its conclusion that the

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170. Id. at 2635. See also Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976); supra note 71 and accompanying text.
171. Tuilaepa, 114 S. Ct. at 2635.
172. Id. at 2635-36 (quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring)).
173. See supra note 163 for a list of the factors challenged in Tuilaepa.
174. Tuilaepa, 114 S. Ct. at 2637.

In particular the Court held: factor (a) was not unconstitutionally vague because it was phrased “in understandable terms”; factor (b) was not unconstitutionally vague because it was “phrased in conventional and understandable terms”; and factor (i) was not unconstitutionally vague because the petitioner’s challenge was not really a vagueness challenge, rather it was merely a complaint that the application of factor (i)
challenged factors were not unconstitutionally vague, the Court stated that the subject matter which the three factors directed the sentencing authority to consider had all been previously approved by the Court as information which is relevant to the process of sentencing an offender to death. Therefore, the Supreme Court affirmed the decision of the California Supreme Court, as well as the defendant’s death sentence.

V. LIMITATION OF THE “COMMON SENSE” STANDARD

The holding of the Court’s decision in *Tuilaepa* is that the three challenged selection phase aggravating factors are not unconstitutionally vague because they possess some “common-sense core of meaning . . . that criminal juries should be capable of understanding.” However, after taking great efforts in its opinion to clarify the requirements that each phase of the capital sentencing process places upon an aggravating factor, the Court fails to clearly articulate whether this “common-sense” standard applies to aggravating factors utilized in the eligibility phase, the selection phase, or both phases of the capital sentencing process. The Court simply announces that “a factor” is unconstitutionally vague if it does not meet this “common-sense” standard. Therefore, for the five reasons which follow, this Comment argues that the “common-sense” standard which the Court announced in *Tuilaepa* should only be used to determine whether aggravating factors in the selection phase of the capital sentencing process are unconstitutionally vague.

First, it is proper to limit the “common-sense” standard to the selection phase of the capital sentencing process because the only issue on which the Court granted certiorari was the constitutional validity of three of California’s selection phase aggravating factors. Furthermore, the Court expressly stated that it was not addressing any aspect of California’s eligibility phase because the defendant had not challenged...
on appeal the validity of any of the eligibility phase aggravating factors. Consequently, if a court applies the "common-sense" standard to both eligibility and selection phase aggravating factors, which it should not, the application to the eligibility phase would be unprecedented.

Second, limiting the applicability of the "common-sense" standard exclusively to the selection phase is necessary in order to ensure that it is a viable standard which does not conflict with any of the settled principles of the Court's Eighth Amendment jurisprudence. As the Tuilaepa decision reinforces, during the eligibility phase, the class of offenders which are eligible for the death penalty must be genuinely narrowed, while during the selection phase the determination of which offenders will be sentenced to death must be made on an individualized basis after considering the character of the offender and the circumstances of the crime. To ensure that these two functions are in fact performed, and performed in a manner that is not arbitrary or capricious, the further requirement that an aggravating factor utilized at either stage of the capital sentencing process not be unconstitutionally vague is imposed. Therefore, the standards used to determine whether an aggravating factor is unconstitutionally vague must ensure that the sentencing authority is provided with meaningful guidance when performing each of these functions.

The "common-sense" standard simply does not ensure that during the eligibility phase the sentencing authority is provided with meaningful guidance. During the eligibility phase, an objective determination is made by the sentencing authority as to whether certain aggravating factors exist in a particular case. This determination is made in order to ensure that the constitutionally mandated narrowing function is

180. Id. at 2636.
181. See supra notes 167-170 and accompanying text.
182. See supra note 171 and accompanying text.
183. Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (stating that "[a] capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not'") (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)); Gregg v. Georgia, 428 U.S. 153, 195 (1976) (stating that "the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance").
performed and performed in a rationally reviewable fashion.\textsuperscript{184} However, a vagueness standard tied to a juror’s common-sense is a very subjective standard and fails to ensure that an objective determination can be made as to whether a given aggravating factor exists. Thus, the constitutionally mandated narrowing function would not be performed in a rationally reviewable manner by an aggravating factor that is only required to have a “common-sense core of meaning.” Jurors would then be permitted to differ as to what is needed to determine that the aggravating factor does in fact exist in a particular case. Therefore, the use of the “common-sense” standard to determine whether an eligibility phase aggravating factor is unconstitutionally vague would inhibit rather than ensure that the function of the eligibility phase is performed.

