468 N.E.2d 879, 479 N.Y.S.2d 706

63 N.Y.2d 41
Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,
v.
Lemuel SMITH, Appellant.

July 2, 1984.

Defendant was convicted in the Supreme Court, Dutchess County, Albert M. Rosenblatt, J., of murder while serving a life term and was sentenced to **death**. The Court of Appeals, Kaye, J., held that: (1) evidence was sufficient to sustain conviction; (2) expert testimony identifying bite mark found on victim as having been made by defendant on the basis of comparison with photograph of another bite mark made by defendant on another victim was properly admitted; (3) defendant was not entitled to new trial based on newly discovered evidence; (4) trial judge was not required to recuse himself; but (5) mandatory **death** sentence for homicide committed by person serving a life term of imprisonment is unconstitutional.

Affirmed as modified and remitted.

Simons, J., dissented in part and filed an opinion in which Jasen, J., concurred.

Cooke, C.J., dissented in part and filed an opinion.

West Headnotes (26)

[1] Criminal Law
Particular offenses and prosecutions

Court of Appeals examines the evidence to determine whether, in its judgment, it is sufficient to make out a case of murder beyond a reasonable doubt; Court must weigh the evidence and form a conclusion as to the facts; it is not sufficient to find evidence which presents a question of fact; even in a capital case, however, the Court of Appeals should not readily interfere with the verdicts of jurors who have had the advantage of seeing and hearing witnesses. McKinney's Const. Art. 6, §§ 3, 5.

7 Cases that cite this headnote

[2] Homicide
Miscellaneous particular circumstances

Direct evidence that bite mark found on victim was made by defendant and other circumstantial evidence was sufficient to sustain defendant's conviction for murder of a corrections officer. McKinney's Penal Law § 125.27.

Cases that cite this headnote

[3] Criminal Law
Weight and Sufficiency of Evidence

Testimony of police investigator was sufficient to sustain finding that defendant's confession was not obtained in violation of his constitutional rights so that his confession could be used to establish the fact that he had made the bite marks which were found on prior victim and which were used for comparison purposes to establish that defendant had also made bite marks found on victim in the instant case.

1 Cases that cite this headnote

[4] Criminal Law
Particular tests or experiments

Technique of identification of bite mark by photograph-to-photograph comparison with bite mark known to have been made by defendant on another person has requisite scientific acceptability.

4 Cases that cite this headnote

[5] Criminal Law

Purpose of admission

Probative value of photograph of prior victim showing bite mark which was compared with that found on victim in the instant case outweighed its potential for unfair prejudice where photograph had been redacted to show nothing other than the bite mark and no circumstances surrounding defendant's murder of the prior victim were admitted.

Cases that cite this headnote

[6] **Criminal Law**

Showing bad character or criminal propensity in general

Evidence of uncharged **crimes**, though inadmissible to establish criminal propensity, is admissible if offered for some other relevant purpose.

1 Cases that cite this headnote

[7] **Criminal Law**

Other Misconduct Showing Identity

One recognized ground for admission of evidence of uncharged **crimes** is to prove the defendant's identity so long as identity is not otherwise conclusively established.

Cases that cite this headnote

[8] **Criminal Law**

Purpose of admission

Where defense experts vigorously disputed identification of bite marks on victims as having been made by defendant and where testimony was elicited that human skin is the ideal medium for bite mark identification, photograph showing bite mark made by defendant on another victim was not merely cumulative and was properly admitted.

Cases that cite this headnote

[9] **Criminal Law**

Purpose of admission

Court did not err in admitting photograph of bite mark made by defendant on prior victim for purpose of comparing that bite mark with bite mark found on victim in the instant case on theory that court could instead have required defendant to bite himself to provide a mark for comparison purposes.

Cases that cite this headnote

[10] **Constitutional Law**

Requests for disclosure

Criminal Law

Application, motion or request; affidavits

Suppression of exculpatory evidence in the face of a specific and relevant defense request will seldom, if ever, be excusable but, where the defense makes only a general request or none at all, failure to turn over obviously exculpatory material violates due process only if omitted evidence creates a reasonable doubt which did not otherwise exist.

6 Cases that cite this headnote

[11] **Criminal Law**

Newly Discovered Evidence

Where defense request did not put prosecutor on notice that specific document existed and prosecutor could have reasonably concluded that disclosure which he made satisfied the request, new trial would be required on the basis of newly discovered exculpatory material only if it were obviously exculpatory and created a reasonable doubt not otherwise existing.

4 Cases that cite this headnote

[12] **Criminal Law**

Newly Discovered Evidence

Prison logbook which did not indicate that defendant participated in recreation on day on which he allegedly made inculpatory remarks

to a fellow inmate at recreation did not show that defendant refused recreation on that day and did not show that he was not at recreation as claimed by the other inmate so that posttrial discovery of the logbook did not entitle defendant to have verdict set aside because of newly discovered evidence. McKinney's CPL § 330.30.

1 Cases that cite this headnote

[13] Criminal Law

Discovery and disclosure;transcripts of prior proceedings

Any error in prosecutor's nondisclosure of prison report was cured when trial court interrupted prosecutor's summation and allowed defense counsel to recall a witness and place the evidence before the jury and permitted him to address the jury on the issue before the prosecutor resumed his summation.

Cases that cite this headnote

[14] Judges

Nature and effect in general

Trial judge's impartiality is not undermined merely by appointment of counsel for one of the adversaries; fact that trial judge had appointed prosecutor whose conduct with respect to submission of evidence to the grand jury was being questioned did not require recusal of judge.

6 Cases that cite this headnote

[15] Judges

Bias and Prejudice

Trial court did not exhibit bias in ruling on defense pretrial motions.

3 Cases that cite this headnote

[16] Judges

Relationship to attorney or counsel

Although it might have been better practice for court to insure that defense counsel was aware of court's previous relationship with special district attorney, whom he had hired as an assistant when he was serving as district attorney for the county, the association was not so substantial that the court abused its discretion in presiding over the trial.

Cases that cite this headnote

[17] Criminal Law

Counsel for Accused

Defendant did not show any prejudice resulting from delay in appointment of counsel who eventually represented him at trial or in disparate funding available for counsel's representation.

Cases that cite this headnote

[18] Criminal Law

Time for making

Trial court did not err in ruling that application for change of venue should await the results of voir dire.

1 Cases that cite this headnote

[19] Criminal Law

In General;Necessity of Motion

Defendant who made motion for change of venue before voir dire but did not make it after voir dire as trial court had suggested could not obtain review of trial court's failure to grant change of venue after voir dire.

3 Cases that cite this headnote

[20] Criminal Law

Evidence in general

Failure of trial court to instruct that a hypnotized witness usually acquires a measure of confidence in the events recalled under

hypnosis did not warrant reversal in the interests of justice.

Cases that cite this headnote

[21] **Witnesses**

Cross-Examination to Discredit Witness or Disparage Testimony in General

Trial court did not abuse its discretion in prohibiting defense counsel from cross-examining witness more extensively than he did where counsel had already mounted a substantial attack on the witness' credibility.

1 Cases that cite this headnote

[22] **Constitutional Law**

Sentencing and punishment

Fact that defendant had not actually shown any mitigating circumstances did not deprive him of standing to attack statute calling for mandatory imposition of **death** sentence on person convicted of murder while serving a life term. McKinney's Penal Law § 60.06.

5 Cases that cite this headnote

[23] **Constitutional Law**

Proceedings

Sentencing and Punishment

Individualized determination

Any **death** **penalty** statute which did not provide for consideration by the sentencer of all relevant **individual** circumstances would be incompatible with the commands of the Eighth and Fourteenth Amendments. U.S.C.A. Const.Amends. 8, 14.

3 Cases that cite this headnote

[24] **Sentencing and Punishment**

Deterrence

Sentencing and Punishment

Retribution

Sentencing and Punishment

Offense committed while in custody or **legal** restraint

Mandatory imposition of **death** **penalty** for homicide committed by inmate serving a lifetime sentence cannot be justified by the need for deterrence or the need for retribution and protection of prison guards and the prison population. McKinney's Penal Law § 60.06.

Cases that cite this headnote

[25] **Sentencing and Punishment**

Individualized determination

Sentencing and Punishment

Provision authorizing **death** **penalty**

Sentencing and Punishment

Offense committed while in custody or **legal** restraint

New York's mandatory **death** **penalty** for homicides committed by inmate serving a life term was unconstitutional because of its failure to provide for consideration of **individual** circumstances and violates the federal prohibition against cruel and unusual punishment. McKinney's Penal Law § 60.06; U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[26] **Sentencing and Punishment**

Aggravating or mitigating circumstances

Court could not interpret mandatory **death** **penalty** statute, which it found to be unconstitutional, to include a provision for consideration of mitigating circumstances. McKinney's Penal Law § 60.06.

4 Cases that cite this headnote

Attorneys and Law Firms

***44** *****708** ****881** William M. Kunstler, Mark B. Gombiner, C. Vernon Mason, New York City, Robert H.

Gombiner, Peter J. Avenia, Poughkeepsie, and Ronald L. Kuby, Ithaca, for appellant.

***46** William E. Stanton, Sp. Dist. Atty., New York City (B. Anthony Morosco, White Plains, and Richard Schisler, Poughkeepsie, of counsel), for respondent.

Robert Abrams, Atty. Gen. (Michael S. Buskus, Peter H. Schiff and Peter J. Dooley, Asst. Attys. Gen., of counsel), in his statutory capacity under section 71 of the Executive Law.

***48** Mitchell A. Karlan, Anthony G. Amsterdam and John H. Hall, New York City, for the NAACP **Legal** Defense and Educational Fund, Inc., and others, amici curiae.

Johathan E. Gradess, Troy, Edward H. Wassermann, Donald B. Smith, Albany, Martin I. Rosenbaum and Charles F. O'Brien, Albany, for New York State Defenders Association, amicus curiae.

***50 OPINION OF THE COURT**

KAYE, Judge.

After a jury trial, defendant was convicted of murder in the first degree and sentenced to **death**. This direct appeal as of right by defendant (N.Y. Const., art. VI, § 3, subd. b; CPL 450.70, subd. 1), the lone resident of New York's **death** row, presents three questions: (1) whether the evidence was sufficient to prove his guilt beyond a reasonable doubt; (2) whether alleged trial errors deprived him of a fair trial; and (3) whether the State's mandatory **death** sentence (Penal Law, § 60.06) for one convicted of murder while "confined in a state correctional institution * * * upon a sentence for an indeterminate term the minimum of which was at least fifteen years *****709 **882** and the maximum of which was natural life" (Penal Law, § 125.27, subd. 1, par. [a], cl. [iii]) is constitutional. We conclude that the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt and that the court below committed no reversible error in the conduct of the proceedings. We also conclude, however, that New York's mandatory **death penalty** law is unconstitutional. For these reasons we modify the judgment by vacating the sentence of **death** and remitting the case to the Supreme Court, Dutchess County, for resentencing and, as so modified, we affirm the judgment.

In May 1981, Donna Payant was employed as a corrections officer at the Green Haven Correctional Facility in Stormville, New York, where defendant was serving an indeterminate sentence of 25 years to life.[1] Some time after reporting for work on the afternoon of May 15, 1981, ***51** Payant disappeared. Her body was discovered the next morning at a landfill in Amenia, New York, when refuse from Green Haven was dumped and examined. An autopsy revealed that she had died of ligature strangulation.

Three weeks later, an information was filed in Beekman Town Court accusing defendant of Payant's murder and charging him with violation of section 125.27 of the Penal Law, a felony which mandates a sentence of **death** upon conviction. The Dutchess County Grand Jury indicted defendant in October 1981. Because of a potential conflict involving the Dutchess County District Attorney's office, a Special District Attorney was appointed by the court, and at a later date defendant's present counsel were appointed pursuant to article 18–B of the County Law. Defendant's pretrial motions to dismiss the indictment, for recusal of the Trial Judge, and for a change of venue were denied.

Defendant's trial commenced in January 1983. On April 21, 1983, after three days' deliberation, the jury returned a verdict of guilty. Defendant's motion to set aside that verdict was denied, and on June 10, 1983 he was sentenced to **death**. This appeal followed.

