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Certain problems remain, of course, under the *Diversified* test. For example, Judge Henley in his dissent accepts generally the new test, but he raises the question of its applicability to communications by employees of corporations that are subsidiaries or affiliates of the corporate client.[44] There is also the question of the applicability of the test in a shareholder's derivative suit involving communications by employees who have dealt adversely to the corporate client.[45]

Despite these unresolved problems, the *Diversified* test, by adding substantial anti-abuse safeguards to the *Harper & Row* requirements, may turn out to be an attractive alternative to the heavily criticized control group test. It may also be of guidance to Missouri courts as they face renewed attorney-client privilege questions following the implementation of the state's new analog to the federal work product rule.[46]

MILTON B. GARBER

SENTENCER MUST HAVE SOME DISCRETION IN IMPOSING CAPITAL PUNISHMENT: ANOTHER RETREAT FROM *Furman v. Georgia*

Lockett v. Ohio[1]

Sandra Lockett was charged with aggravated murder for her part in a homicide which occurred during an armed robbery in an Akron, Ohio, pawn shop. At trial the State established that Lockett, Nathan Dew, and Al Parker had conspired to commit an armed robbery in the neighborhood pawn shop. Testimony indicated that according to a plan Lockett was to keep watch outside the shop during the holdup and drive the getaway car.[2] Witnesses at trial testified that the conspirators had not planned to kill the pawn shop owner during the robbery.[3] However, during the holdup the shop owner was accidentally shot and killed when he grabbed for Al

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44. 572 F.2d at 613.
45. *Id. See also* Chief Judge Gibson's separate opinion stating "few would question the propriety of a shareholder's investigating whether the corporation or its agents have engaged in unlawful conduct." *Id.* at 616.
46. *See* note 11 *supra.*

1. Lockett v. Ohio, 98 S. Ct. 2954 (1978). *See also* Bell v. Ohio, 98 S. Ct. 2977 (1978) (overturned petitioner's death sentence on the basis of decision in *Lockett*).
2. Lockett v. Ohio, 98 S. Ct. 2954, 2957 (1978).
3. *Id.*

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Parker's gun.[4] Lockett, against the advice of counsel, refused to take the stand in her defense and was unable to produce any evidence at trial. In opening statement, Lockett's attorney insisted that his client had no knowledge of the robbery plan. He maintained that Lockett thought Parker was merely going to pawn a ring.[5]

The jury found Lockett to be guilty as charged.[6] The trial judge, pursuant to Ohio law, was required to sentence Lockett to death if, after hearing additional evidence and considering the nature and circumstances of the offense and the history, character and condition of the defendant, he failed to find the existence of one of three statutory mitigating factors.[7] The trial judge did not find any of the mitigating factors present in Lockett's case and she was sentenced to die. The Ohio Supreme Court affirmed.[8]

The United States Supreme Court granted certiorari[9] and, with eight justices participating,[10] reversed the Ohio Supreme Court and declared the Ohio capital punishment statute unconstitutional.[11] A plurality con-

4. *Id.*
5. *Id.* at 2958.
6. Although murder, in Ohio, generally requires the defendant to have a purposeful mental state, OHIO REV. CODE ANN. § 2903.01 (Page Repl. Vol. 1975), the Ohio definition of purpose states that "when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." OHIO REV. CODE ANN. § 2901.22 (Page Repl. Vol. 1975). In the case at bar the *mens rea* was established through felony murder theory and the act was imputed through the Ohio conspiracy statute, OHIO REV. CODE ANN. § 2923.03 (Page Repl. Vol. 1975). Thus it was unnecessary for the State to prove that any of the participants in the conspiracy actually intended to kill the shop owner.

