MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

In *Furman v. Georgia*, 408 U. S. 238 (1972), this Court held the death penalty, as then administered in Georgia, to be unconstitutional. That same year, the Georgia Legislature enacted a new statutory scheme under which the death penalty may be imposed for several offenses, including murder. The issue in this case is whether the death penalty imposed for murder on petitioner Gregg under the new Georgia statutory scheme may constitutionally be carried out. I agree that it may.

I

Under the new Georgia statutory scheme, a person convicted of murder may receive a sentence either of death or of life imprisonment. Ga.Code Ann. § 26-1101 (1972). [Footnote 2/1] Under Georgia Code Ann. § 26-3102 (Supp. Page 428 U. S. 208 1975); the sentence will be life imprisonment unless the jury, at a separate evidentiary proceeding immediately following the verdict, finds unanimously and beyond a reasonable doubt at least one statutorily defined "aggravating circumstance." [Footnote 2/2] The aggravating circumstances are:

"(1) The offense of murder, rape, armed robbery, Page 428 U. S. 209 or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person Page 428 U. S. 210 who has a substantial history of serious assaultive criminal convictions."

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person."

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value."

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty."

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person."

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties. " Page 428 U. S. 211

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement."

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

§ 27-2534.1(b) (Supp. 1975). Having found an aggravating circumstance, however, the jury is not required to impose the death penalty. Instead, it is merely authorized to impose it after considering evidence of "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the [enumerated] statutory aggravating circumstances. . . ." § 27-2534.1(b) (Supp. 1975). Unless the jury unanimously determines that the death penalty should be imposed, the defendant will be sentenced to life imprisonment. In the event that the jury does impose the death penalty, it must designate in writing the aggravating circumstance which it found to exist beyond a reasonable doubt.

An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed. To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionnaire. § 27-2537(a) (Supp. 1975). The questionnaire contains, *inter alia*, six questions designed to disclose whether race played a role in the case, and one question asking the trial judge whether the evidence forecloses "all doubt respecting the defendant's Page 428 U. S. 212 guilt." In deciding whether the death penalty is to be sustained in any given case, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and"

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and"

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. . . ."

In order that information regarding "similar cases" may be before the court, the post of Assistant to the Supreme Court was created. The Assistant must

"accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate."

§ 27-2537(f). [Footnote 2/3] The court is required to include in its decision a reference to "those similar cases which it took into consideration." § 27-2537(e).

II

Petitioner Troy Gregg and a 16-year-old companion, Floyd Allen, were hitchhiking from Florida to Asheville, N.C. on November 21, 1973. They were picked up in an automobile driven by Fred Simmons and Bob Moore, both of whom were drunk. The car broke down, and Simmons purchased a new one -- a 1960 Pontiac – using Page 428 U. S. 213 part of a large roll of cash which he had with him. After picking up another hitchhiker in Florida and dropping him off in Atlanta, the car proceeded north to Gwinnett County, Ga. where it stopped so that Moore and Simmons could urinate. While they were out of the car, Simmons was shot in the eye and Moore was shot in the right cheek and in the back of the head. Both died as a result.

On November 24, 1973, at 3 p.m., on the basis of information supplied by the hitchhiker, petitioner and Allen were arrested in Asheville, N.C. They were then in possession of the car which Simmons had purchased; petitioner was in possession of the gun which had killed Simmons and Moore and $107 which had been taken from them; and in the motel room in which petitioner was staying was a new stereo and a car stereo player.

At about 11 p.m., after the Gwinnett County police had arrived, petitioner made a statement to them admitting that he had killed Moore and Simmons, but asserting that he had killed them in self-defense and in defense of Allen. He also admitted robbing them of $400 and taking their car. A few moments later, petitioner was asked why he had shot Moore, and Simmons and responded: "By God, I wanted them dead."

At about 1 o'clock the next morning, petitioner and Allen were released to the custody of the Gwinnett County police and were transported in two cars back to Gwinnett County. On the way, at about 5 a.m., the car stopped at the place where Moore and Simmons had been killed. Everyone got out of the car. Allen was asked, in petitioner's presence, how the killing occurred. He said that he had been sitting in the back seat of the 1960 Pontiac and was about half asleep. He woke up when the car stopped. Simmons and Moore got out, and, as soon as they did, petitioner turned around and told Allen: "Get out, we're going to rob them." Allen said that he Page 428 U. S. 214 got out and walked toward the back of the car, looked around, and could see petitioner, with a gun in his hand, leaning up against the car so he could get a good aim. Simmons and Moore had gone down the bank and had relieved themselves, and, as they were coming up the bank, petitioner fired three shots. One of the men fell, the other staggered. Petitioner then circled around the back and approached the two men, both of whom were now lying in the ditch, from behind. He placed the gun to the head of one of them and pulled the trigger. Then he went quickly to the other one and placed the gun to his head and pulled the trigger again. He then took the money, whatever was in their pockets. He told Allen to get in the car, and they drove away.