The People's case consisted of circumstantial evidence showing that Payant's known movements at Green Haven on May 15, 1981 brought her to an area near the Catholic Chaplain's office, where defendant worked that day, that Payant and defendant had previously spoken, that Payant and defendant were observed entering the Catholic Chaplain's office together on the day of her disappearance, and that defendant had access to a room (the library of the Chaplain's office) to which he could have lured Payant and killed her in relative seclusion, to materials (cord, plastic bags and masking tape) similar to those with which she was killed and her body was wrapped, and to

vehicles (a large waste drum, a cart for moving refuse, and trash dumpsters) for disposal of her body. The People also introduced testimony of an inculpatory admission defendant made to a fellow inmate approximately one year after Payant's **death**, and expert testimony that a premortem wound on Payant's chest was a bite mark made by defendant.

Defendant at trial showed that several corrections officers had made prior statements that Payant had been seen ***52** at various points of the institution on May 15 after the alleged time of her murder, and that the investigation of Payant's **death** had produced no evidence—save the bite mark—connecting defendant to Payant's murder. The defense introduced its own expert testimony to show that the mark on Payant's body could not be attributed to defendant, and indeed that it was not even a bite mark.

As discussed in the ensuing sections, we conclude that defendant's guilt was established beyond a reasonable doubt, that there was no reversible error in the conduct of the trial, and that the mandatory **death penalty** statute is unconstitutional.

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[1] On this appeal from a judgment of **death**, the New York Constitution empowers us to review the facts (N.Y. Const., art. VI, §§ 3, 5). The scope of our inquiry has been defined in *People v. Davis,* 43 N.Y.2d 17, 36, 400 N.Y.S.2d 735, 371 N.E.2d 456, cert. den. 435 U.S. 998, 98 S.Ct. 1653, 56 L.Ed.2d 88 and *People v. Crum,* 272 N.Y. 348, 350, 6 N.E.2d 51: "A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt." Even in a capital case, however, "this court should not readily interfere with verdicts of jurors who have had the advantage of seeing and hearing witnesses." (*People v. Crum,* 272 N.Y. 348, 357, 6 N.E.2d 51, *supra.*)

[2] The People's theory is that defendant killed Payant in the early afternoon of May 15, 1981 inside the Catholic Chaplain's office complex, wrapped her body in plastic bags, placed the body in a 55-gallon waste drum, and dumped it into a dumpster maintained for the disposal of trash, from which it was collected and later discovered. Upon our review of the record, we conclude that the evidence supported this theory and was sufficient to make out ***53** a case of murder beyond a reasonable doubt. The evidence which in our view justified the jury in finding defendant guilty may be summarized as follows.

Donna Payant began her career at Green Haven some two months before her **death**. She had spoken with defendant on at least two occasions prior to the date of her disappearance: once when she told him she admired a religious article he had crafted and he in turn told her that he worked in the Chaplain's office, and a second time when they spoke in an area of Green Haven's hospital corridor, near the Chaplain's office, on May 12, 1981. (A diagram of Green Haven is annexed to this opinion.)

On May 15, Payant was scheduled to work the 1:00 to 9:00 p.m. shift, and reported to a lineup to receive her assignments. Her assignments that day were to patrol the A/B yard area, then to escort two companies of inmates from D block to the mess hall for dinner and back, lock those inmates in and conduct a count, and finally to report to the mess hall area at 6:00 p.m. Payant, along with Officers Claude King and Barbara Hinson, after lineup went into the officers' mess, where she purchased a soft drink, then proceeded back to the westside corridor and headed south toward their assignments. The telephone in the westside corridor rang and Officer Hinson answered it. The caller asked for Payant and Hinson called her to the telephone. Payant was on the telephone briefly and was overheard saying "what," "who," "yes," and "okay." After hanging up the telephone, Payant told King there was a problem she had to straighten out and that she would be right back, and she headed back down the westside corridor.

Payant passed both the westside control gate and the control station in the hospital corridor, heading east,

at about 1:00 p.m. That direction would lead to the Chaplain's office complex at the other side of the hospital corridor—an area where defendant worked and had been seen that day.

Defendant was a clerk to the Catholic Chaplain. His duties included cleaning the Chaplain's office complex and emptying the garbage collected there. He also worked in Green Haven's package room where, once again, his duties ***54** included cleaning the area and transporting and dumping the garbage.

On May 15, 1981 the Catholic Chaplain was away from the institution on military leave. When defendant arrived for work there at 8:30 a.m. the officer in the hospital corridor, as he had done before, let him through the control gates and into the *****711** ****884** Chaplain's office. After returning to his cell for a count, defendant came back to the Chaplain's office, which was opened for him again at 12:30 p.m. Defendant was observed by corrections officers in the hospital corridor area near the Chaplain's office at or about 1:00 p.m., and around that same time another inmate (Teddy Goodman) saw defendant and Payant enter the Chaplain's office complex and walk down an enclosed corridor to the rear room, the Chaplain's library.

Although defendant elicited testimony from several corrections officers that they had, at various stages of the investigation, previously given statements that Payant was seen elsewhere in the institution on May 15, 1981 after 1:00 p.m., none of the witnesses testifying at trial could recall with certainty seeing her alive after 1:00 p.m.

Some time after 1:00 p.m., an inmate knocked at the outer door to the Chaplain's office complex after hearing loud noises from inside. Defendant appeared from the rear office and, in a "nasty" manner, told the inmate to go away. That inmate later met a corrections officer in the hospital corridor, and the two of them proceeded back to the Chaplain's office to make phone calls. When no one answered their knock, they kicked the Chaplain's office outer door and it opened, a piece of cardboard falling out of the door. Once inside the complex, the corrections officer and another inmate who arrived shortly afterward noticed that the office was in disorder. The 55-gallon waste drum usually maintained in the outer alcove had been moved to the Chaplain's library, was about two-thirds full, and had boards placed over its top.

Defendant returned to the Chaplain's office with a plastic object under his arm, and went into the rear room. He told the corrections officer he had to empty some garbage, and left with the 55-gallon drum, returning some minutes later. Defendant was observed by officers in the hospital ***55** corridor and the gate corridor dumpster area transporting large waste drums on a cart. The officers did not check the drums, which one officer observed to be filled to about nine inches from the top. The corrections officer and the other inmate left the Chaplain's office about 2:45 p.m., while defendant remained inside the rear room. Shortly thereafter defendant appeared at the package room to empty the garbage, although defendant usually emptied the garbage there in the morning. This also was the first time the package room officer could remember that defendant brought the Chaplain's office waste cart with him. The last sighting of defendant that afternoon was near the A block foyer around 3:25 p.m., when he asked a corrections captain to return a cart to the administration corridor or accompany him while he did so.

Although Payant never showed up for her assignments on May 15, her absence was not reported until approximately 6:00 p.m. Subsequent telephone calls and searches by corrections officers failed to locate her. At about 8:00 p.m., the inmates were locked in their cells.

The State Police were contacted, and that evening a State Police bloodhound unit arrived. The bloodhound was given Payant's scent and began his trail at the westside corridor telephone where Payant received her call. On the first trail, the dog went from there up the westside corridor to D block, back down that corridor to A block, across the administration corridor, and up the eastside corridor. The dog paused and became visibly excited near an alcove in H block, then continued up the eastside corridor, out through the truck gates, back into the corridor, and up to the industry building, where he again became excited at an area on the second floor. The trail ended at the east side of the industry building. On the second and third trails, the dog took basically the same route, deviating only at one point to go into the A/B yard. After the dog completed his trails, he was led through the hospital corridor but exhibited no excitement, even though Payant

unquestionably was in the hospital corridor on at least two occasions that day. The dog was not taken through the Chaplain's office.

***712 **885 The institution's dumpsters also were searched that evening. Two corrections officers climbed inside some of the *56 dumpsters and tried to examine the refuse. One officer saw some plastic bags in the gate corridor dumpster, but could not get at them. In the early morning on May 16, the institution's garbage truck was brought in, and the dumpsters at industry, the gate corridor, the mess hall and the administration corridor were emptied into the truck and compacted, while corrections officers shone their flashlights onto the garbage. The search failed to turn up Payant's body. Later that morning, Green Haven's civilian garbage truck operator, accompanied by two corrections officers, took the truckload of garbage to a dump in Amenia, where the garbage was spread out and examined with the aid of a bulldozer. At that time Payant's body was found encased in three plastic bags, her hands tied behind her back, her clothes in disarray, and a cord tied around her neck. The location of the body led the truck operator to believe that it entered the truck via the industry or the first two gate corridor dumpsters.

Plastic bags and cord were present in the package room, and the cords in the venetian blinds of the Chaplain's office had recently been replaced by defendant and others. The plastic bags had been taped together by masking tape. Masking tape was kept in the Chaplain's office.

Payant's identification card and badge case were found in a utility closet near H block on May 18. An examination of those items yielded insufficient fingerprints for any identification. Hairs were found near the door to the rear room—the library—of the Catholic Chaplain's complex, and also in the closet of that room. Examination showed those hairs to be microscopically similar to samples of Payant's hair, but it was not possible to make a positive identification. In addition, hairs were found in the belt buckle area and in the bra on Payant's body. Those hairs were found to be microscopically similar to defendant's hair, although again a positive identification could not be made. Several stains in the Chaplain's office tested for blood were negative. Some scrapings from the office did reveal blood, but there was not sufficient quantity to determine its source or age. Dusting of the office and the 55-gallon drum for fingerprints produced nothing. The plastic bags, cord and tape found with the body of Donna *57 Payant were also examined. While one plastic bag was similar to bags taken from Green Haven, the others were not. Although all 11 pieces of masking tape used on the bags were determined to be from the same roll, the ends of that tape could not be matched to the end of the roll of masking tape found in the Chaplain's office, which was of similar width. No fingerprints were found on the tape. The cord on the body did not match the cord removed from the Chaplain's office venetian blinds on May 27, 1981.

The first autopsy on Payant's body was performed during the evening of May 16, revealing multiple injuries both before and after **death**. The premortem injuries included injuries to the face and head which could have rendered her unconscious instantly, injuries caused by the cord around her neck and hands, and certain injuries on her chest, including a curvilinear erosion on the upper right portion and amputation of both nipples. The postmortem injuries were consistent with the compacting and bulldozing of the garbage. The pathologist testified that his findings were consistent with the theory of the murder posited by the People.

A second autopsy was performed on May 19, 1981 by a pathologist who also reviewed photos taken at the first autopsy. He concluded that Payant had died of strangulation. Most of Payant's premortem injuries were found to be internal, which would not produce much external bleeding, including trauma to the head that could have caused rapid loss of consciousness. The pathologist was of the opinion that the amputation of the nipples was caused by a human bite and that the mark on the upper right chest, which occurred shortly before **death**, could have been a human bite mark. For this reason, he contacted a forensic odontologist. Because of ***713 **886 the perceived importance of the wound on Payant's upper right chest, an expert photogrammetrist was employed to reproduce photographs of that area of her body in life-size. These and other materials subsequently were examined by several forensic odontologists retained by the People and by the defense.

The bite mark evidence was highly significant: if the curvilinear erosion on Payant's upper right chest was defendant's bite mark there was no innocent explanation ***58** for its presence there. The People produced four forensic odontologists (Drs. Homer Campbell, Arthur Goldman, Lowell Levine and Neal Riesner) who testified that the mark was a bite mark made by defendant. The prosecution's expert witnesses used two methods of identification. First, they compared a stone model of defendant's teeth, as well as impressions made in aluwax from the model, with the life-sized photograph of Payant's chest, identifying by visual observation **individual** characteristics of defendant's teeth, such as shape of the arch and tooth shape, spacing and rotation, upon which their opinions were based. Second, the prosecution experts made photo-to-photo comparisons of the Payant mark and a bite mark known to have been made by defendant on human tissue four years earlier. The expert witnesses for the defense—three forensic odontologists (Drs. Haskell Askin, Lester Luntz and Irvin Sopher)—were of the opinion that the mark was not defendant's bite mark, and indeed was not a bite mark at all. Their opinions were in large part based on a different technique involving the production of transparencies, made from a model of appellant's teeth, which were laid over the photograph of the mark on Payant's body. Although the defense technique was portrayed as a controlled method by which the results could be objectively evaluated, in fact the experts acknowledged that steps in the production of the transparencies were subject to human variations and that, whichever technique was used, there was no completely objective method of identifying a bite mark. The methods used all depended in part upon expert judgments to establish relationships between teeth and marks.

Finally, the People introduced the testimony of an inmate (Robert DiBona) who was housed in the same unit as defendant. That inmate testified that on May 16, 1982, approximately one year after Payant's **death** and after defendant had been charged with her murder, he and appellant were speaking when defendant, who seemed to be in a very emotional state, "blurted out * * * that he was being driven and he couldn't help himself, that he had to do what he had to do", and that "he shouldn't never have made the phone call, that he deserved to die." The inmate ***59** believed that the reference to the phone call related to defendant's case.