In Ohio aggravated murder was punishable by death provided the trier of fact found that one or more of the statutory aggravating specifications was present. OHIO REV. CODE ANN. §§ 2929.03-04 (Page Repl. Vol. 1975). The jury determined the third and seventh aggravating circumstances were present. They are: (3) the offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender. (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

7. OHIO REV. CODE ANN. § 2929.03-.04 (Page Repl. Vol. 1975) (statutory mitigating circumstances are: "(1) The victim of the offense induced or facilitated it. (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation. (3) The offense was primarily the product of the offender's psychosis or mental deficiency though such condition is insufficient to establish the defense of insanity.").
8. State v. Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *reversed*, 98 S. Ct. 2954 (1978).
9. Lockett v. Ohio, 98 S. Ct. 261 (1978).
10. Justice Brennan took no part in the decision.
11. The plurality also considered and specifically rejected other grounds for appeal. (1) Lockett claimed that the prosecution's repeated references to the fact that the State's evidence was "uncontradicted" constituted a comment on peti-

sisting of Chief Justice Burger, Justice Stewart, Justice Powell and Justice Stevens, held that the Ohio statute was unconstitutional because it did not require the sentencing authority to consider all evidence relating to the defendant's character or record and any of the circumstances of the offense that would mitigate against the imposition of death.[12] In a separate opinion, Justice White indicated that the imposition of death upon a defendant who lacked the specific intent to kill his victim was grossly disproportionate and therefore was unconstitutional as cruel and unusual punishment within the meaning of the eighth amendment.[13]

It is highly questionable whether the plurality's opinion in *Lockett* can be reconciled with the Court's prior pronouncements in the capital punishment area. The plurality's logic suggests that much of the reasoning of prior capital punishment cases is no longer accepted. The proportionality argument of Justice White proposes an alternative method of determining the constitutionality of the death sentence. Whatever effect *Lockett* finally has on the future of capital punishment, it clearly raises many new constitutional issues in this confused area of the law. As Chief Justice Burger noted in his opinion, few problems in the law have encompassed so much of the Court's time with as little resolution as capital punishment.[14]

The watershed case in this area is *Furman v. Georgia,*[15] but the nine separate concurring and dissenting opinions, when analyzed in their totality, held only that it was sometimes unconstitutional to punish a defendant with death.[16] Four years later, in 1976, the Court decided a

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tioner's failure to testify, and thus violated her fourth and fifth amendment rights per Griffin v. California, 380 U.S. 609 (1965). Lockett v. Ohio, 98 S. Ct. 2954, 2960 (1978). (2) Lockett argued that the exclusion of jurors in *voir dire* on the grounds of their refusal to commit themselves to deciding the guilt or innocence on the basis of the facts presented because of the possibility that defendant could be sentenced to death, deprived her of the right to a trial by jury. Lockett v. Ohio, 98 S. Ct. 2954, 2660-61 (1978). (3) Lockett claimed that the Ohio statute was so complicated, with respect to the *mens rea* requirement for murder, that it deprived her of "fair warning" of the crime with which she was charged. Lockett v. Ohio, 98 S. Ct. 2954, 2961 (1978).

In a separate opinion Justice Blackmun based his opinion favoring reversal, at least in part, upon a violation of sixth amendment rights. Blackmun notes that a plea of no contest or guilty would have allowed the sentencing court "full discretion" in considering whether or not the death penalty was warranted. Because she went to trial, Lockett was barred from receiving certain sentencing considerations she would have enjoyed if she had pleaded guilty. "This disparity . . . under the two sentencing alternatives" warranted reversal in Blackmun's opinion. Lockett v. Ohio, 98 S. Ct. 2954, 2971-72 (1978).

12. Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978).

13. *Id.* at 2983 (White, J., concurring in the judgment and part of the opinion, but dissenting in part.).

14. *Id.* at 2963.

15. 408 U.S. 238 (1972).

16. Lockett v. Ohio, 98 S. Ct. 2962 (1978) (opinion of Burger, C.J.); Furman v. Georgia, 408 U.S. 238, 285-86 (1972) (opinion of Brennan, J.; death penalty always unconstitutional); *id.* at 358 (opinion of Marshall, J.; death penal-

series of cases involving state statutes which attempted to reconcile state law with *Furman.* Some state legislatures interpreted *Furman* to require the total elimination of discretion in the capital punishment sentencing process. Thus they instituted mandatory execution for certain crimes.[17] This interpretation was specifically disapproved in *Woodson v. North Carolina*[18] and *Roberts v. Louisiana*[19] when the Court declared mandatory death penalty statutes unconstitutional. The second group of cases involved statutes of Florida, Georgia and Texas which attempted to eliminate arbitrary and capricious sentencing determinations in capital cases by introducing various procedural safeguards. In these three cases, the Court upheld the statutes.[20] The statutes upheld were not identical, especially in terms of the factors the sentencer could consider in determining the propriety of imposing death in a given case. In order to return a death sentence in Florida and Georgia the jury was required to find at least one of the statutory aggravating circumstances in existence beyond a reasonable doubt. The existence of one of the factors did not, however, dictate the imposition of the death penalty. *Proffitt v. Florida* indicated that the Court recognized a state's right to limit what a sentencer could consider in mitigation of the death penalty.[21] However, in *Gregg v. Georgia* and *Jurek*