However, the “common-sense” standard does ensure that the sentencing authority is provided with meaningful guidance during the selection phase. This is because the determination to be made by the sentencing authority during the selection phase is a much more subjective determination. Here the sentencing authority is not making the objective determination of whether specific aggravating factors exist, but instead is making the more subjective determination of whether all aspects of the crime and the offender’s character warrant sentencing the offender to death.\textsuperscript{185} This determination is permitted to be a more subjective standard. In order to even reach this stage, the offender must be convicted of first-degree murder and an aggravating factor that genuinely narrows the class of persons eligible for the death penalty must have been found by the sentencing authority. Hence, the vagueness standard utilized to judge selection phase aggravating factors is not

\begin{itemize}
\item \textsuperscript{184} Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (explaining that \textit{Furman}’s “basic requirement” is that arbitrary and capricious jury discretion must be replaced “with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.”); Godfrey, 446 U.S. at 428 (stating that “[p]art of a State’s responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates ‘standardless [sentencing] discretion’ . . . and that ‘make rationally reviewable the process for imposing a sentence of death’.”).

\item \textsuperscript{185} This is the point in the capital sentencing process where the distinction between a weighing and a non-weighing statute is relevant. Under a weighing statute, the subjective determination the sentencing authority makes at this point must be guided by a “mental balancing” process. See \textit{supra} note 152. Under a non-weighing statute the sentencing authority makes the same subjective determination, but under this paradigm the decision is guided by the simple consideration of all evidence in “extenuation, mitigation and aggravation of punishment.” See \textit{supra} note 152.

This Comment only addresses the applicability of the Court’s “common-sense” vagueness standard in the context of a weighing jurisdiction because that is the context in which that standard was announced in \textit{Tuilaepa}, namely, California’s weighing statute. This Comment expresses no opinion on whether that “common-sense” standard is applicable in a non-weighing jurisdiction.
\end{itemize}
required to ensure that an aggravating factor is defined in a manner that allows the sentencing authority to make an objective determination of whether it exists. Instead, the standard must ensure that the sentencing authority understands the factors it is directed to consider so that the offender is sentenced on an individualized basis as mandated by the Constitution. Therefore, it is not only proper but necessary to limit the applicability of the “common-sense” standard to the selection phase. To do otherwise would allow the fundamental principles of the Court’s death penalty jurisprudence to be violated.

Third, it is appropriate to have two distinct vagueness standards because the function an aggravating factor performs in each phase demands a different level of precision in factor definition. The narrowing function the eligibility phase performs requires the aggravating factors to be defined with a sufficient level of precision so that the factors will genuinely narrow the class of persons eligible for the death penalty. The individualized sentencing determination the selection phase performs requires the aggravating factors to be defined in terms that the sentencing authority is capable of understanding, so that it knows which characteristics of the offender and crime to consider in making this determination. The eligibility phase inherently requires a higher degree of precision in definition of the aggravating factors, and therefore, the standard utilized in that phase is necessarily a higher one. 186 An aggravating factor can be defined in terms that an ordinary juror could understand and still not genuinely narrow the class of person eligible for the death penalty. Consequently, it is appropriate to require two different levels of precision in defining the aggravating factors.

Fourth, the authority the Court cites only supports this “common-sense” standard if the standard’s applicability is limited to the selection phase of the capital sentencing process. The two cases cited by the Court for its proposition that this “common-sense” standard is to be used to determine whether an aggravating factor is unconstitutionally vague were Maynard v. Cartwright and Godfrey v. Georgia. 187 However, in

186. Due to the eligibility phase standard being a higher standard, the selection phase standard rarely is considered. This is because a vast majority of the statutes utilize the same factors in both the eligibility and selection phases. Thus, once the factors are deemed to meet the eligibility phase standard there is no need to consider the selection phase standard.

