Note: Tichnell v. State - Maryland's Death Penalty: the Need for Reform
Note

TICHNELL v. STATE—MARYLAND'S DEATH PENALTY: THE NEED FOR REFORM

The Maryland death penalty statute requires the sentencing authority to consider and to weigh statutorily defined mitigating and aggravating circumstances relating to the defendant's background and to the nature of the criminal conduct.1 In Tichnell v. State (Tichnell I),2 the Court of Appeals, in its first review of a capital sentence imposed under the 1978 revision of the Maryland death penalty statute,3 announced in dictum that the "Maryland statutory scheme for imposition of the death penalty" was constitutional on its face.4 Specifically, in the absence of clear statutory direction, the court concluded that the state bears "the risk of nonpersuasion... with respect to whether the aggravating factors outweigh the mitigating factors."5 The court's dictum in its review of Tichnell's second death sentence (Tichnell II),6 however, suggested that the defendant bears this risk, highlighting practical as well as constitutional difficulties with the statutory construction in Tichnell I. The significance of these questions intensifies as the number of death penalties sought by the state increases.7

1. MD. ANN. CODE art. 27, § 413(d), (g), (h) (1982).
2. 287 Md. 695, 415 A.2d 830 (1980) [hereinafter cited as Tichnell I].
4. 287 Md. at 729, 415 A.2d at 848. Because Tichnell's death sentence was vacated and remanded for resentencing on another ground, see infra note 33 and accompanying text, this conclusion was unnecessary to the disposition of the case.
5. Id. at 730, 415 A.2d at 849. See infra note 34 and accompanying text.
7. According to the information compiled by the Maryland Department of Public Safety and the Correctional Services Bureau of Statistics, as of June 16, 1983 there were 12 persons on death row in Maryland. Statistics compiled by the State Public Defender's Office indicate that the rate at which State's Attorney's Offices in the twenty-four Maryland jurisdictions sought the death penalty varies widely. The death penalty is sought in all the qualifying cases in one jurisdiction and in none of the qualifying cases in another jurisdiction. The rate at which the death penalty is actually imposed when sought also varies widely—from 50% to 0%. Appendix to Supplemental Brief of Appellant at app. 1, Calhoun v. State, No. 129 Sept. 1981 and No. 5 Sept. 1982. (figures effective Oct. 9, 1981). Although 41 capital proceedings have been held under the 1978 statute as of June 22, 1983, it is impossible to compute similar current percentages because figures for the number of qualifying cases in each jurisdiction are unavailable. Telephone interview with Gary Christopher, Assistant Public Defender, Maryland State Public Defender's Office (June 22, 1983).
At the weighing step under the Maryland statute, the standard and burden pose distinct, albeit related, problems. A strong conceptual link exists between the burden and standard of proof. Both influence the probability of the outcome and the risk of error. Nevertheless, it is helpful, although not always possible, to analyze them separately. This Note argues that Maryland's ambiguous burden allocation, coupled with the inadequate standard of proof, increase the risk of error beyond constitutionally acceptable limits for such a "qualitatively different" punishment. At the critical final weighing step in capital sentencing, therefore, the state should bear the burden of proving that the aggravating circumstances outweigh the mitigating beyond a reasonable doubt. To insure this result, the current statute should be amended accordingly.

I. THE MARYLAND DEATH PENALTY STATUTE

The development of the Maryland death penalty statute illustrates the continual efforts of the Court of Appeals and the General Assembly to comply with the shifting mandates emanating from the Supreme Court. Originally, Maryland's death penalty statute gave the trial court absolute discretion to impose the death penalty unless the jury specified "without capital punishment" in the verdict. Following Furman v. Georgia, which appeared to prohibit all sentencing discretion, the Court of Appeals struck down that statute, concluding that...
"the death penalty is unconstitutional when its imposition is not mandatory." In response, the General Assembly approved a mandatory death penalty, which was automatically imposed upon conviction of a few narrowly defined first degree murders. Subsequently, conforming with Woodson v. North Carolina and Roberts v. Louisiana, which held mandatory death sentencing schemes unconstitutional, the Court of Appeals held that Maryland's mandatory statute was unconstitutional. The present statute—like those schemes approved by the Supreme Court in Gregg v. Georgia, Proffitt v. Florida, and Jurek v. Texas—provides for: bifurcated proceedings to determine guilt separately from sentencing, establishment of at least one aggravating circumstance and "weighing" mitigating circumstances against aggravating circumstances, and mandatory appellate review.