ty always unconstitutional); *id.* at 257 (opinion of Douglas, J.; mandatory death penalty might be constitutional for very specific criminal conduct); *id.* at 310 (opinion of Stewart, J.; procedural guidelines in sentencing might permit constitutional capital punishment).

17. LA. REV. STAT. ANN. §§ 14.30, 14.42, 14.44, 14.113 (West 1974) (made death mandatory for aggravated rape, aggravated kidnapping, treason, and special classes of murder); N.C. GEN. STAT. §§ 14-17 (Cum. Supp. 1975) (made death sentence mandatory in all murders "perpetrated by means of poison, lying in wait, imprisonment, starving, torture or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or any other felony.").

18. 428 U.S. 280 (1976).

19. 428 U.S. 325 (1976).

20. Proffitt v. Flordia, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); *See* FLA. STAT. ANN. § 921.141 (West Cum. Supp. 1977) (the Florida statute contained a list of eight aggravating circumstances which had to outweigh seven mitigating factors before the death sentence could be imposed); GA. CODE ANN. § 27-2534.1 (1977) (Georgia code required sentencer to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law" and ten statutory aggravating circumstances, at least one of which had to be found to exist by the sentencing authority in order to return a death sentence); TEX. CODE CRIM. PROC. ANN. § 37.07 (Vernon Cum. Supp. 1977) (Texas statute required jury to decide whether there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Further the jury was instructed to determine whether the defendant deliberately caused the victim's death and that the defendant reacted unreasonably to the victim's provocation, if any existed.).

21. Proffitt v. Florida, 428 U.S. 242, 250-52 (1976). The validity of this proposition has been dramatically limited by the plurality's opinion in *Lockett. See* text accompanying notes 59-61 *infra.*

v. Texas, the Court suggested that it interpreted the statutes in Georgia and Texas to allow the sentencing authority at least some consideration of the defendant's past criminal record or age in mitigation of sentence.[22] Therefore, in the 1976 decisions the Court overtly overruled the use of mandatory sentencing processes in which the sentencer had no discretion; yet the plurality opinions were nebulous in regard to the nature and scope of the factors which the judge or jury must be permitted to consider in determining whether death is proper for a particular defendant.

In *Coker v. Georgia,*[23] decided in the 1977 term, a plurality of the Court adopted a different route of attack to invalidate the death penalty for the crime of rape. Procedurally, the Georgia statute was identical to the one upheld in *Gregg.*[24] However, Justices White, Stewart, Blackmun and Stevens were of the opinion that the punishment of death was unconstitutional for the crime of rape regardless of the procedure used in the sentencing process. The conclusion was based on the assumption that the death sentence was excessive because it made "no measurable contribution to acceptable goals of punishment" or was "grossly out of proportion to the severity of the crime."[25] The plurality indicated that either of these grounds was sufficient to maintain a finding that the law was unconstitutional. The Court noted that rape was not punishable by death in any other jurisdiction. The justices also found the severity of the punishment for rape was disproportionate to the penalty for similar serious offenses in Georgia.[26] These factors led the Court to the conclusion that death for the crime of rape was unconstitutional. The Court in overruling the death penalty sentence in *Coker* adopted other possible arguments, in addition to the procedural considerations in the 1976 decisions, which could be asserted against the imposition of death in any case.