When Allen had finished telling this story, one of the officers asked petitioner if this was the way it had happened. Petitioner hung his head and said that it was. The officer then said: "You mean you shot these men down in cold blooded murder just to rob them," and petitioner said yes. The officer then asked him why, and petitioner said he did not know. Petitioner was indicted in two counts for murder and in two counts for robbery.

At trial, petitioner's defense was that he had killed in self-defense. He testified in his own behalf, and told a version of the events similar to that which he had originally told to the Gwinnett County police. On cross-examination, he was confronted with a letter to Allen recounting a version of the events similar to that to which he had just testified and instructing Allen to memorize and burn the letter. Petitioner conceded writing the version of the events, but denied writing the portion of the letter which instructed Allen to memorize and burn it. In rebuttal, the State called a handwriting expert who testified that the entire letter was written by the same person. Page 428 U. S. 215

The jury was instructed on the elements of murder [Footnote 2/4] and robbery. The trial judge gave an instruction on self-defense, but refused to submit the lesser included Page 428 U. S. 216 offense of manslaughter to the jury. It returned verdicts of guilty on all counts.

No new evidence was presented at the sentencing proceeding. However, the prosecutor and the attorney for petitioner each made arguments to the jury on the issue of punishment. The prosecutor emphasized the strength of the case against petitioner and the fact that he had murdered in order to eliminate the witnesses to the robbery. The defense attorney emphasized the possibility that a mistake had been made, and that petitioner was not guilty. The trial judge instructed the jury on Page 428 U. S. 217 their sentencing function, and, in so doing, submitted to them three statutory aggravating circumstances. He stated:

"Now, as to counts one and three, wherein the defendant is charged with the murders of -- has been found guilty of the murders of [Simmons and Moore], the following aggravating circumstances are some that you can consider, as I say, you must find that these existed beyond a reasonable doubt before the death penalty can be imposed."

"One -- That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore]."

"Two -- That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment."

"Three -- The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they involved the depravity of mind of the defendant."

"Now, so far as the counts two and four, that is the counts of armed robbery, of which you have found the defendant guilty, then you may find -- inquire into these aggravating circumstances."

"That the offense of armed robbery was committed while the offender was engaged in the commission of two capital felonies, to-wit the murders of [Simmons and Moore], or that the

offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in the indictment, or three, that the offense of armed robbery was outrageously and wantonly vile, horrible and inhuman in that they involved the depravity of the mind of the defendant. " Page 428 U. S. 218

"Now, if you find that there was one or more of these aggravating circumstances existed beyond a reasonable doubt, then, and I refer to each individual count, then you would be authorized to consider imposing the sentence of death."

"If you do not find that one of these aggravating circumstances existed beyond a reasonable doubt in either of these counts, then you would not be authorized to consider the penalty of death. In that event, the sentence as to counts one and three, those are the counts wherein the defendant was found guilty of murder, the sentence could be imprisonment for life."

Tr. 476-477. The jury returned the death penalty on all four counts finding all the aggravating circumstances submitted to it, except that it did not find the crimes to have been "outrageously or wantonly vile," etc.

On appeal, the Georgia Supreme Court affirmed the death sentences on the murder counts and vacated the death sentences on the robbery counts. 233 Ga. 117, 210 S.E.2d 659 (1974). It concluded that the murder sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor; that the evidence supported the finding of a statutory aggravating factor with respect to the murders; and, citing several cases in which the death penalty had been imposed previously for murders of persons who had witnessed a robbery, held:

"After considering both the crimes and the defendant, and after comparing the evidence and the sentences in this case with those of previous murder cases, we are also of the opinion that these two sentences of death are not excessive or disproportionate to the penalties imposed in similar cases Page 428 U. S. 219 which are hereto attached. [Footnote 2/5]"

Id. at 127, 210 S.E.2d at 667. However, it held with respect to the robbery sentences:

"Although there is no indication that these two Page 428 U. S. 220 sentences were imposed under the influence of passion, prejudice or any other arbitrary factor, the sentences imposed here are unusual in that they are rarely imposed for this offense. Thus, under the test provided by statute for comparison (Code Ann. § 27-2537(c), (3)), they must be considered to be excessive or disproportionate to the penalties imposed in similar cases."