The crux of this scheme is the stage when aggravating and mitigating circumstances must be weighed against one another. During the sentencing phase, after the defendant's conviction for first degree murder, the statute directs "the court or jury . . . first [to] consider whether, beyond a reasonable doubt, any of [ten] aggravating circumstances exist." If none exist, the defendant's "sentence shall be imprisonment for life." Alternatively, if the sentencing authority finds that one or

15. 428 U.S. 325 (1976) (plurality opinion).
20. MD. ANN. CODE art. 27, § 413(a).
21. Id. § 413(d), (f), (h).
22. Id. § 414(a).
23. Id. § 413(h) provides:
   (h) Weighing mitigating and aggravating circumstances—(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.
   (2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.
   (3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.
24. Id. § 413(d).
25. Id. § 413(f).
more aggravating circumstances exist, it "shall then consider whether based upon a preponderance of the evidence, any . . . mitigating circumstances exist."26 Presumably, if no mitigating circumstances exist, imposition of the death penalty follows automatically. On the other hand, if any mitigating circumstances are present, the court or jury "shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances."27 If so, "the sentence shall be imprisonment for life."28 If not, "the sentence shall be death."29 Although the statutory language specifies the respective standards of proof necessary to establish and to weigh aggravating and mitigating circumstances, it is silent regarding who bears the burden of persuasion at each step.30

II. AMBIGUITY SURROUNDING THE BURDEN OF PROOF

A. Tichnell I

Richard Danny Tichnell was convicted by a jury of wilful, deliberate, and premeditated murder, storehouse breaking, and grand larceny.31 After the verdict, Tichnell waived his statutory right to jury sentencing and the trial court imposed the death sentence on the murder conviction.32 An automatic review by the Court of Appeals followed.

Although it decided the appeal on other grounds,33 the court found that as to the existence of aggravating circumstances, "the State bears both the risk of nonpersuasion and nonproduction."34 Additionally, the court concluded that the statute "does not require the prosecution to disprove the existence of mitigation, thus placing on the accused the risk of nonproduction and nonpersuasion."35 Because aggravating circumstances constitute elements of the offense of capital murder, the

26. Id. § 413(g).
27. Id. § 413(h)(1).
28. Id. § 413(h)(3).
29. Id. § 413(h)(2). According to this language, if mitigating and aggravating circumstances are in equipoise, a death sentence results.
30. See Tichnell v. State, 287 Md. at 730, 415 A.2d at 848.
31. Id. at 699-700, 415 A.2d at 833.
32. Id.
33. Id. at 743-44, 415 A.2d at 855. Ultimately, the court concluded that the death sentence was imposed "under the influence of an 'arbitrary factor'." Tichnell had apparently relied, in waiving his right to jury sentencing, on a comment made by the trial judge in chambers. Id.
34. Id. at 730, 415 A.2d at 848.
35. Id.
first finding is clearly correct. Furthermore, the court's second finding seems unassailable under *Patterson v. New York,* although arguably the defendant should not be required to bear any burdens of proof in a death penalty case. In *Patterson,* the Supreme Court held that once the prosecution had proved every fact necessary to constitute the offense, it was not required to disprove beyond a reasonable doubt the existence of every fact constituting a mitigating circumstance or affirmative defense. Neither *Patterson* nor any other Supreme Court case, however, addressed the procedural issues of whether the defendant or the state bears the burden of proof in the final weighing step in capital sentencing and by what standard of proof.

The Court of Appeals in *Tichnell I* did consider the burden and

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38. The defendant in *Lockett v. Ohio* raised that issue, but the plurality did not decide it. 438 U.S. 586, 609 n.16 (1978).
39. 432 U.S. at 210. Under a New York statute, a person was guilty of second-degree murder if he intended to cause, and in fact did cause, the death of another person. Additionally, a defendant could reduce his crime to manslaughter by proving by a preponderance of the evidence as an affirmative defense that he "acted under the influence of extreme emotional disturbance." Because he could not convince the jury that he acted under an emotional disturbance, Patterson was convicted of second-degree murder. The Supreme Court affirmed the conviction, reasoning that New York was simply following the traditional rule that required the defendant to prove emotional disturbance. Furthermore, disproving the existence of mitigating circumstances "would be too cumbersome, too expensive, and too inaccurate." *Id.* at 209.