The cases preceding the *Lockett* decision established three criteria which a death penalty statute should satisfy in order to be consitutional. First, the imposition of death could not be mandatory.[27] Second, the capital punishment statute needed certain procedural safeguards to insure a determination would not be made in an arbitrary or capricious manner.[28] Finally, inflicting the death penalty had to make a measurable contribution to acceptable goals of punishment. The sentence could never be grossly disproportionata to the severity of the crime.[29]

Sandra Lockett attacked her conviction arguing the Ohio statute was deficient in the second and third criteria. She asserted that the Ohio

22. Gregg v. Georgia, 428 U.S. 153, 197 (1976); Jurek v. Texas, 428 U.S. 262, 272-73 (1976).
23. 97 S. Ct. 2861 (1977).
24. GA. CODE ANN. §§ 27-2302, 27-2534.1 (1977).
25. Coker v. Georgia, 97 S. Ct. 2861, 2865 (1977).
26. *Id.* at 2866-68.
27. *See* notes 18 & 19 *supra.*
28. *See* note 20 *supra.*
29. *See* note 23 *supra.*

sentencing procedure was constitutionally defective and that the death sentence was grossly disproportionate and therefore unconstitutional for the crime she committed. The four member plurality opinion chose to overturn the conviction by accepting the argument that Ohio's sentencing procedure, like those in North Carolina[30] and Louisiana,[31] was constitutionally defective. The plurality held that by not permitting the sentencing authority the opportunity to consider any aspect of the defendant's character or record, or any of the circumstances of the offense, the Ohio statute subjects the defendant to the same type of risks of arbitrary and capricious decisions as the mandatory death penalty statutes.

The plurality intimates at the outset of its decision that its opinion is merely a clarification of the Court's past holdings[32] and not a radical innovation. The opinion begins by considering the "long line" of Supreme Court opinions upholding the constitutionality of the exercise of discretion on the part of the sentencing authority.[33] The most recent opinion which involved sentencing discretion in capital punishment cases and which commanded a majority of the Court held that jury discretion did not violate a defendant's fourteenth amendment rights.[34] The plurality in *Lockett* asserted that *Furman* did not hold, as some states believed, that *all* sentencing discretion must be eliminated. This contention was effectively dismissed in the five 1976 cases which held that discretion on the part of the sentencing authority should be directed and limited to insure that the death penalty would not be inflicted arbitrarily.[35]

From the premise that nothing in *Furman* or the Court's other decisions barred the sentencer from discretion in considering factors in mitigation of the death sentence, the plurality holds that in all but the rarest cases the *denial* of consideration of all evidence relating to the character and record of the defendant and the circumstances of the offense violates the Constitution.[36] Influenced by the fact that sentencing authorities are

30. *See* note 17 *supra.*
31. *See* note 17 *supra.*
32. Lockett v. Ohio, 98 S. Ct. 2954, 2963 (1978).
33. The "long line" consisted of the following three cases: Williams v. Oklahoma, 358 U.S. 576 (1959) (held not unconstitutional to consider a resultant murder, in aggravation of a kidnapping conviction, even though the defendant had already been tried, convicted and sentenced to death for the murder.); Williams v. New York, 337 U.S. 241 (1949) (allowed judge to impose death penalty based on information relating to the defendant's sexual conduct and other alleged crimes not disclosed at trial or during the sentencing proceedings.); Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51 (1937) (statute allowing a defendant, convicted of escape from prison, to be punished with a sentence not exceeding the original sentence by virtue of which the defendant originally had been imprisoned.).
34. McGautha v. California, 402 U.S. 183, 207 (1971).
35. Lockett v. Ohio, 98 S. Ct. 2954, 2963 (1978).
36. *Id.* at 2965. The plurality's caveat: "in all but the rarest kind of capital case," which prefaces the new test, indicates that at least one of the Justices, presumably Justice Burger, is not willing to abandon the concept of mandatory death sentences for certain isolated crimes. *See* Coker v. Georgia, 97 S. Ct. 2861 (1977) (Burger, C.J., dissenting).

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granted discretion in almost all other offenses, the plurality concludes that the denial of this consideration when the death sentence is at issue imposes a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[37]

Notwithstanding the plurality's contention to the contrary, the broad constitutional endorsement of sentencing discretion is contrary to the principles of *Furman*. By the plurality's own admission, *Furman* required an end to arbitrary and capricious determinations by the sentencing authority seeking to impose the death sentence.[38] But now, under the rule that *Lockett* propounds, the absence of any checks on the jury's power to refuse to impose death, simply because it chooses to consider a mitigating circumstance in one case and refuses to do so in another, clearly allows the jury more opportunity to be arbitrary.[39] Admittedly this possibility has been present since the 1976 decisions disallowing the use of mandatory death sentence statutes. However, the elevation of this discretion to the level of a constitutional imperative, as Justice Rehnquist concludes, tends to codify the very arbitrary factors *Furman* sought to eliminate.[40]

Rather than illuminating the rationale of past decisions, the plurality's solution further blurs the circumstances under which the death penalty may be imposed. The test introduces yet another ground for reversal of a defendant's death sentence. Each state court will now have to determine whether the evidence offered by the defendant in mitigation of the death penalty has any bearing on the character or prior record of the defendant

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37. Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978).

