UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 63 | Number 6 Article 12

8-1-1985

State v. Wilson: The Improper Use of Prosecutorial Discretion in Capital Punishment Cases

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State v. Wilson: The Improper Use of Prosecutorial Discretion in Capital Punishment Cases

In *State v. Wilson*[1] the North Carolina Supreme Court held that a prosecutor may consider the victim's family's feelings about the case when deciding whether to seek the death penalty against an alleged murderer. A prosecutor's decision to pursue capital punishment can be overturned only if he used an unjustifiable standard such as "race, religion, or other arbitrary classification."[2] Absent abuse of prosecutorial discretion, the case may proceed toward a death conviction.

The current status of capital punishment in the United States is founded on the 1972 landmark case *Furman v. Georgia*.[3] In *Furman* a majority of the United States Supreme Court agreed that the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.[4] As a result, virtually every existing capital punishment statute was invalidated.[5] The death penalty, however, was not found unconstitutional per se; *Furman* invalidated only those procedures that allowed capital punishment to be administered in an arbitrary or capricious manner.[6] Many of the statutes were rewritten, and in *Gregg v. Georgia*[7] the Supreme Court approved a procedurally modified capital punishment statute.[8]

In *Gregg* the Supreme Court expressly rejected the argument that arbitrary capital convictions would result from prosecutorial discretion.[9] Nevertheless, the procedural fairness mandated in the *Furman* opinions[10] conflicts with the

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1. 311 N.C. 117, 316 S.E.2d 46 (1984).

2. *Id.* at 124, 316 S.E.2d at 51 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

3. 408 U.S. 238 (1972) (per curiam).

4. *Id.* at 239-40 (per curiam). "The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings." *Id.* All nine justices expressed their views on capital punishment in separate opinions, but a majority of the Court agreed that the Georgia capital punishment statute violated the eighth and fourteenth amendments.

5. *Id.* at 417 & n.2 (Powell, J., dissenting). Forty states had capital punishment statutes; of these, 39 were invalidated. Rhode Island's capital punishment statute imposed the death penalty for murder committed by a life term prisoner; it was the only valid capital punishment statute after *Furman*.

6. "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153, 188 (1976).

7. 428 U.S. 153 (1976).

8. *Id.* at 207. *See also infra* note 46 and accompanying text (the statute provided for separate guilt and sentencing stages of the trial, required the finding of specific aggravating factors to impose the death penalty, and made appeal automatic).

9. *Id.* at 199. *See also infra* note 47 and accompanying text (the statutory requirements in *Gregg* pertained only to the sentencing authority).

10. The Court in *Gregg* read *Furman* to require only that capital punishment statutes include sentencing guidelines that compel juries to consider the aggravating and mitigating circumstances of the crime in deciding whether to impose the death penalty. The separate opinions in *Furman*, however, were more result oriented. The justices did not pinpoint certain stages of prosecution as problematic; they objected to the arbitrary and discriminatory results of capital punishment as it existed

arbitrary and prejudicial effects that can occur if the prosecutor considers the desire of the murder victim's family to seek the death penalty against the defendant. Furthermore, Justice White, representing three concurring votes in *Gregg*, noted, "Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts."[11] *State v. Wilson*, however, presented a case in which the prosecuting attorney was motivated by other than the legal considerations Justice White believed should be imputed to prosecutors.

On October 22, 1981, Luther R. Wilson, Jr. burglarized two Randolph County homes.[12] Wilson broke into the first house and stole a gun, two watches, and a small amount of money. In plain view of neighbors, he then proceeded to the home of Leonard A. Teel, whose presence apparently surprised Wilson. They may have fought.[13] In any event, Wilson was seen by the same neighbors as he escaped with a ski mask pulled over his face and a "long gun in his left hand."[14] The homeowner was not so lucky: dead or dying, Teel lay in his house for two days until his body was discovered. Wilson was convicted of armed robbery and first degree murder. The jury recommended that he be sentenced to life imprisonment.[15]

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in 1972. Justice Douglas noted: " 'A penalty . . . should be considered "unusually" imposed if it is administered arbitrarily or discriminatorily.' " *Furman*, 408 U.S. at 249 (Douglas, J., concurring) (quoting Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)). Referring to the cruel and unusual punishment clause, Douglas held the eighth amendment to "require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." *Id.* at 256 (Douglas, J., concurring). Justice Brennan compared the imposition of the death penalty to a lottery system. "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily." *Id.* at 293 (Brennan, J., concurring). Justice Stewart concluded 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." *Id.* at 310 (Stewart, J., concurring). Justice White objected that "no meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring). Justice Marshall noted: "Regarding discrimination, it has been said that '[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society's sacrificial lamb. . . .' " *Id.* at 364 (Marshall, J., concurring) (quoting *Hearings on S. 1760 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. ii (1968)). Justice Powell conceded that if a minority could "demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established." *Id.* at 449 (Powell, J., dissenting). Powell, however, rejected discrimination arguments as "hypothetical assumptions that may or may not be realistic." *Id.* at 444 (Powell, J., dissenting).