In his dissent, Justice Powell took a different view of traditional law and noted that New York's treatment of extreme emotional disturbance as an affirmative defense operated like the Maine law struck down in *Mullaney v. Wilbur,* which required a defendant to prove that he acted in the heat of passion to rebut the presumption of malice. *Id.* at 220. *See infra* notes 101-11 and accompanying text. As such, the majority's decision was based "on distinctions in language that are formalistic rather than substantive." *Id.* at 221. Furthermore, Justice Powell remarked that the majority's test would allow "a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime." *Id.* at 223. Justice Powell's dissent is persuasive: *Mullaney* and *Patterson* have been called "surprising, if not contradictory." *C. McCormick, McCormick's Handbook on the Law of Evidence* § 341 (2d ed. 1972 & Supp. 1981).

Thus, under *Patterson,* a State can require a defendant to prove mitigating circumstances which essentially function as affirmative defenses. One significant factor distinguishes *Patterson* and *Tichnell I,* however. The consequence of proving the affirmative defense of extreme emotional disturbance would have reduced Patterson's prison term by several years. The consequence of proving mitigating circumstances under the Maryland statute would mean the difference between life and death.

40. In *Proffitt v. Florida,* 428 U.S. 242, 249 (1976), the Supreme Court appeared to approve implicitly a "clear and convincing" standard. That standard, however, refers to the degree of certainty the trial judge must attain under the Florida statute to impose death following the jury's advisory recommendation of life imprisonment.
standard arising at the weighing stage. Tichnell had argued that the statute violated due process because it did not require the prosecution "to assume the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh[ed] mitigating circumstances." 41 The court concluded that "the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating outweigh the mitigating" 42 and so met the requirements of due process.

Policy as well as constitutional considerations support this outcome on the burden issue as the better reading of ambiguous statutory language. Although the statute does not expressly allocate the burden of persuasion in the weighing process, the court's construction of this statutory omission upheld the statute's constitutionality. Additionally, it was consistent with an overall statutory scheme which, like criminal law generally, places a heavier burden on the state in capital proceedings. For example, the prosecution bears the burden of proving beyond a reasonable doubt both first degree murder and the existence of aggravating circumstances. Furthermore, the state should bear the burden when it seeks to change the status quo by executing a defendant. 43

The court's construction is supported more by sound policy than by the statutory language. At no point does the statute require the sentencing authority to determine whether the state has proved that aggravating outweigh mitigating circumstances. Nevertheless, the court concluded that "[b]ecause the state is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors." 44 By contrast, section 413(h) directs the court or jury to "determine whether . . . the mitigating circumstances outweigh the aggravating circumstances." 45 This language, repeated in other subsections, 46 implies that the defendant, who must prove that mitigating circumstances exist in the first place, must also show that mitigating outweigh aggravating. Thus, to reach its conclusion, the court subtly revised the statutory language by reversing the order of aggravating and mitigating.

To be sure, courts often manipulate statutory language under the guise of artful construction to uphold a statute's constitutionality. Nev-

41. 287 Md. at 729, 415 A.2d at 849.
42. Id. at 730, 415 A.2d at 848.
43. C. McCormick, supra note 39, at § 337.
44. 287 Md. at 730, 415 A.2d at 848.
46. See Md. Ann. Code art. 27, §§ 413(j)(3), (4), 414 (e)(3); Md. R. P. 772A(d) Section III.
ertheless, such tactics can only imperfectly remedy ambiguous language. Dictum in *Tichnell II* illustrates the perils of this strategy.

**B. Tichnell II**

In *Tichnell II*, the court reviewed Tichnell's second death sentence and again vacated the death penalty and remanded for resentencing. Discussing the final step—the weighing of aggravating and mitigating circumstances—the court described a process consistent with the statutory language but inconsistent with its opinion in *Tichnell I*:

"To persuade the jury to impose a life rather than a death sentence, Tichnell wanted to convince it that the mitigating circumstances outweighed the aggravating circumstances." This dictum implies that the defendant bears the burden of proof, and cannot merely weaken the state's case, but must show affirmatively that he does not deserve the death penalty.

Thus, trial courts, attempting to instruct juries or to weigh aggravating and mitigating circumstances themselves, must reconcile the incompatible language in *Tichnell I*, which burdens the state, with that in *Tichnell II*, which appears to burden the defendant, in the weighing process. The statute itself, directing the sentencing authority to determine "whether . . . the mitigating circumstances outweigh the aggravating circumstances," supports the dictum in *Tichnell II*. Although the better, and constitutional, reading would burden the state, the statutory language, combined with the dicta in *Tichnell I* and *II*, foster ambiguity concerning who bears the risk of nonpersuasion at the final weighing stage in capital sentencing. Actual practice in death cases indicates that trial courts require the defendant to persuade the sentencing authority that the nature and quantity of mitigating circumstances militate against a capital sentence.