The theory posited by the defense both at trial and on appeal is that Payant was murdered as part of a conspiracy among unknown corrections officers, who lured her to the eastside corridor area of the institution by the telephone call, murdered her in the H block or industry area, and placed her body in the Green Haven dump truck while it was temporarily abandoned. This theory, which defendant concedes is "bizarre," takes Payant far from her assigned area, and means that both Payant's murder and the hiding and disposal of her body occurred in relatively open areas to which many people had access. This would have required a truly substantial conspiracy, which had no basis in the proof at trial.

The evidence linked defendant to the bite mark on Payant's body. The remaining circumstantial evidence established that defendant had both the opportunity, and access to the materials, for killing Payant and disposing of her body. We therefore conclude that the evidence was of such weight and credibility as to convince us that the jury was justified in finding defendant guilty beyond a reasonable doubt.

II

The various errors in the proceedings charged by defendant are without merit.

*****714 **887** THE BITE MARK EVIDENCE

Defendant's major point in support of his request for a new trial concerns the admissibility of a photograph of a bite mark allegedly made by him in August 1977 on the nose of another victim, Marilee Wilson. In its presentation of the case the prosecution originally set out to identify the bite mark on Donna Payant's body by comparing a stone model of defendant's teeth to a photograph of the mark on Donna Payant's body. However, Dr. Campbell, a prosecution expert, testified on cross-examination that, for purposes of identifying bite marks, human skin was the ideal material in which to

take bite mark impressions. The prosecutor argued that in light of that testimony the People should be permitted to introduce the Wilson photograph ***60** for comparison of a bite mark by defendant in human skin with the Payant photograph. The court thereafter conducted a hearing out of the jury's presence to determine (1) whether there existed an independent basis for concluding that defendant was responsible for the Wilson bite mark and (2) whether such a photographic comparison of bite marks was scientifically acceptable, and it held that a black and white photograph of the Wilson bite mark, redacted so as to show little more than the mark itself, could be admitted and a comparison made to the Payant photograph.

Defendant argues that the evidence should have been excluded for three reasons. *First,* he claims that his alleged confession to the Wilson homicide either was not made or was obtained in violation of his constitutional rights. If so, the only remaining evidence of his commission of the Wilson murder would have been the expert's comparison of the stone cast of his teeth to the photo of the bite mark. Such evidence, defendant maintains, would suffer from the same flaw as comparison of the stone model of his teeth to Payant's photograph, and thus could not be admitted to corroborate that comparison. *Second,* defendant contends that the Wilson photograph was inadmissible because a photo-to-photo comparison is not a generally accepted scientific procedure for identifying bite marks. *Third,* defendant urges that even if the evidence were otherwise admissible, it should have been excluded because the danger of unfair prejudice outweighed its probative value.

At the hearing conducted to determine the admissibility of the Wilson bite mark photograph, State Police Investigator William Barnes testified that on August 22, 1977, he met with defendant and his attorney, Sanford Rosenblum, to administer a polygraph test regarding the Wilson homicide. Barnes said he brought defendant to the polygraph room, recited the *Miranda* warnings, and conducted a four and one-half hour interview during which defendant confessed to the Wilson homicide but then refused to take the polygraph test. Throughout the interview Rosenblum sat in an adjacent room where he could see but not hear the interview. Barnes denied agreeing with Rosenblum that any statement defendant made would not be used against ***61** him, nor did he ever hear of any such agreement. Rosenblum's testimony contradicted Barnes. Rosenblum said he arranged the polygraph examination but had an oral understanding with Barnes that defendant's statement would be limited to other charges arising out of a kidnapping and sexual assault on Mary Ann Maggio. Rosenblum testified he did not hear the *Miranda* rights administered, but could not hear the interview clearly because of static in the speaker **system**, and was told at the end of the interview that a polygraph test was not given because the length of time Barnes spent with defendant would have rendered any result suspect.

Supported by a full explanation of its reasoning, the court found Barnes' testimony credible and ruled that the People had shown by independent evidence that defendant was responsible for the murder of Marilee Wilson as well as the bite mark found on her body.

Defendant now argues that even if the confession was made, it was obtained in violation of his constitutional rights. Specifically, he claims that the interrogation *****715** ****888** violated the Sixth Amendment right to the presence of counsel, the Fifth Amendment privilege against self-incrimination which could only be waived knowingly and voluntarily, the State constitutional prohibition of uncounseled waivers of the right to counsel, and the due process right to **demand** compliance with the terms of the agreement concerning the polygraph test.

[3] Defendant's arguments assume that Rosenblum's testimony must be credited and Barnes' rejected. Having reviewed the testimony, we find no reason to disturb the conclusion of the trial court that Barnes was a credible witness. With the added benefit of having observed both witnesses as they testified, the trial court was justified in concluding that Rosenblum's testimony may have been affected by personal concern about possible claims of inadequate representation, and that the arrangement as related by Barnes may well have been thought to serve defendant's interests at the time in establishing an insanity defense (see *People v. Smith,* 59 N.Y.2d 156, 464 N.Y.S.2d 399, 451 N.E.2d 157). Crediting Barnes' testimony, it is evident that defendant was deprived of no constitutional rights. Appellant waived his ***62** *Miranda* rights and no agreement was breached because of the questioning regarding the Marilee Wilson murder. Nor was there any

violation of defendant's right to counsel under the New York State Constitution since defense counsel agreed to the questioning outside of his immediate presence and placed no limit on the scope of the interview (cf. *People v. Beam,* 57 N.Y.2d 241, 253–254, 455 N.Y.S.2d 575, 441 N.E.2d 1093; *People v. Yut Wai Tom,* 53 N.Y.2d 44, 439 N.Y.S.2d 896, 422 N.E.2d 556). Thus, the trial court properly found that there was independent basis for concluding that defendant was responsible for the Wilson bite mark.

[4] Similarly, there is no merit in defendant's second argument: that the technique of identification of the Payant bite mark by a photo-to-photo comparison with the Wilson bite mark was not shown to have requisite scientific acceptability.

The chief expert witness for the People, Dr. Levine,[2] testified that he could make a positive identification by comparing a photograph of a bite mark to a stone cast of teeth, but the best means for identifying a bite mark would be comparison with another bite mark made in skin in similar circumstances. According to Levine, photo comparison of different bite marks on the same victim is an accepted technique. Levine testified that, though there has been little occasion for comparison of bite marks on different persons, among forensic odontologists such a procedure was reliable and accepted, and he named seven such odontologists (among 45 to 50 in the Nation) who have recognized it. Levine had himself used this technique previously and on one occasion testified in court on the procedure. For the defense, the principal expert witness, Dr. Luntz, testified that the comparison of a 1977 photograph of a bite mark on a nose with a 1981 photograph of a bite mark on a chest was not generally accepted as a reliable technique for identifying the biter. He noted differences in the elasticity of skin and in skin properties depending on the affected area of the body, and observed that skin is not a good medium for registering bite marks. Dr. Luntz testified that photographs create distortions, but acknowledged that he had relied on a photo-to-photo comparison for purposes of excluding a suspect as the biter.

***63** The court overruled defendant's objection to the evidence, reasoning that the photographic comparison was admissible here, as buttressed by identification through additional, more conventional means, such as (1) the comparison of a 1977 stone cast of defendant's teeth with a photograph of the 1977 Wilson bite mark, (2) the comparison of the 1977 cast with a cast of defendant's teeth taken in 1981, and (3) the comparison of the Payant photograph with the 1981 stone cast of defendant's teeth.

*****716 **889** In *People v. Middleton,* 54 N.Y.2d 42, 444 N.Y.S.2d 581, 429 N.E.2d 100, this court recognized that identification of the perpetrator of a **crime** through bite mark evidence had gained general acceptance in the scientific community. "[T]he test is not whether a particular procedure is unanimously indorsed by the scientific community, but whether it is generally acceptable as reliable." (*Id.,* at p. 49, 444 N.Y.S.2d 581, 429 N.E.2d 100.) The techniques employed in *Middleton* (photography, freezing of tissue specimens, taking of dental molds, visual observation) were approved by the majority of experts in the field as well as by appellate courts and therefore were accepted as generally reliable without a hearing concerning the scientific principles involved.

The need for comparison of bite marks on different victims apparently arises infrequently, and there are no published standards governing the process. *Middleton* specifically mentioned the use of photographs as a generally reliable technique in bite mark identification. Moreover, this was not a situation, like *Middleton,* where techniques were accepted without a hearing. Extensive examination and cross-examination of the experts centered on methodology. The prosecution experts testified that the technique was reliable and accepted by the scientific community. The defense experts acknowledged the reliability and acceptance of photographic comparisons for exclusion purposes, and there was testimony establishing the reliability of such comparisons for inclusion purposes when bites appear on different parts of the body of a single victim. Given the acceptability of photographs for comparisons of bites on a single victim and the other evidence, we conclude that the process here was not significantly different. Indeed, because of a similarity in both the substance ***64** on which the bite marks were imprinted and the circumstances surrounding infliction of the marks, a photographic comparison could have a reliability not

present with other techniques. We therefore agree that no error was committed in permitting the photo-to-photo comparison.

[5] Finally, the probative value of the Wilson photograph outweighed its potential for unfair prejudice and was therefore properly admitted.

[6] **[7]** Evidence of uncharged **crimes**, though inadmissible to establish criminal propensity, is admissible if offered for some other relevant purpose (*People v. Allweiss,* 48 N.Y.2d 40, 46, 421 N.Y.S.2d 341, 396 N.E.2d 735). One recognized ground for admission is to prove the defendant's identity, so long as identity is not otherwise conclusively established (*People v. Beam,* 57 N.Y.2d 241, 455 N.Y.S.2d 575, 441 N.E.2d 1093, *supra; People v. Condon,* 26 N.Y.2d 139, 309 N.Y.S.2d 152, 257 N.E.2d 615). "In final analysis the process is one of balancing in which both the degree of probativeness and the potential for prejudice of the proffered evidence must be weighed against each other" (*People v. Ventimiglia,* 52 N.Y.2d 350, 359–360, 438 N.Y.S.2d 261, 420 N.E.2d 59).

The redaction of the Wilson photograph was so complete that little more than a jagged line representing the teeth marks appears, and the parties were required, in the presence of the jury, to refer to the exhibit only as defendant's known bite mark in human tissue. Based on our own examination of the photograph, we find it highly unlikely that the jury could have drawn any conclusions about defendant's past acts of violence. Similarly, while a juror might perhaps have speculated as to the origin of the bite mark, the redacted photograph as well as the innocuous description were fully consistent with noncriminality and certainly conveyed none of the circumstances surrounding Marilee Wilson's brutal murder. Thus, the danger of unfair prejudice, if not eliminated, was minimal.

[8] In characterizing the probative value of the evidence as negligible, defendant claims that the identification of the bite mark on Donna Payant's body through a photographic comparison was cumulative (see *People v. Ventimiglia,* 52 N.Y.2d 350, 360, 438 N.Y.S.2d 261, 420 N.E.2d 59, ****890** *****717** *supra; People v. Blanchard,* 83 A.D.2d 905, 906, 442 N.Y.S.2d 140). Prosecution experts did identify the mark on Payant's body by comparing it with models of defendant's ***65** teeth. But defense experts vigorously disputed this identification; moreover, testimony was elicited by the defense to the effect that human skin was an ideal medium for bite mark identification. In these circumstances, identifying the bite mark through another procedure cannot be dismissed as cumulative.

[9] Defendant also argues that the comparison of the photographs was unnecessary because the prosecutor could have applied for a court order compelling defendant to bite into his own skin. Without determining that a court could have required defendant to bite himself with the force necessary to leave a mark like that present on Payant's body, no error was committed in not following that course. The mark left by defendant, who would have known both how this evidence was to be used and the precise method of infliction of the mark on Payant, could properly be regarded as not representative.

In light of the limitations placed on the prosecution's use of the Wilson photograph and the probative value in comparing the unknown Payant mark to one known to have been made by defendant in human tissue, no error was committed by the admission of that evidence.

THE DIBONA TESTIMONY

Defendant contends that reversal is appropriate because of a document discovered after trial which allegedly cast doubt on the testimony of the prosecution witness DiBona. DiBona testified that on May 16, 1982, during a recreation period, defendant made statements implicating himself in the murder of Donna Payant.