187. Tuilaepa v. California, 114 S. Ct. 2630, 2636 (1994). The Court stated that it has relied on this “basic principle” when it has found any aggravating factors to be
those two cases, the Court did not expressly use this standard to hold the challenged aggravating factors unconstitutionally vague.

Both *Maynard* and *Godfrey* held that the challenged factors were unconstitutionally vague because they failed to channel the sentencing authority's discretion by clear and objective standards, not because they lacked a common-sense core of meaning. Arguably, the use of the "common-sense" standard would render the factors challenged in *Maynard* and *Godfrey* unconstitutionally vague. However, it is simply not the standard utilized by the Court to arrive at that conclusion in those cases. In fact, both cases are conspicuously absent any reference to Justice White's concurring opinion in *Jurek*, from which the "common-sense" standard is derived. The only reference to the Court's *Jurek* decision at all appears buried in a "see also" string cite in *Godfrey*. Furthermore, the Court's examination of the challenged aggravating factors in *Maynard* and *Godfrey* was limited to the eligibility stage of sentencing. In *Godfrey*, the Court held that the challenged aggravating factor was invalid because it failed to limit the class of murderers eligible for the death penalty at the eligibility phase of capital sentencing. In *Maynard*, the Court held that the challenged factor was invalid for the identical reason. Therefore, in announcing this "common-sense" standard, the *Tuilaepa* Court cites no authority which would support the application of this standard to aggravating factors utilized in the eligibility phase. However, because *Tuilaepa* is the first unconstitutionally vague. *Id.* As examples of its use of this "basic principle," the Court references *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Tuilaepa*, 114 S. Ct. at 2636.

188. *See* Godfrey, 446 U.S. at 428 (stating that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence"); *Maynard*, 486 U.S. at 363-64 (explaining that "the language of the Oklahoma aggravating circumstance at issue ... gave no more guidance than the ... language" utilized in *Godfrey*). *See also supra* notes 108-128 and accompanying text.

189. In *Godfrey* and *Maynard* the Court stated that its reason for holding the challenged aggravating factors unconstitutional was that the factors failed to adequately channel the sentencing authority's discretion. *See supra* note 188. Although the Court did not use the "common-sense" standard in *Godfrey* and *Maynard*, the challenged factors could be said to lack a "common-sense core of meaning." The Court, however, made no reference to this "common-sense" standard in either decision.


192. *See id.* at 433 (holding that "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not").

193. *See Maynard*, 486 U.S. at 364 (concluding that the challenged factor was invalid because an ordinary person could honestly believe that said factor applied in every murder case).
decision by the Court addressing a challenge to aggravating factors used solely in the selection phase, the fact that there is no authority to support the use of the "common-sense" standard does not preclude its use if it is limited strictly to the selection phase.

Finally, as previous sections of this Comment have indicated, the Supreme Court has already set forth a vagueness standard to evaluate aggravating factors that perform the eligibility phase's narrowing function. 194 That standard is that an aggravating factor "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'"195 The Court's decisions have implicitly limited this standard's applicability to the eligibility phase because that is the context in which it was developed and has been the only context in which it has been applied.196 This well settled vagueness standard is not expressly overruled by the Court's decision in Tuilaepa. In fact, it does not even refer to it. Therefore, given this context, it is appropriate to limit the "common-sense" standard to the selection phase because doing so fills a void highlighted by the Court clearly differentiating between the two phases of the capital sentencing process; such an interpretation also avoids overruling a well settled standard by implication alone.