Ibid. Accordingly, the sentences on the robbery counts were vacated.

III

The threshold question in this case is whether the death penalty may be carried out for murder under the Georgia legislative scheme consistent with the decision in *Furman v. Georgia*, *supra.* In *Furman*, this Court held that, as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed

discriminatorily, [Footnote 2/6] Page 428 U. S. 221 wantonly and freakishly, [Footnote 2/7] and so infrequently, [Footnote 2/8] that any given death sentence was cruel and unusual. Petitioner argues that, as in *Furman*, the jury is still the sentencer; that the statutory criteria to be considered by the jury on the issue of sentence under Georgia's new statutory scheme are vague, and do not purport to be all-inclusive; and that, in any event, there are no circumstances under which the jury is required to impose the death penalty. [Footnote 2/9] Consequently, the petitioner argues that the death penalty will inexorably be imposed in as discriminatory, standardless, and rare a manner as it was imposed under the scheme declared invalid in *Furman.*

The argument is considerably overstated. The Georgia Legislature has made an effort to identify those aggravating factors which it considers necessary and relevant to the question whether a defendant convicted of capital murder should be sentenced to death. [Footnote 2/10] The Page 428 U. S. 222 jury which imposes sentence is instructed on all statutory aggravating factors which are supported by the evidence, and is told that it may at impose the death penalty unless it unanimously finds at least one of those factors to have been established beyond a reasonable doubt. The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while, at the same time, permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate, as they are in Georgia by reason of the aggravating circumstance requirement, it becomes reasonable to expect that juries -- even given discretion not to impose the death penalty -- will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly, or so infrequently that it loses its usefulness as a sentencing device. There is, therefore, reason to expect that Georgia's current system would escape the infirmities which invalidated its previous system under *Furman.* However, the Georgia Legislature was not satisfied with a system which might, but also might not, turn out in practice to result in death sentences being imposed with reasonable consistency for certain serious murders. Instead, it gave the Georgia Supreme Court the power and the obligation to perform precisely the task which three Justices of this Court, whose opinions were necessary to the result, performed Page 428 U. S. 223 in *Furman:* namely, the task of deciding whether, in fact, the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion.

In considering any given death sentence on appeal, the Georgia Supreme Court is to determine whether the sentence imposed was consistent with the relevant statutes -- *i.e.*, whether there was sufficient evidence to support the finding of an aggravating circumstance. Ga.Code Ann § 27-2537(c)(2) (Supp. 1975). However, it must do much more than determine whether the penalty was lawfully imposed. It must go on to decide -- after reviewing the penalties imposed in "similar cases" -- whether the penalty is "excessive or disproportionate" considering both the crime and the defendant. § 27-2537(c)(3) (Supp. 1975). The new Assistant to the Supreme Court is to assist the court in collecting the records of "all capital felony cases" [Footnote 2/11] in the State of Georgia in which sentence was imposed after January 1, 1970. § 27-2537(f) (Supp. 1975). The court also has the obligation of determining whether the penalty was "imposed under the influence of passion, prejudice, or any other arbitrary factor." § 27-2537(c)(1) (Supp. 1975). The Georgia Supreme Court has interpreted the appellate review statute to require it to set aside

the death sentence whenever juries across the State impose it only rarely for the type of crime in question, but to require it to affirm death sentences whenever juries across the State generally impose it for the crime in question. Page 428 U. S. 224

Thus, in this case, the Georgia Supreme Court concluded that the death penalty was so rarely imposed for the crime of robbery that it set aside the sentences on the robbery counts, and effectively foreclosed that penalty from being imposed for that crime in the future under the legislative scheme now in existence. Similarly, the Georgia Supreme Court has determined that juries impose the death sentence too rarely with respect to certain classes of rape. *Compare Coley v. State,*231 Ga. 829, 204 S.E.2d 612 (1974), *with Coker v. State,* 234 Ga. 555, 216 S.E.2d 782 (1975). However, it concluded that juries "generally throughout the state" have imposed the death penalty for those who murder witnesses to armed robberies.*Jarrell v. State,* 234 Ga. 410, 425, 216 S.E.2d 258, 270 (1975). Consequently, it armed the sentences in this case on the murder counts. If the Georgia Supreme Court is correct with respect to this factual judgment, imposition of the death penalty in this and similar cases is consistent with *Furman.* Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish, and has not even attempted to establish, that the Georgia Supreme Court failed properly to perform its task in this case, or that it is incapable of performing its task adequately in all cases, and this Court should not assume that it did not do so.