At some point in the prosecution, the defense submitted the following request for disclosure: "it would be appreciated if you would send to my attention Lemuel Smith's institutional record and the daily log book while Mr. Smith was housed in Cell Number 11." In response to this request the Special Prosecutor turned over excerpts from the SHU (Special Housing Unit) logbook, a detailed record of events such as meal periods, prisoner visits and inmate counts. The excerpts also reveal that several recreation periods were conducted throughout the day on

May 16. Two of these periods are reflected in the following entries:

***66** "8:50 PC[3] back from rec.

"8:55 PC to rec (6 inmates)

"9:50 PC back from rec."

After trial, defendant himself obtained a "Chronological Report on Inmates Assigned to Special Housing Unit —Downstate Correctional Facility." This report covers defendant's activities over a 24-day period and contains one or more entries for each day. It records such events as church visits, court appointments, showers and the administration of medication. Though the report does not disclose when defendant went to recreation, it does indicate that he refused recreation 10 times on 9 different days during the 24-day period. The three entries for May 16 are:

"9:30 AM Seen Father Licata

"9:35 AM Med. from R.N.

"2:20 PM Call out to visit # 2 Sgt. R."

There is no indication that defendant refused recreation on May 16.

Defendant moved, pursuant to CPL 330.30, to set aside the verdict because of this "newly discovered evidence."[4] The report, according to defendant, demonstrated that he did not visit the recreation yard on May 16 and thus could not have made the statements *****718** ****891** to DiBona. In reply, the People claimed that there was no indication of a request for this document and, in any event, the report failed to demonstrate that DiBona and defendant were not in the recreation yard at the same time. The court denied the motion, finding the evidence "ambiguous, and of only speculative value." On appeal, defendant contends that the prosecutor breached his duty to disclose exculpatory material.

[10] The suppression of exculpatory evidence in the face of a specific and relevant defense request will seldom, if ever, ***67** be excusable (*United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342; *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; *People v. Cwikla,* 46 N.Y.2d 434, 414 N.Y.S.2d 102, 386 N.E.2d 1070). However, where the defense makes only a general request, or none at all, the failure to turn over obviously exculpatory material violates due process only if the omitted evidence creates a reasonable doubt which did not otherwise exist. (*United States v. Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342, *supra.*)

[11] It would be inappropriate to apply the standard which obtains where the prosecutor had notice of exactly what the defense desired and suppressed it. Since the request did not put the prosecutor on notice that this specific document existed, he could have reasonably concluded that the disclosure of the SHU logbook satisfied the request. The record is devoid of any indication of prosecutorial bad faith or negligence. Thus, applying the *Agurs* standard, a new trial would be required only if the material were obviously exculpatory and created a reasonable doubt not otherwise existing.

[12] The report satisfies neither requirement. Initially, it fails to establish that defendant did not participate in the recreation period between 8:55 a.m. and 9:50 a.m. because he could have been called out of recreation to meet with the priest. The discussion between DiBona and defendant could have occurred during one of the other recreation periods that day. Indeed, to the extent the report sheds any light on the question whether defendant went to the recreation yard on May 16, the report implies that he did, since—unlike the days when defendant refused recreation—there was no record of defendant's refusal to attend recreation on May 16. Accordingly, the trial court properly denied this branch of defendant's motion to vacate.

ADDITIONAL ISSUES SUPPORTING REQUEST FOR NEW TRIAL

[13] *The Unusual Incident Report:* Corrections Officer Eric Johnson, a defense witness, testified that he was assigned to the F and G corridor during his 9:45 a.m. to 5:45 p.m. shift on May 15, 1981. Three days after the murder, on May 18, 1981, Johnson told police that on the day of the **crime** he observed Payant walking toward him

shortly after 2:00 p.m. However, on September 18, 1981, he signed a statement indicating that this observation was ***68** made on the same day he assisted an inmate in setting a digital watch, an event which occurred on May 8, 1981, a week before the murder. In the midst of the prosecutor's summation, the defense obtained from a third party a copy of an "unusual incident" report, containing the following notation, "2:08 [a.m., May 16, 1981] per conversation with Officer Johnson—he reported seeing Officer Payant in F and G corridor at approximately 1:30 p.m." Counsel moved for a mistrial, arguing that the jury would have been much less likely to accept Johnson's story about the mix-up in dates had it been aware that a mere 12 hours after the observation Johnson said he saw Payant on the 15th. Any error in the prosecutor's nondisclosure of this report was cured when the trial court interrupted the People's summation, allowed defense counsel to recall Johnson and place this evidence before the jury, and permitted him to address the jury on this issue before the prosecutor resumed his summation.

[14] **[15]** **[16]** *Recusal of the Trial Judge:* Defendant next argues that the Trial Judge should have recused himself for three reasons: *****719** ****892** he appointed the prosecutor whose conduct with respect to the submission of evidence to the Grand Jury was being questioned; he had exhibited hostility toward defense counsel in denying several pretrial motions; and he had been associated with the Special District Attorney, when, as District Attorney of Dutchess County, he had hired the Special District Attorney as an Assistant District Attorney. These claims are unpersuasive. A Trial Judge's impartiality is not undermined merely by appointment of counsel for one of the adversaries. Nor did the court exhibit bias in ruling on defense motions. To the contrary, the record demonstrates that the court dealt with defense requests in an evenhanded manner. Finally, the decision on a recusal motion is generally a matter of personal conscience. While it may have been the better practice for the court to **insure** that defense counsel was aware of its previous relationship with the Special District Attorney, the association was not so substantial that the court abused its discretion in presiding over the trial. (Compare *Matter of Corradino v. Corradino,* 48 N.Y.2d 894, 424 N.Y.S.2d 886, 400 N.E.2d 1338; see, also, *People ex rel. Stickle v. Fay,* 14 N.Y.2d 683, 249 N.Y.S.2d 879, 198 N.E.2d 909.)

[17] ***69** *Delay in Appointing Counsel and Disparity in Funding:* Defendant challenges as violating his right to counsel the delay in appointing his present counsel and the disparity in funding between the prosecution and the defense. Defendant's counsel first appeared for defendant on June 10, 1981, when appellant informed him that he lacked confidence in the Public Defender's office. Counsel declared in open court that he would serve without compensation. Some months later, however, he made the first of a series of **legal** moves to obtain compensation for his services. These requests were denied. In March 1982, defendant discharged counsel because of the funding impasse and the court appointed the Dutchess County Public Defender, who was unable to establish a meaningful attorney-client relationship with defendant. Finally, in September 1982, the court granted the Public Defender's motion to be relieved and defendant's counsel and his associate were appointed, with compensation at the established rates for defense counsel. Whatever other rights defense counsel may have to receive increased compensation, in order to prevail on this appeal defendant must show that his defense was ineffective as a result of the delay or disparate funding. Such a showing has not been made. Nor can the court presume that the alleged errors resulted in a denial of meaningful representation where our independent review of the record belies this conclusion.

[18] **[19]** *Change of Venue:* Prior to jury selection, defendant moved in the Appellate Division for a change of venue because of the great number of penal facilities in Dutchess County, the substantial impact of their presence on the economy of the community, the atmosphere of hatred and fear, and the danger of racism. We find no error in the court's conclusion that the application should have awaited the results of *voir dire* (see *People v. Culhane,* 33 N.Y.2d 90, 350 N.Y.S.2d 381, 305 N.E.2d 469; *People v. Boudin,* 87 A.D.2d 133, 135, 451 N.Y.S.2d 153). Since defendant failed to renew the motion following *voir dire,* there is no other ruling for this court to review (*People v. Parker,* 60 N.Y.2d 714, 468 N.Y.S.2d 870, 456 N.E.2d 811).

[20] *Hypnosis Charge:* Although several prosecution witnesses were hypnotized, the trial court determined that it would limit their testimony to events recalled prior to

*70 hypnosis, and defendant admits that the hypnosis issue was not a major factor before the jury. In *People v. Hughes,* 59 N.Y.2d 523, 548, 466 N.Y.S.2d 255, 453 N.E.2d 484, the court said that a trial court should instruct the jury that a hypnotized witness usually acquires a measure of confidence in events recalled under hypnosis—if the defendant requests such a charge. Defendant failed to ask for this instruction, and its absence from the **893 charge does not warrant reversal in the interest of justice.

***720 [21] *Further Cross-Examination of Goodman:* The trial court did not abuse its discretion in prohibiting defense counsel from cross-examining Teddy Goodman more extensively about the details of his testimony at his own murder trial. (Goodman testified that on May 15, 1981, he saw defendant and Payant enter the Chaplain's office together.) Counsel had already mounted a substantial attack on Goodman's credibility and the limits placed on cross-examination regarding a collateral **crime** were not unreasonable (see Cohen and Karger, Powers of the New York Court of Appeals [rev ed], § 197, p. 740).

III

Having found that the evidence was convincing beyond a reasonable doubt, and having discovered no error warranting a new trial, we turn to defendant's challenge to the constitutionality of New York's **death** **penalty** statute.

Defendant was convicted of murder in the first degree under section 125.27 of the Penal Law, which provides: "A person is guilty of murder in the first degree when: 1. With intent to cause the **death** of another person, he causes the **death** of such person; and * * * at the time of the commission of the **crime**, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the **crime**, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and * * * [the] defendant was more than eighteen years old at the *71 time of the commission of the **crime**." Upon a conviction of first degree murder, the court must impose a sentence of **death** (Penal Law, § 60.06).

[22] Defendant argues primarily that the statute's failure to allow the sentencer to consider any relevant mitigating circumstances violates the Eighth and Fourteenth Amendments' prohibition of the infliction of cruel and unusual punishments.[5] To prevail on this claim, defendant must overcome the strong presumption of constitutionality which attaches to legislative enactments (*People v. Davis,* 43 N.Y.2d 17, 30, 400 N.Y.S.2d 735, 371 N.E.2d 456, *supra*).

Mindful of the singular gravity of the **death** **penalty**, our **legal** **system** has struggled to accommodate the twin objectives of "a **system** of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the **individual**." (*Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1.) While not addressing the precise issue before us, over the past 12 years since *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, the Supreme Court in a line of decisions reviewing **death** **penalty** statutes, has defined the criteria required to meet these objectives.

In *Furman,* the court nullified a statute which gave the sentencer unguided discretion to decide whether to impose the **death** **penalty**. Although the five-Justice majority did not agree on a uniform rationale, the case is generally interpreted to prohibit the **894 arbitrary and capricious imposition of the **death** **penalty** (see ***721 *Gregg v. Georgia,* 428 U.S. 153, 188, 195, 206, 96 S.Ct. 2909, 2932, 2935, 2940, 49 L.Ed.2d 859). The court provided further explanation of the constitutional requirements for **death** **penalty** statutes in a group of cases decided in 1976. Finding, substantively, that capital punishment was not a per se violation of the Eighth Amendment, the court examined the procedures used in imposing such a sentence. A three-Justice plurality *72 concluded that the concerns of *Furman* could be satisfied "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance" (*Gregg v. Georgia,* 428 U.S. 153, 195, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, *supra*), and the court

upheld the "guided discretion" statutes of three States (*Id.; Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929).

However, the court struck down two **death penalty** statutes which provided for a mandatory **death** sentence upon conviction for specified **crimes** (*Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; *Roberts* [*Stanislaus*] *v. Louisiana,* 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974). The *Woodson* plurality identified three independent deficiencies in a mandatory **death penalty** statute. *First,* in light of the near-universal rejection of mandatory **death penalties** prior to *Furman,* such a statute violated the "evolving standards of decency which mark the progress of a maturing society." (*Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630.) The reenactment of the **death penalty** by some States after *Furman* reflected attempts "to retain the **death penalty** in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory **death** sentencing" (*Woodson v. North Carolina,* 428 U.S. 280, 298, 96 S.Ct. 2978, 2988, 49 L.Ed.2d 944, *supra*). *Second,* the mandatory **death penalty** failed to answer *Furman's* concern about unbridled sentencing discretion because jurors often vote to acquit despite sufficient evidence of guilt where the inevitable consequence of their guilty verdict is a **death** sentence. *Third,* a mandatory **death** sentence failed to allow for particularized consideration of relevant aspects of the defendant's character and record and the circumstances of the offense: "While the prevailing practice of **individualizing** sentencing determinations generally reflects **simply** enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles,* 356 U.S., at 100, 78 S.Ct., at 597 (plurality opinion), requires consideration of the character and record of the **individual** offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the **penalty** of **death**." (*Id.,* 428 U.S. at p. 304, 96 S.Ct. at p. 2991.) Because **death**, "in its finality, differs more from life imprisonment than a 100-year prison ***73** term differs from one of only a year or two * * * there is a corresponding difference in the need for reliability in the determination that **death** is the appropriate punishment in a specific case" (*id.,* at p. 305, 96 S.Ct. at p. 2991). This sharpened need in the case of each irreversible execution precludes treating all persons subject to such **penalty** as "a faceless, undifferentiated mass" (*id.,* at p. 304, 96 S.Ct. at p. 2991).