Thus, with its decision in Tuilaepa, the Supreme Court clearly articulates that there are indeed two stages to the process of sentencing an offender to death and that each stage has its own distinct set of requirements placed upon aggravating factors. In the eligibility phase, an aggravating factor must genuinely narrow the class of persons eligible for the death penalty.197 Typically, this requirement is satisfied if the sentencing authority is provided with a principled means of distinguishing the cases in which the death penalty is imposed from the many in which it is not.198 In the selection phase, the aggravating and mitigating factors together must ensure that the offender is sentenced on an

194. See supra notes 104-36 and accompanying text for a discussion of that standard.
195. Godfrey, 446 U.S. at 428 (citations omitted); see also supra note 117 and accompanying text.
198. Zant, 462 U.S. at 876-78.
individualized basis.\textsuperscript{199} This requirement is satisfied in a weighing jurisdiction by requiring the sentencing authority to weigh the aggravating factors found in the case against the mitigating factors.

Regardless of the phase in which an aggravating factor is utilized, it cannot be unconstitutionally vague. If it is, the factor is likely to lead to the arbitrary and capricious imposition of the death penalty.\textsuperscript{200} After \textit{Tuilaepa}, each phase of the capital sentencing process has its own standard to determine if an aggravating factor utilized is unconstitutionally vague. If the aggravating factors utilized in the selection phase of sentencing are the same as those utilized in the eligibility phase, then only the eligibility phase standard of vagueness needs to be satisfied, because the eligibility phase standard is more rigorous than the selection phase standard.\textsuperscript{201} The eligibility phase standard requires that the sentencing authority's discretion be channeled by clear and objective standards that provide specific and detailed guidance.\textsuperscript{202} If a different set of factors is utilized in the selection phase, as in California, then the factors utilized in the selection phase must satisfy the selection phase vagueness standard instead of the eligibility phase standard. That standard requires that an aggravating factor have some "common-sense core of meaning . . . that criminal juries should be capable of understanding."\textsuperscript{203} Therefore, through its decision in \textit{Tuilaepa}, the Supreme Court implies that the function an aggravating factor is constitutionally mandated to perform, as well as the amount of precision the Constitution requires in defining it, depends upon the phase of the capital sentencing process in which the aggravating factor is utilized.

\textbf{VI. CONCLUSION}

This Comment has traced the evolution of the requirements placed upon capital punishment statutes and the manner in which those requirements permit the death penalty to be a constitutional form of punishment. Central to all of the constitutional capital punishment statutes has been the aggravating factor, or something the Supreme Court has construed to be its equivalent. Over the past two decades, the Court has devoted an immeasurable amount of time to its efforts to clarify the requirements the Constitution places upon the use of aggravating factors,

\begin{itemize}
\item \textsuperscript{199} See \textit{Tuilaepa}, 114 S. Ct. at 2635.
\item \textsuperscript{200} Id.
\item \textsuperscript{201} See \textit{supra} note 186 and accompanying text.
\item \textsuperscript{202} Godfrey v. Georgia, 446 U.S. 420, 428 (1980).
\item \textsuperscript{203} \textit{Tuilaepa}, 114 S. Ct. at 2636 (quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring)).
\end{itemize}
as well as how aggravating factors permit the death penalty to be imposed in a constitutional manner.

After the "'76 Cases," the simple inclusion of aggravating factors in a capital punishment statute virtually ensured its constitutional validity. In those cases, the Court endorsed aggravating factors as the preferred means to prevent the constitutional deficiencies addressed in *Furman v. Georgia*. In *Godfrey v. Georgia* the Court ruled that the simple inclusion of aggravating factors was no longer sufficient. The Court found that if the constitutional deficiencies addressed in *Furman* were to be adequately addressed, the aggravating factors had to be defined with a certain amount of precision. Next, in *Zant v. Stephens*, the Court ruled that defining aggravating factors in a certain manner was no longer sufficient. The Court found that aggravating factors must also perform a certain function if all of the constitutional concerns regarding the death penalty were to be satisfied. Now, in the recent decision of *Tuilaepa v. California*, the Court rules that what is needed to satisfy these two requirements depends upon the phase of capital sentencing in which the aggravating factors are utilized.

Thus, the Supreme Court's cases on capital punishment make two things clear. First, the appropriate use of aggravating factors will guarantee that a capital punishment statute is constitutional. Second, what constitutes the appropriate use of aggravating factors is an evolving concept allowing the imposition of the death penalty to comport with the contemporary societal values used to determine the protection of the Eighth Amendment.