38. *Id.* at 2963.

39. *Id.* at 2973-75 (Rehnquist, J., concurring and dissenting), 2982 (White, J., dissenting and concurring in the judgment).

40. Lockett v. Ohio, 98 S. Ct. 2954, 2975 (1978) (Rehnquist, J., dissenting). No sentencing system can provide a foolproof check against unbridled jury discretion. The mandatory sentencing procedures, overruled by the Court in the 1976 decisions sought to alleviate the problem of arbitrariness by eliminating any discretionary options for the sentencing authority in fixing punishment upon the defendant. The Ohio statute, overruled in *Lockett,* sought to define the aspects a jury could permissibly consider to three narrow factors. *See* note 7 *supra.* The obvious effect of the statute was to limit the sentencing authority to a rather narrow list of criteria in determining the propriety of death in a given instance. Such an approach does tend to have its advantages, especially in terms of facilitating the review of the propriety of the sentence on appeal. The criteria on which the sentencing authority is to base its decision is specifically listed.

Under the test which *Lockett* propounds, the factors which the sentencing authority is required to consider are much broader. Almost any aspect of the defendant's demeanor could be considered as a factor mitigating the defendant's sentence. The dissent's fear is that the lack of specificity will encourage the jury or trial judge to base the sentencing decision on improper factors, such as the defendant's race, thus restoring arbitrariness to the sentencing process. The dissent is also concerned that the broad discretionary criteria allowed by the plurality's test will make it impossible for appellate review of the decision. Lockett v. Ohio, 98 S. Ct. 2954, 2975 (1978).

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or the circumstances of the offense.[41] Each exclusion of evidence will potentially be grounds for appeal and reversal.

At least one member of the Court disagrees with the plurality's new test; Justice White would not expand on the Court's previous attempts to end arbitrary determinations in death penalty sentencing.[42] He considers the reasoning of *Coker,* a rape case, also appropriate to felony murder cases.[43] Instead of overturning the Ohio statute on the grounds that it was procedurally defective, Justice White accepts the proportionality test, concluding that the death sentence can serve no useful deterrent value when the defendant lacks the specific intent to kill his victim.[44]

White's conclusion is based in part on empirical data tending to show the infrequency of death sentences when a defendant did not intend to kill. Justice White contends that because this data shows that capital punishment is rarely inflicted, it demonstrates society's aversion to this severe punishment and cripples any deterrent value the sentence might have.[45] He acknowledges that approximately half the state legislatures have not foreclosed the possibility of imposing death in these cases, but he argues that sentencing authorities have by an overwhelming majority refused to employ this punishment even when the option is available.[46] Justice White asserts that the time has come to foreclose the possibility entirely by making it unconstitutional.

This proportionality test, while not endorsed by the plurality, was neither specifically rejected.[47] In *Lockett,* only Justice Blackmun raised any serious objections to the argument of Justice White.[48] Moreover, Justice Marshall has relied on the proportionality test to find capital

41. *See* note 12 *supra* for a discussion of other grounds for appeal of Lockett's conviction; *see also* text accompanying notes 17-19 & 25-29 *supra* for grounds used in other cases.

The problem is further compounded by the plurality's caveat (see note 36 *supra*). The prosecutor will undoubtedly argue that this was one of those "rarest kind[s] of capital case[s]" and therefore the sentencer should not be required to hear or consider certain evidence offered in mitigation of punishment.

42. Lockett v. Ohio, 98 S. Ct. 2954, 2983 (1978).

43. *Id.* at 2983.

44. *Id.* at 2984.

45. *Id.* at 2983-84.

46. *Id.* at 2983.

47. *Id.* at 2967 n.16.