Even where the **death penalty** statute was narrowly restricted to five defined categories of homicide, in *Roberts (Stanislaus),* 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974, *supra* the absence of meaningful opportunity for the sentencer to consider mitigating factors was considered a fatal infirmity: "The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such **crimes**, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the ****895** circumstances of the particular **crime** or by *****722** the attributes of the **individual** offender." (*Id.,* at pp. 333–334, 96 S.Ct. at 3006.)

Subsequent decisions both in the Supreme Court and this court have invalidated mandatory **death penalty** statutes which do not permit consideration of mitigating circumstances, however heinous the **crime**. In *Roberts (Harry) v. Louisiana,* 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637, the Supreme Court declared unconstitutional a statute which mandated a sentence of **death** upon a conviction for intentional murder of a police officer, stating that it was incorrect to assume that no mitigating circumstances could exist when the victim is a police officer. Among the circumstances which could be offered in mitigation were the offender's age and prior record, the influence of drugs, alcohol or extreme emotional disturbance, and "even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct" (*id.,* at p. 637, 97 S.Ct. at p. 1995). "[I]t is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." (*Id.*) Following *Roberts (Harry),* this court in ***74** *People v. Davis,* 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456, *supra* invalidated that portion of New York's mandatory **death penalty** which applied to the intentional murder of a corrections officer: "plainly and **simply** and without

verbiage, because the New York statute 'does not allow consideration of particularized mitigating factors' for purposes of 'the capital sentencing decision' as to 'the particular offender', it is unconstitutional." (*Id.,* at p. 33, 400 N.Y.S.2d 735, 371 N.E.2d 456.)

In *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, the Supreme Court reviewed an Ohio statute which limited the number of mitigating circumstances which could be considered. As the plurality wrote: "There is no perfect procedure for deciding in which cases governmental authority should be used to impose **death**. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the **death penalty** will be imposed in spite of factors which may call for a less severe **penalty**. When the choice is between life and **death**, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Id.,* at p. 605, 98 S.Ct. at 2965.) A majority of the Supreme Court embraced this rule in *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, *supra.* Because the sentence of **death** was imposed without consideration of mitigating factors required by the Eighth and Fourteenth Amendments in capital cases, Eddings' conviction for murder of a police officer was set aside, and the case remanded for consideration of all relevant mitigating circumstances. "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring **individual** differences is a false consistency." (455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1, *supra.*)

[23] **Individualized** consideration of the offender and the offense is **simply** a recognition that in every case there are invariably differences. In capital cases, where such consideration is constitutionally required, the purpose is to reduce the risk that the **death penalty** will be imposed in spite of factors about the person or the **crime** which call for a different **penalty**. The requirement is premised not on the ***75** fact that one class of **crimes** is more or less atrocious than another, or one category of defendants more or less sympathetic, but on the final, irrevocable quality of the **death penalty**. This same concern necessarily pervades every capital case. Thus, under the standards established by the Supreme Court, any **death penalty** statute which did not provide for consideration by the sentencer of all relevant **individual** circumstances would be incompatible with the commands of the Eighth and Fourteenth Amendments.

*****723** ****896** But the issue on this appeal cannot be so readily resolved. The Supreme Court has repeatedly, without explication, stated that it was not deciding whether the Eighth Amendment forbids a mandatory **death penalty** for murder committed by a person serving a life term of imprisonment (*Lockett v. Ohio,* 438 U.S. 586, 604, n. 11, 98 S.Ct. 2954, 2964, n. 11, 57 L.Ed.2d 973, *supra; Roberts* [*Harry*] *v. Louisiana,* 431 U.S. 633, 637, n. 5, 97 S.Ct. 1993, 1995, n. 5, 52 L.Ed.2d 637, *supra; Roberts* [*Stanislaus*] *v. Louisiana,* 428 U.S. 325, 334, n. 9, 96 S.Ct. 3001, 3006, n. 9, 49 L.Ed.2d 974, *supra; Woodson v. North Carolina,* 428 U.S. 280, 287, n. 7, 292, n. 25, 96 S.Ct. 2978, 2983, n. 7, 2985, n. 25, 49 L.Ed.2d 944, *supra; Gregg v. Georgia,* 428 U.S. 153, 186, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859, *supra*). [6] This court also has expressly left the question open (*People v. Davis,* 43 N.Y.2d, at p. 34, n. 3, 400 N.Y.S.2d 735, 371 N.E.2d 456).

In *Lockett,* the plurality hinted at a reason why such a departure from constitutional requirements could even be considered: "We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory **death** sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder" (438 U.S. 586, 604, n. 11, 98 S.Ct. 2954, 2964, n. 11, 57 L.Ed.2d 973, *supra;* see, also, *People v. Davis,* 43 N.Y.2d 17, 43, 400 N.Y.S.2d 735, 371 N.E.2d 456 [Breitel, Ch. J., dissenting], *supra*).

If the Supreme Court indeed intended to limit its reservation to the conceivable need for deterring murder by a life-term inmate with no possibility of parole, who could not otherwise be punished, then the reservation is not even applicable to defendant. Although the sentences for defendant's prior **crimes** were consecutive, they were imposed under section 70.30 of the Penal Law as it existed before the 1978 amendment. Thus, when he committed the present offense defendant was serving an indeterminate prison term with a minimum of 25 years and a maximum ***76** of life, and (according to defense counsel, undisputed

by the People) had the prospect of parole in 2003, at the age of 63.

[24] That, even in the case of life-term inmates, there may be **penalties** available to punish and thus deter further **crime** underscores the necessity, in fulfilling the twin objectives of our capital-sentencing **system**, for requiring **individual** consideration of the offense and the offender.[7] In New York, a life sentence is not the necessary equivalent of life imprisonment. Diverse **crimes** are classified as A–1 felonies and thus punishable by a minimum sentence of 15 years and a maximum term of life (Penal Law, § 70.00), including arson (Penal Law, § 150.20), kidnapping (Penal Law, § 135.25), drug offenses (Penal Law, §§ 220.21, 220.43), and persistent felony offenses (Penal Law, § 70.10; see, also, Penal Law, § 70.08). Life-term inmates thus include persons who have never before committed a violent act, and persons with a realistic prospect of parole. Even before reaching the invariable differences in the circumstances of the **crime**, it is obvious that life-term prisoners in this State are not "a faceless, undifferentiated mass." (*Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, *supra.*) Given the Supreme Court's definition of the rationale underlying the requirement of **individual** consideration by the capital-sentencer, society has no less motivation to avoid irrevocable error in fixing the ***724 **897** appropriate **penalty** for life-term inmates than other human beings.

Where the question is whether the **death penalty** is per se unconstitutional, one can argue capital punishment is necessary to deter a person under a sentence of life imprisonment from committing additional **crimes** because any other sentence would be merely cumulative. This concern evidently led the *Gregg* court, in its discussion of whether the **death penalty** was per se unconstitutional, to note that other sanctions may be inadequate to deter lifers. Indeed, the Supreme Court's reservation regarding life prisoners had its genesis in this discussion in ***77** *Gregg v. Georgia,* 428 U.S. 153, 186, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859, *supra*, and logically pertains to evaluation of the **death penalty** per se. But the distinction is not similarly meaningful where a statute is attacked only because the imposition of the **death penalty** is mandatory.

Execution is never an inevitable consequence of a criminal act. In every case, including one where the **death** sentence is mandatory upon conviction, it is only the specter of execution which can serve as a general deterrent. In the process of investigation and adjudication, there are several points where the ultimate imposition of the **death penalty** may be precluded. Initially, a culprit rarely expects to get caught. Even if the defendant is apprehended, the Grand Jury may not indict for a capital offense, the District Attorney may consent to a guilty plea to a noncapital offense (CPL 220.10), or the petit jury may return a verdict of not guilty. After conviction, an appellate court may reverse as to sentence or the executive may commute the sentence. Thus, even where the **death penalty** is mandatory, its imposition, in the eyes of an **individual** about to commit a **crime**, can never be more than a possibility.

Because execution is not inevitable, a discretionary **death penalty**, which allows for the consideration of the character as well as the record of the **individual** offender and the circumstances of the particular offense, differs little in terms of deterrence from a mandatory **death penalty** and does not in fact detract from the value of capital punishment as a deterrent. This conclusion is especially warranted upon the recognition that any defendant's status as a life-term inmate would constitute a powerful aggravating circumstance and undoubtedly increase the likelihood that the sentencer would find the **death penalty** appropriate under all the circumstances.

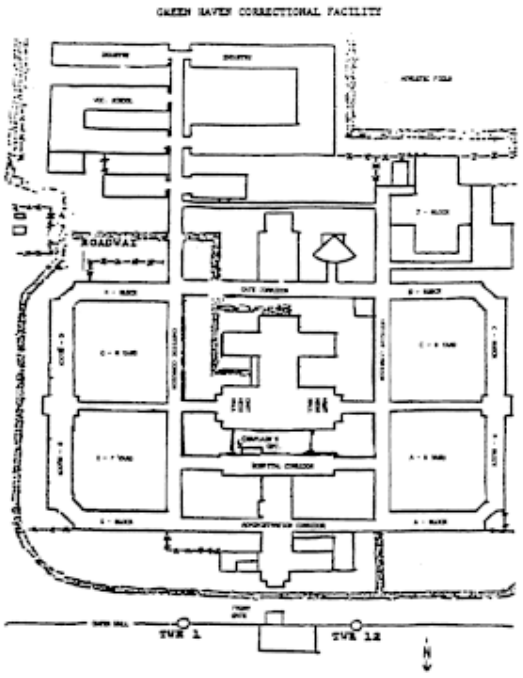
While the People suggest that retribution and the protection of prison guards and the prison population support a departure from constitutional command in the case of life-term inmates, these fail as bases for a principled distinction for the same reasons as relate to deterrence. Providing the sentencer with the option of imposing the **death penalty** is no less an expression of society's outrage, of its vital concern for the safety of prison guards and the prison ***78** population, and its resolve to punish maximally, than a mandatory **death** sentence. The sentencer merely is given the authority to impose a different **penalty** where, in a particular case, that would fulfill all of society's objectives. A mandatory **death** statute **simply** cannot be **reconciled** with the **scrupulous care** the **legal system demands** to **insure** that the **death penalty fits** the **individual** and the **crime**.

The People argue that New York's **death penalty** statute is so narrowly drawn as to include by definition a consideration of aggravating and mitigating circumstances—that the defendant's age, prior record of serious **crimes** and homicidal intent are all elements of first degree murder, and that the affirmative defense of extreme emotional disturbance is a built-in mitigating circumstance. Even if it were true, that the statute comprehended every mitigating circumstance a defendant might be able to show, [8] this precise argument, urged also ***725 **898** by the dissent, has already been rejected by this court. In *People v. Davis,* 43 N.Y.2d 17, 34, 400 N.Y.S.2d 735, 371 N.E.2d 456, *supra*), we identified "the fundamental error" in built-in defenses: "defenses relate to guilt or innocence whereas a mitigating factor may be of no significance to a determination of criminal culpability * * * The point is that what is urged in mitigation will often not rise to the level of a defense." (See, also, *Roberts [Stanislaus] v. Louisiana,* 428 U.S. 325, 332, 96 S.Ct. 3001, 3005, 49 L.Ed.2d 974, *supra.*)

[25] In sum, New York's mandatory **death penalty** is constitutionally infirm as applied to this defendant because of its failure to provide for the consideration of **individual** circumstances, one of the three deficiencies of a mandatory **death penalty** articulated in the plurality opinion in *Woodson.* [9] In view of our conclusion that New York's ***79** statute contravenes the Federal Constitution, we do not reach the issue of the State Constitution's similar prohibition of cruel and unusual punishments (art. I, § 5), or defendant's additional arguments that a mandatory **death penalty** for life-term inmates suffers from the other two deficiencies of a mandatory **death** statute identified in *Woodson.*

[26] The Attorney-General, relying primarily on *People v. Bailey,* 21 N.Y.2d 588, 289 N.Y.S.2d 943, 237 N.E.2d 205, argues in the alternative that the court should deem the **death penalty** statute to include a provision for consideration of mitigating circumstances and remit for a hearing. In *Bailey,* this court considered the validity of a statute which permitted the sentencing Judge to impose an alternative indeterminate term of imprisonment upon sex offenders. Since additional findings were necessary before this alternative sentence could be imposed, a then-recent Supreme Court case (*Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326) required a hearing. The court construed New York's statute in a manner as to uphold its constitutionality and read into the statute a requirement for a hearing. This reading was not inconsistent with the language of the statute. By contrast, section 60.06 of the Penal Law provides that "the court shall sentence the defendant to **death**" upon a first degree murder conviction. The Attorney-General's suggested interpretation is wholly at odds with the wording of the statute and would require us to rewrite the statute. This we cannot do. (See *State v. Cline,* 121 R.I. 299, 397 A.2d 1309; *United States v. Harper,* 729 F.2d 1216 [9 Cir.1984]).