11. *Gregg*, 428 U.S. at 225 (White, J., concurring).

12. *Wilson*, 311 N.C. at 120, 316 S.E.2d at 49.

13. Two witnesses testified that on different occasions defendant told them that he had broken into a man's house with the intention of robbing him and subsequently had to kill him after the man pointed a gun at him. *Id.* at 121, 316 S.E.2d at 49. An unexpected conflict between a defendant and the victim may be considered by the jury as a mitigating circumstance in deciding whether to impose the death penalty. N.C. GEN. STAT. § 15A-2000(f)(9) (1977).

14. *Wilson*, 311 N.C. at 120, 316 S.E.2d at 49.

15. *Id.* at 119, 316 S.E.2d at 48. "[The] jury found defendant guilty of robbery with a firearm, guilty of murder in the first degree based upon the felony-murder rule, and not guilty of murder in the first degree based upon premeditation and deliberation." *Id.*

Wilson appealed, arguing that the trial judge erred by refusing to reduce the crime charged to second degree murder.[16] The motion to reduce the crime had been denied at a pre-trial hearing at which the defense attorney tried to establish that most defendants charged with first degree murder in Randolph County had been offered a chance to plead guilty to a lesser offense.[17] The prosecuting attorney testified that he had not plea-bargained with the defendant because he had consulted with the victim's family: "It's their feeling that they want to pursue first degree murder. Only if the family wanted a plea to second degree murder would it be possible for that plea to be entered."[18] The prosecuting attorney added that he "always, if possible, consulted with the victim's family to consider their feelings about the case."[19]

Wilson contended that his case was treated differently because Teel's family wanted him to be tried for first degree murder. He argued that allowing the family to decide whether a capital crime would be charged was an abuse of prosecutorial discretion.[20] The district attorney abdicated his responsibility and delegated it to the victim's family, thus denying Wilson due process and equal protection.[21] The North Carolina Supreme Court reviewed the decision to prosecute for first degree murder and held that absent proof of discrimination the prosecutor is presumed to have acted within legal bounds.[22] The court concluded that the "district attorney's consideration of the wishes of the family as *one factor* in determining which defendant will be prosecuted for murder and thereby subjected to the death penalty" was permissible.[23]

Although North Carolina may be the only state that has expressly permitted a prosecutor to consider the wishes of the victim's family in a potential capital case,[24] the use of prosecutorial discretion has been widely recognized as necessary.[25] District attorneys are forced to balance limited prosecutorial re-

16. *Id.* at 121, 316 S.E.2d at 50. The defense argued that if Wilson had been allowed to plead guilty to second degree murder, he would have been sentenced as a Class B Felon and would have been eligible for early release or parole. Brief for Defendant-Appellant at 16.

17. *Wilson*, 311 N.C. at 122, 316 S.E.2d at 50. Defendant introduced evidence that during the tenure of the then-present district attorney in Randolph County, in "eight out of nine cases where the defendant had been charged with murder in the first degree (exclusive of defendant's case), the defendant was subsequently allowed to plead guilty to a lesser-included offense or the defendant had been tried on a lesser-included offense." *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 121, 316 S.E.2d at 50.

21. Brief for Defendant-Appellant at 19. The defense argued that this practice would "convert a system of justice into a system of irrational retribution." *Id.*

22. *Wilson*, 311 N.C. at 124, 316 S.E.2d at 51; *see also infra* notes 29-33 and accompanying text (requirements for the defense of discriminatory prosecution).

23. *Wilson*, 311 N.C. at 124, 316 S.E.2d at 51.

24. Capital punishment studies have recognized that prosecutors may be influenced by the victim's family. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1967, 1976 (1983). Apparently, however, no other courts have allowed consideration of the wishes of the victim's family.