48. *Id.* at 2969 n.2. Justice Blackmun's opinion questions the conclusions drawn from the data which Justice White relied on to show the death penalty is no longer imposed on murderers who lack the specific intent to kill. As Justice Blackmun notes, the evidence offered merely demonstrates that of 363 reported execution cases in the last 22 years, 347 were cases in which the defendant actually *killed* his victim. The data does not address the issue of specific intent. Moreover, Justice Blackmun questions the wisdom of imposing "an elaborate 'constitutionalized' definition of the requisite *mens rea,* involving myriad problems of line-drawing that normally are left to jury discretion."

punishment unconstitutional in all cases.[49] The specific intent argument then was by no means dealt a death blow in the *Lockett* opinion, and it is still a viable argument for defendants when the facts are appropriate.

Missouri courts must now interpret and attempt to evaluate the implications of the *Lockett* decision upon Missouri law.[50] The drafters of the Missouri death penalty statutes have apparently borrowed procedure from both the Georgia and Florida examples.[51] However, Missouri law differs from both the Florida and Georgia statutes in that in Missouri the imposition of death is only proper in cases where the defendant "unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being."[52] The possibility that the death sentence could be imposed through the felony murder doctrine is foreclosed.[53] Missouri has adopted by statute the result that would be reached judicially with Justice White's proportionality argument: the death penalty cannot be imposed where the defendant lacked the specific intent to kill his victim.

Unfortunately, the impact of the plurality argument on Missouri law is not so clear. Missouri courts will be faced with some difficult questions as to the admissibility of evidence offered in mitigation of the death sentence. In terms of guidance in individual cases, the Court offers the trial judge little beyond its wide holding allowing the defendant to present, and the jury to consider, all evidence pertaining to the defendant's character or record and the circumstances of the offense.[54]

Certainly, as the plurality noted, the traditional rules of evidence would still apply as to relevancy;[55] the relevance of any evidence is depen-

49. Furman v. Georgia, 408 U.S. 238, 330-333 (1972) (Marshall, J., concurring).

50. V.A.M.S. §§ 565.001, 565.006, 565.008, 565.012, 565.014 (Supp. 1978). The statute was originally passed in May 1977, after the mandatory death penalty statute was declared unconstitutional in *State v. Duren,* 547 S.W.2d 476 (Mo. En Banc 1977). It was not revised by the 1979 Missouri Criminal Code.

51. *Id.* § 565.006 (this section, like both the Florida and Georgia statutes, provides for a separate sentencing proceeding after a guilty verdict has been returned). *See* GA. CODE ANN. § 27.2503 (1977); V.A.M.S. § 565.012 (Supp. 1978) (unlike the Georgia system, Missouri lists both aggravating and mitigating factors for the jury to consider; like the Florida system, Missouri instructs the jury to weigh aggravating and mitigating circumstances in determining whether death is proper in a given case; *Compare* FLA. STAT. ANN. § 921.141 (West Cum. Supp. 1977); V.A.M.S. § 565.012 (Supp. 1978); *with* MO. APPROVED INSTR. CRIM. No. 15.44 (1978 ed.).

52. V.A.M.S. § 565.001 (Supp. 1978) (emphasis added).

53. The felony murder doctrine allows a defendant to be convicted of murder for a homicide committed while the defendant was perpetrating or attempting to perpetrate one of the statutory designated felonies. State v. Devoe, 430 S.W.2d 164, 165 (Mo. 1968). Felony murder is now defined as first degree murder and is punishable by life in prison. *See* V.A.M.S. § 565.008 (Supp. 1978); *see also* State v. Marston, 479 S.W.2d 481 (Mo. 1972); MO. APPROVED INSTR. CRIM. Nos. 15.02, 15.04 (1978 ed.) for a concise interpretation of capital murder.

54. Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978).

55. *Id.* at 2965 n.12.

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dent on what factors the law will allow the court to consider in making a determination.[56] The Ohio statute allowed the defendant to introduce evidence of and the sentencer to consider "the nature and circumstances of the offense and the history, character, and condition of the offender."[57] The defect of the Ohio statute was not that it refused to allow the defendant to present his mitigating evidence; the problem was that it attempted to limit the purpose for which the evidence could be considered by restricting the consideration of the evidence to the three statutory mitigating factors.[58]