Based on our review of the record, the People have established defendant's guilt of murder in the first degree (Penal Law, § 125.27, subd. 1, par. [a], cl. [iii]). We therefore modify the judgment by vacating the sentence of **death** and remitting this case to the Supreme Court, County of ***726 **899** Dutchess for resentencing in accordance with section 70.00 of the Penal Law (see Penal Law, § 60.05, subd. 2) and, as so modified, the judgment should be affirmed.



***81** SIMONS, Judge (dissenting in part).

I concur in parts I and II of the majority opinion which hold that defendant's guilt was established beyond a reasonable doubt in proceedings free of error. I dissent, however, from part III of the majority opinion because defendant has failed to establish that section 60.06 of the Penal Law fixing the **penalty** for first degree murder (Penal Law, § 125.27, subd. 1, par. [a], cl. [iii]) is unconstitutional. I would, therefore, affirm the judgment.

The legislative power of this State is vested in the Senate and the Assembly. Our task as Judges is, quite **simply**, to determine whether the Legislature in exercising that power has violated the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the Federal Constitution, which is made ***727 **900** applicable to the States through the Fourteenth Amendment (*Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758). In doing so we are constrained by the strong presumption that the statute is constitutional and we may invalidate it only as a last resort (see *People v. Davis,* 43 N.Y.2d 17, 30, 400 N.Y.S.2d 735, 371 N.E.2d 456; *People v. Nieves,* 36 N.Y.2d 396, 400, 369 N.Y.S.2d 50, 330 N.E.2d 26; *Matter of Van Berkel v. Power,* 16 N.Y.2d 37, 40, 261 N.Y.S.2d 876, 209 N.E.2d 539). The presumption arises because the Legislature has had the opportunity to investigate and study the need for the legislation and it has found circumstances warranting its enactment (*Hotel Dorset Co. v. Trust for Cultural Resources,* 46 N.Y.2d 358, 413 N.Y.S.2d 357, 385 N.E.2d 1284). Thus, a heavy burden rests on one attacking the statute to demonstrate that the legislators, as the elected representatives of the people, have exceeded their constitutional powers (see *Gregg v. Georgia,* 428 U.S. 153, 175, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859; see, also, *People v. Scott,* 26 N.Y.2d 286, 291, 309 N.Y.S.2d 919, 258 N.E.2d 206; *People v. Pagnotta,* 25 N.Y.2d 333, 337, 305 N.Y.S.2d 484, 253 N.E.2d 202; *Matter of Van Berkel v. Power, supra;* see *People v. Whidden,* 51 N.Y.2d 457, 462, 434 N.Y.S.2d 937, 415 N.E.2d 927). Defendant has failed to do so.

It is now beyond question that, as a substantive matter, imposition of the **death** **penalty** does not violate the "cruel and unusual punishments" provision of the Eighth Amendment. Although capital punishment is not unconstitutional per se, it may become so if imposed when the nature of the **crime** involved does not warrant capital punishment (*Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 [felony murder]; *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 [rape]; see, also, ***82** *Woodson v. North Carolina,* 428 U.S. 280, 286, 96 S.Ct. 2978, 2982, 49 L.Ed.2d 944) or when the procedure by which it is imposed does not meet constitutional standards. Because capital punishment may be imposed for intentional murder, our inquiry is directed to the procedural aspects of the New York statute and whether they are constitutionally sufficient.

The general principle is that statutes permitting capital punishment must **insure** that it is not imposed "wantonly" or "freakishly" but in an objective, evenhanded and substantially rational way (*Furman v. Georgia,* 408 U.S. 238, 310, 92 S.Ct. 2726, 2762, 33 L.Ed.2d 346 [Stewart, J., concurring], reh. den. 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 164; see, also, *Gregg v. Georgia,* 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 [plurality opn], *supra*). The statute must permit **individualized** determination to **insure** that the **penalty** **fits** not only the **crime** but also the criminal. The jury should consider the aggravating details of the **crime** (see, e.g., *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973; *Gregg v. Georgia, supra; Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929) and also relevant factors mitigating the offender's punishment (see *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1; *Lockett v. Ohio, supra; Woodson v. North Carolina,* 428 U.S. 280, 303–305, 96 S.Ct. 2978, 2990–2991, 49 L.Ed.2d 944, *supra*). The rule to be derived from the cases is this: State Legislatures have discretion to determine the scope of the sentences to be imposed for violation of their criminal statutes provided that (1) capital punishment is not imposed for a broad category of homicidal offenses, (2) **individual** consideration is given to the offender and (3) the statute, except in the rarest type of cases, permits the jury to consider any pertinent mitigating factors (see *Lockett v. Ohio,* 438 U.S. 586, 603–604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973, *supra; Woodson v. North Carolina,* 428 U.S. 280, 287, 304, 96 S.Ct. 2978, 2983, 2991, 49 L.Ed.2d 944, *supra*).

These past decisions are of limited value, however, because this appeal presents one of those rare homicide cases which

the ***728 **901 Supreme Court has not addressed. [1] Indeed the court's decisions have specifically excepted from their reasoning and holdings mandatory capital punishment for a murder committed by a prisoner or escapee serving a life sentence (see *Lockett v. Ohio, supra,* 438 U.S. at p. 604, n. 11, 98 S.Ct. at 2964, n. 11; *Roberts [Harry] Louisiana,* 431 U.S. 633, 637, n. 5, 97 S.Ct. 1993, 1995, n. 5, 52 L.Ed.2d 637; *Roberts [Stanislaus] v. Louisiana,* 428 U.S. 325, 334, n. 9, 96 S.Ct. 3001, 3006, n. 9, 49 L.Ed.2d 974; *Woodson v. North* *83 *Carolina, supra,* 428 U.S. at p. 287, n. 7, and at p. 292, n. 25, 96 S.Ct. at p. 2983, n. 7, and at p. 2985, n. 25; *Gregg v. Georgia, supra,* 428 U.S. at p. 187, 96 S.Ct. at p. 2931; but see *Eddings v. Oklahoma, supra*). And so have we (see *People v. Davis,* 43 N.Y.2d 17, 34, n. 3, 400 N.Y.S.2d 735, 371 N.E.2d 456, *supra*). Thus, our task is to analyze sections 60.06 and 125.27 bearing in mind that we are addressing an issue the court has not yet passed upon involving a particularized **crime** committed by a singularly circumstanced **individual**.

New York's statute provides that a prisoner serving a sentence of life imprisonment or an indeterminate term of 15 or more years to life who intentionally causes the **death** of another person is guilty of first degree murder (Penal Law, § 125.27, subd. 1, par. [a], cl. [iii]) and shall be sentenced to **death** (Penal Law, § 60.06). A finding of guilt must rest on evidence which includes proof that the defendant was more than 18 years of age at the time of the **crime** (Penal Law, § 125.27, subd. 1, par. [b]). Thus, the statute meets the first two constitutional requirements because it covers only intentional homicide and it includes within the definition of the offense **individualized** consideration of the offender: he must be an adult who has previously committed a **crime** of sufficient magnitude to warrant a maximum sentence of life imprisonment. [2] Furthermore, although the statute mandates execution, it does not violate the third condition because it defines a rare type of **crime** and its definition meets precisely the standard suggested for such cases stated by the Supreme Court plurality in *Woodson v. North Carolina,* 428 U.S. 280, 287, n. 7, 96 S.Ct. 2978, 2983, n. 7, 49 L.Ed.2d 944, *supra,* "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender." The court has repeatedly stated that in such cases the jury need not be required to consider mitigating factors.

The Chief Judge would affirm on that ground alone, holding that the necessary import of the Supreme Court's statements indicates that the Legislature need not provide *84 for consideration of mitigating factors concerning the defendant in this narrow category of homicide. That may indeed be so, but we need not decide the point for our statutory scheme contains several limiting or ameliorative factors which may be considered before capital punishment is imposed. This legislative determination that the statute should not be mandatory in an absolute sense certainly does not detract from its constitutionality and indeed supports the conclusion that the statute is constitutional. Thus, there may be no conviction for first degree murder if the defendant was acting under extreme emotional disturbance or was aiding another to commit suicide (Penal Law, § 125.27, subd. 2, pars. [a], [b]), if his conduct was justified ***729 **902 (Penal Law, art. 35), if he acted under duress (Penal Law, § 40.00), if he lacked capacity (Penal Law, § 30.05), or if he was intoxicated at the time (Penal Law, § 15.25). These statutory defenses are precisely the same circumstances, save two, as those suggested in mitigation by the Supreme Court in *Roberts (Harry) v. Louisiana,* 431 U.S. 633, 636–637, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637, *supra,* and recommended in the Model Penal Code (ALI Model Penal Code, § 210.6 [Proposed Official Draft, 1962], as cited in *Gregg v. Georgia,* 428 U.S. 153, 193–194, n. 44, 96 S.Ct. 2909, 2934–2935, n. 44, 49 L.Ed.2d 859, *supra*). Indeed our statutory scheme makes explicit more ameliorative factors than did the statutes approved in *Proffitt v. Florida,* 428 U.S. 242, 248, n. 6, 96 S.Ct. 2960, 2965, n. 6, 49 L.Ed.2d 913, *supra* and *Jurek v. Texas,* 428 U.S. 262, 271–273, 96 S.Ct. 2950, 2956–2957, 49 L.Ed.2d 929,*supra.* The two circumstances listed in the Model Penal Code and the *Roberts* decision which are not expressly included in our statute are a lack of prior criminal experience and accomplice liability. Neither applies here. Before a defendant may be subject to prosecution under section 125.27, he must have been convicted previously of a **crime** calling for imposition of a life sentence and he must murder while serving his sentence for that predicate **crime**. Thus, it is impossible for a person without any prior serious criminal involvement to be convicted of first degree murder under this subdivision. Indeed, this

defendant had been twice previously convicted of murder and once of a rape-kidnapping. In each instance the sentencing Judge had before him presentence reports showing defendant's prior criminal, social and medical history (CPL 390.30, 390.40) and in each case the court ***85** sentenced defendant to the maximum term permitted by law. In addition, the record shows that defendant has acknowledged responsibility for three other homicides and a second rape. Prosecution was never started for one of those additional murders and the prosecution of the other two was discontinued because conviction would serve no purpose: defendant's sentence could not be increased beyond the sentence he was already serving because under the former statute the minimum terms merged. Manifestly, defendant had an extensive and serious criminal record at the time of this, his sixth, homicide. Nor must accomplice liability be considered as a necessary mitigating factor and defendant does not claim that it should. Thus, unlike the North Carolina statute which authorized capital punishment for murder generally and which was invalidated in *Woodson* because it did not provide for consideration of any mitigating circumstances, New York's statute not only comes within the exception stated in *Woodson,* but it also provides several bases consonant with the rule stated in the Model Penal Code and other statutes approved by the Supreme Court cases on which the **crime** may be reduced to a noncapital offense. The New York Legislature has followed the general prescription of the Supreme Court's rules. It has made the permitted determination that because of the nature of this **crime** and the character of the offender, the mandatory **death** sentence may be imposed because of the nature of the offense and that extenuating circumstances are to be considered as defenses during the trial, not at a separate hearing. The Legislature's decision to leave the burden on the defendant to prove such circumstances as affirmative defenses, rather than to allow for their consideration as mitigating circumstances following a determination of guilt, finds support in the singular nature of the **crime** and the character and record of the criminals to which the statute applies, and in the exemption contained in *People v. Davis,* 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456, *supra* and the Supreme Court decisions of such **crimes** from the general rule.