25. *See* Oyler v. Boles, 368 U.S. 448 (1962); United States v. Brokaw, 60 F.Supp. 100, 102 (S.D. Ill. 1945) (dictum that the discretion of the prosecutor derives from the common law); State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980). In *Spicer* the court recognized that the charging function of the district attorney includes weighing "many factors such as 'the likelihood of a successful prosecution, the social value of obtaining a conviction as against the time and expense to the State,

sources against the likelihood of a conviction.[26] Moreover, because every case is different and may not fit clearly into one statutory classification of a crime, the prosecutor must decide which crime or crimes best fit the facts.[27] Prosecutorial discretion helps bridge the gap between textbook criminal prosecution and the actual charging of criminals on a day-to-day basis.

If the prosecutor abuses his discretion, however, the accused may raise the defense of "discriminatory prosecution," which usually is based on the fourteenth amendment's guarantee of equal protection.[28] North Carolina recognizes this defense[29] and follows the standards set by the United States Supreme Court in *Oyler v. Boles*.[30] In *Oyler* the Supreme Court ruled that a criminal prosecution "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" violated the equal protection clause.[31] The unequal application of the law must be purposeful or intentional;[32] mere unequal effects on an individual only demonstrate that the prosecutor exercised his discretion.[33]

By approaching the abuse of prosecutorial discretion as a defense, courts analyzing the prosecutor's decision to seek the death penalty ask only whether certain unjustifiable standards such as race or religion were used. Thus, the legally relevant factors a prosecutor may use to decide whether to charge a capital crime remain undefined. Although *Wilson* recognized one prosecutorial factor—the wishes of the victim's family—the North Carolina Supreme Court expressly has avoided the task of establishing specific standards for when the death penalty will be sought.[34] The court, however, has stated that the general

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and his own sense of justice in the particular case.'" *Id.* at 311, 261 S.E.2d at 895 (citing Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1119 (1961)).

26. *See* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1119 (1961).

27. *See Wilson*, 311 N.C. at 124, 316 S.E.2d at 51.

28. U.S. CONST. amend XIV, § 1.

29. State v. Lawson, 310 N.C. 632, 644, 314 S.E.2d 493, 500-01 (1984); State v. Cherry, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979), *cert. denied*, 446 U.S. 941 (1980).

30. 368 U.S. 448 (1961). In *Oyler* defendant claimed that he was the only person prosecuted as a habitual offender in Taylor County, West Virginia, from January 1940 to June 1955; five other defendants in that period could have been prosecuted as habitual offenders. *Id.* at 455. Defendant argued that the more severe penalty under the habitual offender statute was imposed only in a minority of cases and that this denied equal protection to those against whom the heavier penalty was enforced. The Court held: "Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of denial of equal protection were not alleged." *Id.* at 454-56.

31. *Id.* at 456.

32. *See* State v. Spicer, 299 N.C. 309, 312, 261 S.E.2d 893, 896 (1980) (citing *Oyler*, 368 U.S. at 456, in which the Court said that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."); State v. Cherry, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979), *cert. denied*, 446 U.S. 941 (1980).

33. State v. Spicer, 299 N.C. 309, 312, 261 S.E.2d 893, 896 (1980). "A defendant must show more than simply that discretion has been exercised in the application of a law resulting in unequal treatment among individuals. He must show that in the exercise of that discretion there has been intentional or deliberate discrimination by design." *Id.*

34. State v. Lawson, 310 N.C. 632, 644 n.2, 314 S.E.2d 493, 501 n.2 (1984).

assembly could define prosecutorial considerations.[35] Unless the general assembly acts, the prosecutor's charging function in capital punishment cases will continue on an ad hoc basis.

The danger in not prescribing legally relevant prosecutorial factors lies in the possibility that not all arbitrary or capricious charging decisions will be checked by the defense of discriminatory prosecution. Some unfair criteria may not rise to the level required for a defense based on prosecutorial abuse, and other discrimination may not be subject to proof.[36] Capital punishment studies are split on whether discrimination based on socio-economic and racial grounds occurs in prosecutions despite post-*Furman* protections.[37] Most studies, however, recognize that prosecutors consider such non-legal factors as a judge's reputation for imposing capital punishment, pressure from police and media, and public reaction to the crime.[38] Legally relevant considerations generally include

35. *Id.* ("If prosecutors are to be 'guided' in the exercise of this kind of discretion, we think it is the province of the legislature and not this Court to so provide.").