Petitioner also argues that decisions made by the prosecutor -- either in negotiating a plea to some lesser offense than capital murder or in simply declining to charge capital murder -- are standardless, and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman.* I address this Page 428 U. S. 225 point separately because the cases in which no capital offense is charged escape the view of the Georgia Supreme Court, and are not considered by it in determining whether a particular sentence is excessive or disproportionate.

Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that, since prosecutors have the power not to charge capital felonies, they will exercise that power in a standardless fashion. This is untenable. 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. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus, defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus, the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects, it is unlikely that

prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.

Petitioner's argument that there is an unconstitutional Page 428 U. S. 226 amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be, in final analysis, an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made, and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens, and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

IV

For the reasons stated in dissent in *Roberts v. Louisiana*, *post* at 428 U. S. 350-356, neither can I agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment.

I therefore concur in the judgment of affirmance.

[Footnote 2/1]

Section 21101 provides as follows:

"Murder."

"(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart."

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice."

"(c) A person convicted of murder shall be punished by death or by imprisonment for life."

The death penalty may also be imposed for kidnaping, Ga.Code Ann § 26-1311; armed robbery, § 26-1902; rape, § 26-2001; treason, § 26-2201; and aircraft hijacking, § 26-3301.

[Footnote 2/2]

Section 26-3102 (Supp. 1975) provides:

"Capital offenses; jury verdict and sentence."

"Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Georgia Laws, 1973, Act No. 74, p. 162, provides:

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

[Footnote 2/3]

Section 27-2537(g) provides:

"The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence. . . ."

[Footnote 2/4]

The court said:

"And, I charge you that our law provides, in connection with the offense of murder the following. A person commits murder when he unlawfully and with malice aforethought, either express or implied causes the death of another human being."

"Express malice is that deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances, capable of proof."

"Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart."

"Section B of this Code Section, our law provides that a person also commits the crime of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice."

"Now, then, I charge you that, if you find and believe beyond a reasonable doubt that the defendant did commit the homicide in the two counts alleged in this indictment, at the time he was engaged in the commission of some other felony, you would be authorized to find him guilty of murder."

"In this connection, I charge you that, in order for a homicide to have been done in the perpetration of a felony, there must be some connection between the felony and the homicide. The homicide must have been done in pursuance of the unlawful act, not collateral to it. It is not enough that the homicide occurred soon or presently after the felony was attempted or committed; there must be such a legal relationship between the homicide and the felony that you find that the homicide occurred by reason of and a part of the felony, or that it occurred before the felony was at an end, so that the felony had a legal relationship to the homicide, and was concurrent with it, in part, at least, and a part of it in an actual and material sense. A homicide is committed in the perpetration of a felony when it is committed by the accused while he is engaged in the performance of any act required for the full execution of such felony."

"I charge you that, if you find and believe beyond a reasonable doubt that the homicide alleged in this indictment was caused by the defendant while he, the said accused was in the commission of a felony as I have just given you in this charge, you would be authorized to convict the defendant of murder."

"And this you would be authorized to do whether the defendant intended to kill the deceased or not. A homicide, although unintended, if committed by the accused at the time he is engaged in the commission of some other felony, constitutes murder."

"In order for a killing to have been done in perpetration or attempted perpetration of a felony, or of a particular felony, there must be some connection, as I previously charged you, between the felony and the homicide."

"Before you would be authorized to find the defendant guilty of the offense of murder, you must find and believe beyond a reasonable doubt that the defendant did, with malice aforethought, either express or implied, cause the deaths of [Simmons or Moore], or you must find and believe beyond a reasonable doubt that the defendant, while in the commission of a felony, caused the death of these two victims just named."

"I charge you, that, if you find and believe that, at any time prior to the date this indictment was returned into this court, that the defendant did, in the county of Gwinnett, State of Georgia, with malice aforethought, kill and murder the two men just named in the way and manner set forth in the indictment, or that the defendant caused the deaths of these two men in the way and manner set forth in the indictment, while he, the said accused, was in the commission of a felony, then, in either event, you would be authorized to find the defendant guilty of murder."