It should also be noted that New York courts when instructing a jury must submit for the jury's consideration any lesser included offenses (see CPL 300.50; *People v.* ***86** *Glover,* 57 N.Y.2d 61, 453 N.Y.S.2d 660, 439 N.E.2d 376), and that a defendant in a capital case may appeal his conviction directly to this court which then reviews both *****730** ****903** the law and facts and determines whether defendant's guilt has been established beyond a reasonable doubt (N.Y. Const., art. VI, § 3, subd. b; CPL 450.70). These are important additional safeguards against the unbridled jury discretion and a verdict infected by caprice.

The majority contends that *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, *supra* controls this appeal. It sees no facts in the case significant enough to distinguish it from the accomplice liability involved in *Lockett* and although it notes that the court expressly reserved from that ruling a murder committed by one serving a life sentence, it holds that the reservation does not apply to this case because defendant was serving a statutory life sentence not a sentence for a term of his natural life (majority opn., at pp. 75–76, 479 N.Y.S.2d at pp. ——– ———, 468 N.E.2d at pp. 896–897). No **legal** basis is given for that restrictive interpretation of the court's language.

Relying upon *Lockett* (see, also, *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, *supra*), the majority fault the New York statute because it does not permit the jury to consider mitigating factors to **insure** that the punishment is appropriate to this defendant. In *Lockett* the defendant was sentenced to **death** for the felony murder of a pawn broker accidentally killed by her confederates during the course of a robbery. She was outside the shop at the time of the robbery with the getaway car and her guilt rested on accomplice liability. At the time of her conviction, the defendant was 21 years of age, of low normal intelligence and had never been in serious trouble with the law before. Psychologists rated her chances at rehabilitation as favorable. She challenged the Ohio sentencing statute because it did not permit the Judge to consider her character, prior record, age, lack of specific intent to cause **death**, and her relatively minor part in the **crime** in mitigation of sentence. The Supreme Court, in a plurality opinion, declared the Ohio statute unconstitutional because it restricted the sentencer's consideration of mitigating factors (*Lockett v. Ohio, supra,* 438 U.S., at p. 604, 98 S.Ct. at p. 2964). The *Lockett* holding has left in doubt prior decisions which

appear to conflict with it (see, e.g., *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *supra;* ***87** *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, *supra*). It should be obvious that it does not control this case because it is factually distinguishable from it and because the Supreme Court expressly reserved the application of that decision by stating that it did not pass on "whether the need to deter certain kinds of homicide would justify a mandatory **death** sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder" (*Lockett v. Ohio,* 438 U.S. 586, 604, n. 11, 98 S.Ct. 2954, 2964, n. 11, 57 L.Ed.2d 973, *supra*). The Supreme Court has repeatedly included this exception in its decisions on capital punishment (see *supra,* at pp. 82–83, 479 N.Y.S.2d at pp. ——–——, 468 N.E.2d at pp. 900–901) and we should not disregard it or strain to read more or less into the court's language to justify striking down this statute.

Nevertheless, the majority is persuaded by that decision that it was beyond the power of the Legislature to enact this statute requiring mandatory capital punishment because it suggests that retribution fails as a consideration in capital cases and because it finds that any deterrent effect of the statute in cases of less than life imprisonment is served by discretionary sentencing. The majority recognizes capital punishment is not unconstitutional per se because it may be the only deterrent to some **crimes**, but then, turning the reasoning around, it argues that mandatory capital punishment is not constitutional in this case because it is not the only deterrent available. It is not up to us, however, to reinvestigate the legislative determination that the **death penalty** is the only deterrent available for murders committed by prisoners serving life sentences. Once the Legislature decides to enact a statute calling for capital punishment, its validity rests upon the procedural safeguards built into it. ****904** Thus, the Supreme Court stated in *Gregg* ***731** that it is for the Legislature to evaluate the deterrent and retributive value of the legislation:

"The value of capital punishment as a deterrent of **crime** is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

***88** "In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the **death penalty** and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of **death** as a punishment for murder is not without justification and thus is not unconstitutionally severe.

"Finally, we must consider whether the punishment of **death** is disproportionate in relation to the **crime** for which it is imposed * * * we are concerned here only with the imposition of capital punishment for the **crime** of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the **crime**. It is an extreme sanction, suitable to the most extreme of **crimes**" (*Gregg v. Georgia,* 428 U.S. 153, 186–187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859, *supra*).

Notwithstanding this language, the majority now evaluates the retributive and deterrent values of capital punishment and finds the **penalty** mandated by the New York statute disproportionate to defendant's **crime**. I know of no other punishment which this court has struck down as disproportionate (see *People v. Broadie,* 37 N.Y.2d 100, 111, 371 N.Y.S.2d 471, 332 N.E.2d 338).

Briefly, and without accepting the majority's premise, it should be pointed out that the retributive value and deterrent effect of capital punishment are valid sentencing considerations which the Legislature was entitled to weigh and accept when enacting the statute (see *Furman v. Georgia,* 408 U.S. 238, 394–395, 92 S.Ct. 2726, 2806–2807, 33 L.Ed.2d 346, *supra; Roberts [Stanislaus] v. Louisiana,* 428 U.S. 325, 353–355, 96 S.Ct. 3001, 3015–3016, 49 L.Ed.2d 974 [White, J., dissenting], *supra; People v. McConnell,* 49 N.Y.2d 340, 346, 425 N.Y.S.2d 794, 402 N.E.2d 133; *People v. Suitte,* 90 A.D.2d 80, 83–85, 455 N.Y.S.2d 675; see, also, *People v. Gittelson,* 18 N.Y.2d 427, 432, 276 N.Y.S.2d 596, 223 N.E.2d 14). Perhaps retribution when used in the sense of revenge is losing favor with the courts, as the majority contends (see LaFave & Scott,

Criminal Law, § 5, p. 24), but it is accepted theory that an offender should receive a deserved punishment according to the gravity of his offense as the community perceives it. In that sense, i.e., society's response to the **crime**, not to the criminal, ***89** retribution remains an important penological consideration. Indeed, the concept of retribution supplies much of the rationale for the current nationwide movement towards determinant sentencing—a fixed period of incarceration for offenses, lengthened or shortened minimally by consideration of a limited number of aggravating and mitigating factors (see Pugsley, Retributivism: A Just Basis for Criminal Sentences, 7 Hofstra L Rev 379). But critical to this appeal is the fact that retribution has nothing to do with the requirements of constitutional law and mandatory capital punishment may be imposed for purposes of retribution without violating constitutional precepts by recognizing the serious nature of the **crime** and the **individual** characteristics of the defendant.

Similarly, the majority challenges the deterrent effect of the mandatory sentence because defendant may be punished otherwise for the commission of this homicide by loss of parole or by pardon. To repeat, deterrence is not an issue for the court, the Legislature has made that policy decision and it is not charged with the burden of ****905** *****732** enacting a statute which invariably results in the least severe **penalty** having some deterrent effect (*Gregg v. Georgia,* 428 U.S. 153, 175, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859, *supra*). But to the extent that the necessity of the statute as a deterrent may be considered to be before us, it should be noted that there are various forms of deterrence, specific deterrence to incapacitate the offender from repeating this or other **crimes**, and general deterrence, to deter others from committing similar **crimes**. The statute undeniably serves the function of specific deterrence in this case. It prevents this defendant who has committed six murders and two rapes from killing again. The general deterrent effects of capital punishment on the population as a whole, i.e., the prison population, is a subject on which reasonable minds can differ but it is significant that the majority of American jurisdictions after studying the matter and reviewing the available evidence on the subject have decided certain **crimes** warrant capital punishment and this record contains no evidence to establish otherwise. Because the available evidence is unpersuasive and because reasonable minds may differ about it, the subject is one appropriately left to the Legislature (see ***90** *Gregg v. Georgia,* 428 U.S. 153, 179, 186–187, 96 S.Ct. 2909, 2928, 2931, 49 L.Ed.2d 859, *supra;* and see *People v. Broadie,* 37 N.Y.2d 100, 117, 371 N.Y.S.2d 471, 332 N.E.2d 338, *supra*).

Several other grounds are urged for invalidating the statute.

The majority notes that homicide is not the only **crime** which may result in a life sentence in New York and that the statute may apply to many whose predicate convictions are less egregious than are this defendant's. Insofar as that may be so, those cases are not before us. We are required to decide whether the statute is constitutional as applied to this defendant. He, of course, may argue that the statute is unduly restrictive as to him but whether it is unconstitutional when applied to others must await another day (see *New York v. Ferber,* 458 U.S. 747, 767, 102 S.Ct. 3348, 3360, 73 L.Ed.2d 1113; *Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830; *United States v. Raines,* 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524; *People v. Parker,* 41 N.Y.2d 21, 24, 390 N.Y.S.2d 837, 359 N.E.2d 348; *People v. Drayton,* 39 N.Y.2d 580, 385 N.Y.S.2d 1, 350 N.E.2d 377; *People v. Broadie,* 37 N.Y.2d 100, 109, 371 N.Y.S.2d 471, 332 N.E.2d 338, *supra*).

Next, the majority contends that mandatory capital punishment is wanton or arbitrary for a number of reasons: possible unevenness in the application and enforcement of the statute; the chance that the defendant may not be caught; the possibility of a plea bargain to a lesser charge or the possibility that the petit jury may refuse to convict (majority opn., at p. 77, 479 N.Y.S.2d at p. ——, 468 N.E.2d at p. 897). These arguments have been made and rejected before (see, e.g., *Gregg v. Georgia,* 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859, *supra; Proffitt v. Florida,* 428 U.S. 242, 254, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913, *supra; Jurek v. Texas,* 428 U.S. 262, 274, 96 S.Ct. 2950, 2957, 49 L.Ed.2d 929, *supra;* see, also, *Roberts [Stanislaus] v. Louisiana,* 428 U.S. 325, 348–349, 96 S.Ct. 3001, 3013, 49 L.Ed.2d 974 [White, J., dissenting], *supra*).

Finally, the majority urges that the trial should be bifurcated to permit the submission of mitigating

circumstances at a sentencing hearing rather than requiring them to be asserted as defenses at trial. Mandatory sentences are not necessarily unconstitutional, however (see *Rummel v. Estelle,* 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382; *People v. Broadie,* 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338, *supra; Matter of Dodd v. Martin,* 248 N.Y. 394, 398–399, 162 N.E. 293; *People v. Gowasky,* 244 N.Y. 451, 466, 155 N.E. 737), and although bifurcation may be a desirable procedure, it is not required, even in cases less serious than this one, involving murderers who do not kill while serving a life sentence (see *Lockett v. Ohio,* 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, *supra;* ***91** *Gregg v. Georgia,* 428 U.S. 153, 195, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, *supra;* see, *****733** also, ****906** *People v. Davis,* 43 N.Y.2d 17, 34–35, 400 N.Y.S.2d 735, 371 N.E.2d 456, *supra*).

The disagreement in this court, as in the Supreme Court (see, e.g., *Lockett v. Ohio,* 438 U.S. 586, 628–636, 98 S.Ct. 2954, 2985–2977, 57 L.Ed.2d 973 [Rehnquist, J., dissenting in part], *supra; Roberts [Stanislaus] v. Louisiana,* 428 U.S. 325, 356–358, 96 S.Ct. 3001, 3016–3017, 49 L.Ed.2d 974 [White, J., dissenting], *supra*), is the extent to which mitigating factors must be considered by the court or jury before capital punishment may be imposed. The majority hold that mandatory sentencing is not constitutionally permissible even in a case involving a murder by a prisoner serving a life sentence, that there must be a discretionary procedure which leaves the sentencer free to consider all factors mitigating defendant's **crime**. The Supreme Court has not adopted that rule. Indeed, the court has scarcely been able to gather a majority for the rule that the sentencer must consider any relevant mitigating factors in cases involving persons not serving a life sentence who are convicted of murder. It did so only once, in a division of the court that spoke more to the kinetics of the collegial decision-making process than certainty in the law (see *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, *supra*). Surely, considering this state of the law defendant has not carried his burden of proving that the statute is unconstitutional and this court should not declare it so.

There is a great temptation for Judges to tinker with statutes to satisfy their own likes. Many, if given the opportunity to do so, might abolish capital punishment altogether or create a different sentencing procedure. But respect for fundamental rules of separation of powers, our positions as appointed Judges and the legislators' roles as the elected representatives of the people, requires that we accept the legislative will. We must take the statute as we find it and interpret it according to existing constitutional standards. This statute meets those standards, at least defendant has not met his burden of establishing otherwise, and we should not "substitute [our] judgment for that of the Legislature as to wisdom and expediency of the legislation" (*People v. Davis,* 43 N.Y.2d 17, 30, 400 N.Y.S.2d 735, 371 N.E.2d 456, *supra*).