36. North Carolina currently recognizes race, religion, or other arbitrary classification as unjustifiable standards for imposing the death penalty. *See supra* notes 30-33 and accompanying text. Allowing the victim's family to help decide whether to pursue capital punishment also may be an unfair or arbitrary standard; however, the North Carolina Supreme Court held in *Wilson* that this procedure is not sufficiently unjustifiable to be considered discriminatory prosecution. *Wilson*, 311 N.C. at 124, 316 S.E.2d at 51. Considerations such as the prosecutor's inclination towards capital punishment or the scheduled judge's reputation also may not rise to the level of discriminatory prosecution.

Even the use of clearly unjustifiable standards such as race or religion will be difficult to prove. With an unlimited number of factors on which a district attorney can base his decision to prosecute, any unjustifiable standards can be masked by allowable standards.

37. Bowers, *supra* note 24, at 1071-78. This study, conducted in Florida during 1976-77, found a 19 percent greater chance of a first degree murder indictment when a black killed a white than when a black killed a black. The study also found a 17 percent difference between first degree indictments of defendants with court appointed attorneys as compared with defendants who retained private attorneys. *Id.*

A study of all homicides in South Carolina between June 1977 and November 1979 in which the death penalty could have been sought found that "[w]hile prosecutors sought the death penalty nearly four times as often for blacks accused of killing whites as they did when blacks were accused of killing other blacks, they were only twice as likely to seek the death sentence when white defendants had white rather than black victims." Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges To the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 384-85 (1982); *see also* Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983) (disparity between rural and urban death penalty charges).

Other studies have not found conclusive evidence of discrimination in death penalty convictions. Redelet, *Racial Characteristics and the Impostion of the Death Penalty*, 46 AM. SOC. REV. 918, 922-23 (1981). This study was cited in Paternoster, *supra* ("Radelet found that murderers of whites were significantly more likely to be indicted for first-degree murder than were killers of blacks. . . . Radelet, however, found no evidence of discrimination by race of offender once the victim's race was controlled."); *see also* Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman *Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75, 76 (1980) ("Although sentences were the most severe in cases where blacks killed whites, there is no conclusive evidence of racial discrimination after taking into account the differences between felony murders and nonfelony killings.").

38. Bowers, *supra* note 24, at 1076. Interviews with judges, prosecutors, and defense attorneys revealed the following nonlegal influences on the prosecutor's decision to bring a capital charge:

1) Personal orientations or values of prosecutors which include aggressiveness of the prosecutor and his orientation towards punishment (deterrence, retribution).

2) Situational pressures or constraints in handling cases which include plea bargaining strategy, judge's reputation, and pressure from police.

the facts of the case, the sufficiency and quality of the evidence, and any aggravating and mitigating circumstances that relate to the crime and the defendant.[39] Not establishing objective guidelines and allowing such a wide range of factors makes it possible for the prosecutor to discriminate based on his personal motivations rather than analyzing possible charges in terms of the circumstances of the crime.

Removing discrimination, regardless of its source, from capital punishment was a primary consideration for the *Furman* Court. Although the per curiam opinion held only that the imposition of the death penalty in that case constituted cruel and unusual punishment,[40] six justices noted that unbridled discretion in capital proceedings could have discriminatory effects.[41] Justice Stewart objected to administering the death penalty in a "wanton" and "freakish" manner.[42] Referring to the cruel and unusual clause of the eighth amendment, Justice Douglas noted: "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."[43]

To reduce the risk that the death penalty would be imposed in a discriminatory or capricious manner, capital statutes were rewritten to provide procedural safeguards at the sentencing phase of the trial.[44] The primary protection is the requirement that juries find at least one statutory aggravating circumstance before imposing the death penalty.[45] The Supreme Court in *Gregg* approved the changes made by the Georgia legislature in the Georgia capital punishment stat-

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3) Social influences or pressures from community which include media coverage and public opinion. *Id.* (excerpt from Table 2).

The general use of prosecutorial discretion is analyzed in Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971). Abrams classified those prosecutorial factors that are applicable to all offenses in varying degrees as "practical factors." Practical factors "include the prosecutor's belief in the guilt of a suspect, the likelihood of a conviction, the possibility of obtaining the suspect's cooperation in other matters, the prosecutor's concern about his record for obtaining convictions, the influence of the law enforcement agents involved, and the general character of the offender." *Id.* at 11.

39. Bowers, *supra* note 24, at 1076.

40. *Furman*, 408 U.S. at 239-40 (per curiam) (opinion quoted *supra* note 4).

41. *See supra* note 10.

42. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

43. *Id.* at 242 (Douglas, J., concurring).