[Footnote 2/5]

In a subsequently decided robbery-murder case, the Georgia Supreme Court had the following to say about the same "similar cases" referred to in this case:

"We have compared the evidence and sentence in this case with other similar cases, and conclude the sentence of death is not excessive or disproportionate to the penalty imposed in those cases. Those similar cases we considered in reviewing the case are: *Lingo v. State*, 226 Ga. 496 (175 S.E.2d 657), *Johnson v. State,* 226 Ga. 511 (175 S.E.2d 840), *Pass v. State,* 227 Ga. 730 (182 S.E.2d 779), *Watson v. State,* 229 Ga. 787 (194 S.E.2d 407), *Scott v. State,* 230 Ga. 413 (197 S.E.2d 338), *Kramer v. State,* 230 Ga. 855 (199 S.E.2d 805), and *Gregg v. State,* 233 Ga. 117 (210 S.E.2d 659)."

"In each of the comparison cases cited, the records show that the accused was found guilty of murder of the victim of the robbery or burglary committed in the course of such robbery or burglary. In each of those cases, the jury imposed the sentence of death. In *Pass v. State, supra,* the murder took place in the victim's home, as occurred in the case under consideration."

"We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann. § 27-2537(c)(3). Notwithstanding the fact that there have been cases in which robbery victims were murdered and the juries imposed life sentences (*see* Appendix), the cited cases show that juries faced with similar factual situations have imposed death sentences. *Compare Coley v. State,* 231 Ga. 829, 835, *supra.* Thus, the sentence here was not 'wantonly and freakishly imposed' (*see* above)."

Moore v. State, 233 Ga. 861, 865-866, 213 S.E.2d 829, 833 (1975). In another case decided after the instant case, the Georgia Supreme Court stated:

"The cases reviewed included all murder cases coming to this court since January 1, 1970. All kidnapping cases were likewise reviewed. The comparison involved a search for similarities in addition to the similarity of offense charged and sentence imposed."

"All of the murder cases selected for comparison involved murders wherein all of the witnesses were killed or an attempt was made to kill all of the witnesses, and kidnapping cases where the victim was killed or seriously injured."

"The cases indicate that, except in some special circumstance such as a juvenile or an accomplice driver of a get-away vehicle, where the murder was committed and trial held at a time when the death penalty statute was effective, juries generally throughout the state have imposed the death penalty. The death penalty has also been imposed when the kidnap victim has been mistreated or seriously injured. In this case, the victim was murdered."

"The cold-blooded and callous nature of the offenses in this case are the types condemned by death in other cases. This defendant's death sentences for murder and kidnapping are not excessive or disproportionate to the penalty imposed in similar cases. Using the standards prescribed for our review by the statute, we conclude that the sentences of death imposed in this case for murder and kidnapping were not imposed under the influence of passion, prejudice or any other arbitrary factor."

Jarrell v. State, 234 Ga. 410, 425-426, 216 S.E.2d 258, 270 (1975).

[Footnote 2/6]

See Furman v. Georgia, 408 U.S. at 408 U. S. 240 (Douglas, J., concurring).

[Footnote 2/7]

See id. at 408 U. S. 306 (STEWART, J., concurring).

[Footnote 2/8]

See id. at 408 U. S. 310 (WHITE, J., concurring).

[Footnote 2/9]

Petitioner also argues that the differences between murder -- for which the death penalty may be imposed -- and manslaughter -- for which it may not be imposed -- are so difficult to define and the jury's ability to disobey the trial judge's instructions so unfettered, that juries will use the guilt-determination phase of a trial arbitrarily to convict some of a capital offense while convicting similarly situated individuals only of noncapital offenses. I believe this argument is enormously overstated. However, since the jury has discretion not to impose the death penalty at

the sentencing phase of a case in Georgia, the problem of offense definition and jury nullification loses virtually all its significance in this case.

[Footnote 2/10]

The factor relevant to this case is that the "murder . . . was committed while the offender was engaged in the commission of another capital felony." The State, in its brief, refers to this type of murder as "witness-elimination" murder. Apparently the State of Georgia wishes to supply a substantial incentive to those engaged in robbery to leave their guns at home and to persuade their coconspirators to do the same in the hope that fewer victims of robberies will be killed.

[Footnote 2/11]

Petitioner states several times without citation that the only cases considered by the Georgia Supreme Court are those in which an appeal was taken either from a sentence of death or life imprisonment. This view finds no support in the language of the relevant statutes. *Moore v. State,* 233 Ga. at 863-864, 213 S.E.2d at 832.