COOKE, Chief Judge (dissenting in part).

I respectfully dissent in part.

I would affirm the judgment of conviction and sentence imposed. There is no disagreement with the proposition ***92** that defendant's guilt was established beyond a reasonable doubt in a trial free of reversible error. I cannot agree, however, that section 60.06 of the Penal Law, entitled "Authorized disposition; murder in the first degree," is unconstitutional.

As recognized in the other writings, we must approach the constitutional issue with an acceptance that the State statute in question carries with it a strong presumption of constitutionality, that it should be stricken as unconstitutional only as a last resort, and that courts may not substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation (*People v. Davis,* 43 N.Y.2d 17, 30, 400 N.Y.S.2d 735, 371 N.E.2d 456, cert. den. 435 U.S. 998, 98 S.Ct. 1653, 56 L.Ed.2d 88). Furthermore, the question of constitutionality is a **legal** issue separate and apart from the topic of whether the statute, granted it is constitutional, is wise or advisable, which is a legislative responsibility (*id.,* at p. 23, 400 N.Y.S.2d 735, 371 N.E.2d 456).

New York's provisions for the **death penalty** set forth in sections 60.06 and 125.27 of the Penal Law are to be read together (see *People v. Davis,* 43 N.Y.2d 17, 29, 400 N.Y.S.2d 735, 371 N.E.2d 456, *supra*). Section 60.06 of the Penal Law provides that "[w]hen a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to **death**." The

relevant components of the first-degree-murder statute (Penal Law, § 125.27) provide: "A person is guilty of murder in the first degree when: 1. With intent to cause the **death** of another person, he causes the **death** of such person; and (a) ****907** *****734** * * * (iii) at the time of the commission of the **crime**, the defendant was confined in a state correctional institution * * * upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life * * * and (b) [the] defendant was more than eighteen years old at the time of the commission of the **crime**." Certain affirmative defenses, further limiting the scope of the category for conviction of first-degree murder, are listed in subdivision 2 of the section.

It is clear that a majority of the Supreme Court now hold that, generally, a **death** **penalty** statute, to be constitutional, must permit consideration of, " '*as a mitigating factor,* any aspect of a defendant's character or record and ***93** any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than **death**' " (*Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, quoting *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 [emphasis in original]).

There is a legitimate exception to this general rule, which is embodied in the New York statute. As set forth by Judge Simons, the Supreme Court plurality in *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 referred to "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender" (at p. 287, n. 7, 96 S.Ct. at p. 2983, n. 7). Although the **death** sentences imposed there were set aside, the plurality was careful to point out that no opinion was expressed regarding the constitutionality of a mandatory **death** **penalty** statute limited to such a narrow category of homicide (*id.*). Such a reservation was also noted in *Lockett v. Ohio,* 438 U.S. 586, 604, n. 11, 98 S.Ct. 2954, 2964, n. 11, 57 L.Ed.2d 973 [1978], *supra,* and in *Roberts (Harry) v. Louisiana,* 431 U.S. 633, 637, n. 5, 97 S.Ct. 1993, 1995, n. 5, 52 L.Ed.2d 637 [1977]). In *Roberts (Stanislaus) v. Louisiana,* 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 [1976], the plurality observed that "a prisoner serving a life sentence presents a unique problem that may justify such a law" (at p. 334, n. 9, 96 S.Ct. at p. 3006, n. 9; see, also, *Woodson v. North Carolina,* 428 U.S. 280, 292, n. 25, 96 S.Ct. 2978, 2985, n. 25, 49 L.Ed.2d 944 [1976], *supra; Gregg v. Georgia,* 428 U.S. 153, 186, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 [1976]; and *People v. Davis,* 43 N.Y.2d 17, 34, n. 3, and at p. 43, 400 N.Y.S.2d 735, 371 N.E.2d 456 [Breitel, Ch. J., dissenting], *supra.*).

Capital punishment is an extreme sanction. As Judge Simons notes, it has been declared as "suitable to the most extreme of **crimes**" (see *Gregg v. Georgia,* 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859, *supra*). "The value of capital punishment as a deterrent of **crime** is a complex factual issue the resolution of which properly rests" with the Legislature, which can evaluate the results of statistical studies in terms of conditions prevalent in the State and with a flexibility of approach that is not available to the courts (*id.,* at p. 186, 96 S.Ct. at p. 2931). The further presumption, that the Legislature has investigated for and found facts necessary to support the legislation (*I.L.F.Y. Co. v. Temporary State Housing Rent Comm.,* 10 N.Y.2d 263, 269, 219 N.Y.S.2d 249, 176 N.E.2d 822), should not be disregarded. Courts should not substitute their social beliefs and values for those of the Legislature (*Ferguson v. Skrupa,* 372 U.S. 726, 730, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93). There should be and need be no such substitution here.

***94** It cannot be said that there is no rationale to justify the Legislature's imposition of the extreme sanction where a defendant intended to cause the **death** of a person and did cause the **death** of that person, where at the time of commission defendant was over 18 years of age, and where he or she was confined in a State correctional institution serving a sentence for an indeterminate term the minimum of which was at least 15 years and the maximum of which was life (Penal Law, § 125.27, subd. 1, par. *****735** ****908** [a], cl. [iii]).[*] The need for discipline in our State correctional institutions is urgent and obvious. The legislative prerogative and prescription of a deterrent limited to this "narrow category" in question, as further circumscribed by the statutory defenses, is compatible with the absolute necessity for order in State correctional institutions. At least, the Legislature could so find.

Although I arrive at the same result, I do not join in the dissent of Judge Simons, however, because one of its bases

takes root in the affirmative defenses recited in the Penal Law. These are defenses, not mitigating circumstances. This court has already pointed out the difference: such defenses "relate to guilt or innocence whereas a mitigating factor may be of no significance to a determination of criminal culpability", and "statutory defenses alone do not take the place of a distinct consideration of mitigating factors" (*People v. Davis,* 43 N.Y.2d 17, 34, 400 N.Y.S.2d 735, 371 N.E.2d 456, *supra*). "[W]hile there may be some visual or empirical satisfaction derived from counting and generally comparing the New York defenses with the mitigating factors indorsed by the Supreme Court, the fact is that these defenses do not require consideration of the character and record of the **individual** in respect to his sentence or punishment * * * New York's law does not permit a jury which has rejected these defenses and has found a defendant guilty of murder in the first degree to then mitigate the punishment by resurrecting the defenses" (*id.,* at pp. 35, 36, 400 N.Y.S.2d 735, 371 N.E.2d 456). For affirmance, we cannot rely on a statutory provision for mitigating circumstances, because there is none, and so, in that respect, the ***95** statute does not comply with the general rule enunciated by the Supreme Court (see *Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, *supra; Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973, *supra*). This case, however, falls under an exception to that general rule as provided in the specified New York statute.

JONES, WACHTLER and MEYER, JJ., concur with KAYE, J.

SIMONS, J., dissents in part and votes to affirm in a separate opinion in which JASEN, J., concurs.

COOKE, C.J., dissents in part and votes to affirm in another dissenting opinion.

Judgment modified and case remitted to Supreme Court, Dutchess County, for resentencing in accordance with the opinion herein and, as so modified, affirmed.

All Citations

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Footnotes

1 Defendant was actually given three consecutive sentences of 25 years to life, but they were imposed under section 70.30 of the Penal Law as it existed before the 1978 amendment (L.1978, ch. 481, § 24), and therefore merged into a single 25-year-to-life term.

2 The testimony of the remaining experts, both for the prosecution and for the defense, was substantially similar to that of Drs. Levine and Luntz, respectively.

3 "PC," denoting "Protective Custody," refers to the inmates.

4 In a noncapital case, "[t]he power to review a discretionary order denying a motion to vacate judgment upon the ground of newly discovered evidence ceases at the Appellate Division." (*People v. Crimmins,* 38 N.Y.2d 407, 409, 381 N.Y.S.2d 1, 343 N.E.2d 719.) Even in a capital case, this court has been most reluctant to substitute its discretion "to overturn the lower courts' exercise of discretion in denying a motion for a new trial upon the ground of newly discovered evidence." (*Id.,* at p. 416, 381 N.Y.S.2d 1, 343 N.E.2d 719.)

5 The People urge that defendant has no standing to attack the statute on this basis because he has not actually shown any mitigating circumstances, and the statute must be evaluated as applied to him. Where the statute is attacked because it affords no opportunity to show mitigating circumstances, a defendant can hardly be denied review for failure to show any. It would be nothing short of outrageous to put a defendant to **death** because his counsel failed to make an offer of proof of mitigating circumstances, when the statute did not permit the sentencer to consider any mitigating circumstances. Moreover, **death** **penalty** statutes have been reviewed without a specific showing by defendant that the constitutional defects actually prejudiced him. (See, e.g., *Roberts [Stanislaus] v. Louisiana,* 428 U.S. 325, 96 S.Ct. 3001; 49 L.Ed.2d 974; *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; and *People v. Davis,* 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456.)

6 In the Supreme Court's most recent decision on the subject, *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, the majority did not perpetuate the reservation as to life-time inmates.

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7 While the dissent notes that evaluating deterrence and alternate punishments is for the Legislature, not the courts, such considerations are hardly to be ignored by us in light of the Supreme Court's reference to deterrence as a basis for its persistent "lifer" reservation (see *Lockett v. Ohio,* 438 U.S. 586, 604, n. 11, 98 S.Ct. 2954, 2964, n. 11, 57 L.Ed.2d 973). In order to determine the proper application of that reservation, it is obviously necessary to consider the basis on which it rests.

8 For example, mental defect short of insanity (see, e.g., *Lockett v. Ohio,* 438 U.S. 586, 612–613, 98 S.Ct. 2954, 2968–2969, 57 L.Ed.2d 973), which is not specified in New York's statute, might be a mitigating circumstance. While the dissent takes comfort from the Supreme Court's approval in *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 of a **death penalty** statute which contained a limited list of mitigating factors, the court later made clear that, in approving the Florida statute, "six Members of this Court assumed * * * that the range of mitigating factors listed in the statute was not exclusive" (*Lockett v. Ohio,* 438 U.S. 586, 606, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, *supra*). Similarly, the Court's approval of the Texas statute in *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 rested on the conclusion of three Justices that the statute was broadly interpreted so as to permit the sentencer to consider whatever mitigating circumstances the defendant might be able to show. (*Lockett v. Ohio,* 438 U.S. 586, 607, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973, *supra.*)

9 Our conclusion is consistent with the results reached by other courts. (See *Shuman v. Wolff,* 571 F.Supp. 213, 217, app. pending ["(i)mposing mandatory capital punishment for the life term prisoner who intentionally kills is to consider but one aspect of the character and record of the **individual** while ignoring totally the circumstances of the **crime** for which he is being sentenced"]; *State v. Cline,* 121 R.I. 299, 303, 397 A.2d 1309 ["a **death** sentence imposed by a sentencer who is not statutorily authorized to consider mitigating circumstances is a nullity"]; *Graham v. Superior Ct.,* 98 Cal.App.3d 880, 888, 160 Cal.Rptr. 10 [a mandatory **death penalty** "is not sufficiently narrow to encompass a consideration of mitigating factors required for a finding of constitutionality"].)

1 At oral argument counsel could recall no similar New York homicide and only one foreign case has been called to our attention (see *State v. Cline,* 121 R.I. 299, 397 A.2d 1309).

2 These elements distinguish this subdivision of section 125.27 from the subdivision invalidated in *People v. Davis,* 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456. The *Davis* decision actually involved two appeals, one from a conviction for killing a police officer, and the other for killing a correction officer. Defendant Davis' judgment of conviction was modified because of a failure of proof. In the companion *James* case, defendant was convicted of murdering a correction officer and sentenced to **death**. We declared the subdivision involved in that case unconstitutional because, unlike this subdivision, it failed to take into account the character of the offender (Penal Law, § 125.27, subd. 1, par. [a], cl. [ii]).

* As noted in the majority writing, defendant had been sentenced to three consecutive sentences of 25 years to life, once for kidnapping and twice for murder (see *People v. Smith,* 59 N.Y.2d 156, 160, 162, 163, 464 N.Y.S.2d 399, 451 N.E.2d 157) imposed under former section 70.30 of the Penal Law. These sentences merged into a single 25-year-to-life term.