44. *See* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974).

45. *See Gregg*, 428 U.S. at 197. N.C. GEN. STAT. § 15A-2000(c) (1977) complies with this requirement:

> (c) Findings in Support of Sentence of Death. When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:
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> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
>
> (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and
>
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

ute and held that the statute was constitutional.[46] The Georgia statute, however, did not restrict the prosecutor's discretion in deciding who would be subject to the death penalty.

Addressing the issue of discretion in *Gregg*, the Court concluded that only sentencing procedures were required to protect against arbitrary use of capital punishment.[47] The Court distinguished prosecutorial discretion that could only have a mercy-granting effect by removing a defendant from consideration for the death penalty from unbridled jury discretion that could result in selective imposition of the death penalty on those already convicted of a capital offense.[48] Moreover, the Court felt that removing prosecutorial discretion would be equivalent to creating a mandatory charging system that would require a capital prosecution whenever evidence existed that a suspect had committed a capital murder.[49] Such a system, the Court noted, would force the prosecutor to distinguish between murderers solely on the basis of legislative classifications of crimes,[50] a requirement very similar to the mandatory death penalty statutes held unconstitutional in *Woodson v. North Carolina*.[51]

Notwithstanding *Gregg*, unbridled prosecutorial discretion subsequently has been challenged as allowing discriminatory imposition of the death penalty. The North Carolina Supreme Court, relying on *Gregg*, rejected this challenge in *State v. Lawson*.[52] *Gregg*, however, provides weak support for unrestricted prosecutorial discretion; it is stronger support for requiring prosecutorial discretion but restricting it solely to a consideration of legally relevant factors. First, the contention that prosecutorial discretion can only grant mercy,[53] and thus benefit a defendant, is suspect. Applied in the extreme, an offer to plea bargain could be made to all capital defendants except a select few the prosecutor feels

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46. *Gregg*, 428 U.S. at 207.

Gregg established three essential components for a capital punishment statute:

1. The trial must have separate guilt and sentencing stages. "No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die." *Id.* at 197.

2. The jury must weigh aggravating and mitigating circumstances of the crime and "must find a *statutory* aggravating circumstance before recommending a sentence of death." *Id.*

3. The statute must provide for an automatic appeal of all death sentences. *Id.* at 198. *See also Survey of Developments in North Carolina Law*, 55 N.C.L. REV. 895, 973-74 (summary of the *Gregg* capital punishment statute requirements).

47. *Gregg*, 428 U.S. at 199 ("*Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the *sentencing authority* would focus on the particularized circumstances of the crime and the defendant.") (emphasis added).

48. *Id.*

49. *Id.* at 199 n.50.

50. *Id.* The *Gregg* Court suggested in a footnote that without prosecutorial discretion in charging death-penalty crimes, the procedure "in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson v. North Carolina* and *Roberts v. Louisiana*." *Id.* (citations omitted). The Court in *Woodson* objected to legislative classifications of capital crimes which, if mandatory, would have unduly harsh results. *Woodson*, 428 U.S. 280, 293 (1975).

51. 428 U.S. 280 (1976) (North Carolina capital punishment statute requiring the death penalty in all cases of first-degree murder held unconstitutional).

52. 310 N.C. 632, 644, 314 S.E.2d 493, 501 (1984).

53. *See supra* text accompanying note 48.

deserve the death penalty. Using discretion in this manner is a "wanton" and "freakish" imposition of the death penalty.

Second, if prosecutorial discretion is constitutionally required to avoid the *Woodson*-type mandatory prosecution,[54] this result still can be achieved if the prosecutor only considers legally relevant factors. Consideration of the aggravating and mitigating circumstances of the crime would help avoid overly rigid compliance with legislative crime classifications.

Last, the three-justice concurring opinion in *Gregg*[55] indicated that the Supreme Court was not considering the possibility of abuse by prosecutors. Justice White assumed prosecutors would use legally relevant factors;[56] he contended that defendants would escape the death penalty through prosecutorial charging decisions only if the offense was not serious enough, or the proof was not strong enough.[57] The concurring opinion therefore shows that *Gregg* is not support for a prosecutor's reliance on nonlegal considerations.

If *Gregg* allows the use of prosecutorial discretion but limits it to legally relevant considerations, the scope of allowable factors should be defined. Under *Furman* a decision to impose the death penalty should focus on the circumstances of the crime and the defendant.[58] Justice White stated in *Gregg* that the prosecutor should use the same criteria that the jury uses to decide whether to impose the death penalty.[59] Under capital punishment statutes consistent with *Gregg*, the jury is limited to weighing the aggravating and mitigating circumstances of the crime.[60] Use of this standard in the decision to prosecute would exclude nonlegal considerations such as the personal motivation of the prosecutor or the wishes of the victim's family.