The inescapable conclusion is that *Lockett* prohibits the state legislature from setting up any type of *absolutely* exclusive list of mitigating factors which the defendant must prove. This is not to say that any statute which contains a list of statutory mitigating circumstances is unconstitutional per se. Such a list was contained in the Florida law the Court endorsed less than two years ago in *Proffitt.*[59] The plurality clearly indicates that a judicial gloss permitting the defendant to introduce *and the sentencer to consider* any aspect of the defendant's character or record and any of the circumstances of the offense would save a statute which on its face appeared to violate the constitutional test *Lockett* imposes.[60] However, a statute which gives an *exclusive* list of circumstances which can be used in mitigation of the death sentence is unconstitutional.[61]

The Missouri statute requires the sentencer to hear "evidence in extenuation, mitigation, and aggravation of punishment."[62] Further, the sentencing authority is required to "weigh" seven specific statutory mitigating circumstances, and mitigating circumstances otherwise authorized by law, against ten aggravating circumstances in order to determine whether death is warranted.[63] At first the Missouri statute

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56. *Lockett* did not deal with what evidence could be introduced; it dealt with what mitigating factors the defendant must be permitted to have considered by the sentencing authority. 98 S. Ct. at 2966-67.

57. OHIO REV. CODE ANN. § 2929.04 (Repl. Vol. 1975).

58. This defect in the Ohio statute was not cured by the evidence being presented in a two-step process. OHIO REV. CODE ANN. § 2929.03 (Repl. Vol. 1975). Missouri has a similar two-step proceeding. V.A.M.S. § 565.012 (Supp. 1978). The *Lockett* decision indicates that the Court will look beyond the structure of the proceeding and scrutinize the availability of the opportunity for the defendant to present, and the sentencer to consider, evidence of mitigating circumstances.

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

60. Lockett v. Ohio, 98 S. Ct. 2954, 2966 (1978).

61. *Accord,* State v. Watson, No. 3089 (Az. 1978); State v. Evans, No. 3721 (Az. 1978); State v. Steelman, No. 3299 (Az. 1978). Since the plurality's test would encompass such a wide variety of factors for the sentencer to consider, it is fair to assume that any "exclusive list" in order to meet the constitutional requirement of *Lockett* would do little more than advise the sentencing authority of factors it might consider.

62. V.A.M.S. § 565.006 (Supp. 1978).

63. *Id.* § 565.012.

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would appear to be contrary to *Lockett's* directive that all factors pertaining to the defendant's character, record and the nature of the offense be considered by the sentencer. However, the Missouri Supreme Court indicated in its newly published jury instructions that this is not the case. The instructions specify that the jury may consider mitigating circumstances other than those which are authorized by the statute or which exist at law.[64] The Missouri Supreme Court appears to be distinguishing the exclusive language with regard to the statutory aggravating circumstances from the lack of such language when the statute speaks of mitigating circumstances.[65]

Even if the Missouri statute as interpreted by the state supreme court does pass the plurality's test, Missouri may still need to react to the *Lockett* pronouncement. It is at least questionable whether the rather ambiguous language of the statute and the jury instructions will be sufficient to put the jury as sentencer on notice that it is not limited to the statutory list of mitigating circumstances. Perhaps the best solution to the problem would be the addition of a new clause to the instruction, specifically authorizing the sentencing authority to consider any aspect of the defendant's character or record and any of the circumstances of the offense.

Whatever action the Missouri Supreme Court chooses, it seems clear that the problems raised in *Lockett* will remain viable until the United States Supreme Court explicitly resolves the perplexing issue of the propriety of capital punishment in today's society. One cannot avoid echoing the fears of Justice Rehnquist that the plurality's opinion is, indeed, "the third false start in this direction within the past six years."[66]

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64. MO. APPROVED INSTR. CRIM. No. 15.44 (1978 ed.) (The instruction reads in part: "it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding this question you may consider all of the evidence relating to the murder of [*name of victim*]." Note 5 provides: "The jury may consider extenuating or mitigating circumstances . . . even though not 'authorized by law' . . . . However, no instruction should be given calling the jury's attention to [this].")

65. V.A.M.S. § 565.012 (Supp. 1978). This interpretation was implied by the United States Supreme Court when it examined the Florida statute in *Proffitt v. Florida,* 428 U.S. 242, 250 n.8 (1976). Because Missouri's statute is virtually identical to the Florida law in this passage, *see* notes 20 and 51 *supra,* it seems logical to assume that the Missouri Supreme Court has also made this interpretation of the statute.

66. Lockett v. Ohio, 98 S. Ct. 2954, 2975 (1978).