Limiting prosecutorial discretion to the circumstances of the crime and the defendant also is supported by Justice Douglas' remarks in *Gregg* that the death penalty cannot be imposed under a procedure that "gives room for the play of such prejudices" as race, religion, or social position.[61] Because a request for capital prosecution by the victim's family could stem from long-harbored resentment towards a particular segment of the community, consulting the family permits these prejudices to surface. Conversely, consideration only of the circumstances of the crime and the defendant would preclude such prejudices from affecting the outcome of the case.[62]

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54. *See supra* text accompanying notes 49-51.

55. 428 U.S. at 207 (White, J., concurring) (joined by Chief Justice Burger and Justice Rehnquist).

56. *Id.* at 225 (White, J., concurring). Justice White's proposition is quoted *supra* text accompanying note 11. White noted: "*Absent facts to the contrary*," prosecutors are presumed to use legally relevant criteria. *Id.* (White, J., concurring) (emphasis added). Perhaps Justice White suggested that facts indicating a prosecutor's use of nonlegal criteria would result in arbitrary imposition of the death penalty in violation of the eighth amendment.

57. *See Gregg*, 428 U.S. at 225 (White, J., concurring).

58. *See supra* note 47.

59. *Gregg*, 428 U.S. at 225 (White, J., concurring).

60. *See supra* note 46.

61. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

62. Prejudicial and arbitrary prosecution can surface in many forms. Public or media pressure stemming from a widely publicized murder may tilt a district attorney's decision in favor of capital

Limiting the prosecutor's charging function to an analysis of the circumstances of the crime and the defendant also creates a procedural advantage. Any indication of discriminatory prosecution is likely to result in an appeal. The state appellate courts then must decide whether the prosecutor relied on proper grounds in charging a capital offense. Appeals taken by capital defendants can be as numerous as the reasons for a prosecutor to seek the death penalty.[63] Appeals based on the prosecutor's use of nonlegal consideration, however, can be avoided. Since the jury will find a defendant guilty of a capital offense only if sufficient evidence of guilt exists and will impose the death penalty only if sufficient aggravating circumstances exist, the prosecutor can prevent these appeals by basing his decision to seek capital punishment on only those considerations available to the jury. Because legally relevant factors are available to the prosecutor, he need not resort to nonlegal considerations. Limiting the prosecutor to a consideration of the circumstances of the crime and the defendant therefore would reduce the grounds for procedural appeals.

Despite *Furman*'s nondiscrimination objectives, unbridled prosecutorial discretion permits arbitrary and capricious imposition of the death penalty. Even in a nondiscriminatory context, procedural appeals will result when the prosecutor unnecessarily strays from legally relevant considerations in deciding whether to charge a capital offense. These problems can be resolved by a minor change in North Carolina's capital punishment statute. The existing statute lists the aggravating and mitigating circumstances the jury may use in imposing the death penalty.[64] These circumstances focus on the crime and the defendant, and

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prosecution. In this situation the defendant's charge would not be based on legally relevant considerations; rather, it would result from public demand for anticrime action. Restricting prosecutorial discretion to the circumstances of the crime and the defendant would limit the prejudicial effects of a defendant's notoriety.

63. *See supra* note 38 (nonlegal prosecutorial considerations).

64. The North Carolina statute states:

(e) Aggravating Circumstances.—Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person

determine the egregiousness of the murder. Additionally, the North Carolina Constitution and General Statutes specify which crimes are capital;[65] the jury considers evidence that proves whether a capital crime was committed by the defendant. The general assembly and the courts have approved the jury's use of these factors in deciding whether a defendant committed the crime and whether a death sentence should be imposed. The prosecutor, like the jury, should be limited to considering these legally relevant factors in deciding whom to prosecute for a death-punishable crime.

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by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances.—Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

N.C. GEN. STAT. § 15A-2000(e)-(f) (1977).

65. N.C. CONST. art. XI, § 2 (murder, arson, burglary, and rape punishable by death if the general assembly shall so enact); N.C. GEN. STAT. § 14-17 (1981) (murder in the first degree includes those murders committed in the perpetration or attempted perpetration of any arson, rape or sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon; first degree murder punishable by death).