**III. Practical and Conceptual Difficulties with the Standard of Proof**

Regardless of who bears the burden of persuasion, the standard of proof specified in the statutory weighing process poses practical difficulties in addition to procedural due process issues. The preliminary practical, as well as theoretical, problem in the weighing process is that
the factfinder may weigh the quantity of evidence used to establish the existence of the circumstances rather than balancing the quality—heinousness or mitigating effect—of those circumstances against each other. 50 If so, it is hard to see how mitigating factors established by a mere preponderance of the evidence can ever outweigh aggravating circumstances proved beyond a reasonable doubt, the highest standard of proof. 51 Another problem is that the factfinder may consider the number of aggravating circumstances in proportion to the number of mitigating circumstances. 52 Even assuming that the state bears the burden of proving that aggravating circumstances outweigh mitigating factors, such possible faulty applications of the statute increase the likelihood of a death penalty if the sentencing authority may impose it merely by finding that it is "as likely as not," 53 or in other words, by a preponderance, that aggravating outweigh mitigating circumstances.

Theoretically at least, it appears that statutorily defined aggravating circumstances, established beyond a reasonable doubt, should usually outweigh mitigating circumstances, established by a mere preponderance, resulting in an almost automatic death penalty. 54 Obviously, this is not the case; the state does not obtain the death penalty in every prosecution in which it is sought. Even assuming that the


51. State v. Brown, 607 P.2d 261, 280 (Utah 1980) (Maughan, J., concurring and dissenting with comment). The Utah statute was silent on both the burden and standard in the weighing process. The majority reaffirmed that, in capital sentencing, the prosecution bore the burden of proving that aggravating circumstances outweighed mitigating, but failed to elucidate a standard of proof. Id. at 270. Justices Maughan and Stewart assumed that this lack of specification implied a mere preponderance (the express standard under the Maryland statute) and concluded that standard was insufficient to insure due process of law under the fourteenth amendment. See id. at 272 (Stewart, J., concurring in the judgment).

52. In State v. Jones, the prosecution for the Stephanie Ann Roper rape-murder, the jury concluded that nine mitigating factors were sufficient to outweigh two aggravating circumstances. The mitigating circumstances included findings that the defendant was remorseful, had turned to religion, was unlikely to be a threat to society, was impaired by drugs and alcohol at the time of the murder, lacked parental guidance, and his execution would cause suffering to his family. Baltimore Sun, Oct. 16, 1982, at B1, col. 1.

The jury may be less likely to resort to purely mathematical resolution when the numbers are closer. See Tichnell v. State, 290 Md. at 52, 427 A.2d at 995 (three mitigating circumstances insufficient to outweigh two aggravating circumstances); Pools v. State, 295 Md. 167, 200, 453 A.2d 1218, 1235 (1983) (Murphy, C.J., concurring and dissenting) (jury could have concluded that one aggravating circumstance "was not outweighed by the [three] piddling mitigating circumstances found to exist").


factfinder attempts correctly to balance the circumstances, however, other factors render the decisional process itself problematic.

Realistically, the factfinder does not impose the death penalty in a vacuum, but carries into the sentencing determination personal values and opinions concerning, for example, crime and capital punishment. In addition, in an especially gruesome case, the factfinder may fear the defendant's possible parole or may respond emotionally to the facts. Thus, a myriad of factors figure in the ultimate determination of whether the death penalty is the appropriate punishment. Some of these factors are inseparable from the sentencing process because the decision to impose a death sentence is essentially a moral one: "Should a defendant, who is guilty of murder, live or die for that crime[?]" With good reason, the Supreme Court rejected the exercise of unbridled discretion in capital sentencing. Nevertheless, it is neither possible nor desirable to extract totally all moral or value-based elements from that determination. Whether aggravating circumstances outweigh mitigating circumstances, rendering the death penalty appropriate, cannot be determined by the same mental processes or with the same moral detachment "by which direct and circumstantial evidence are evaluated for determining such questions as who entered an intersection first" because the moral significance of these determinations is fundamentally different.

Moreover, the weighing process used to determine a factual proposition does not adapt easily to capital sentencing. For example, to prove that the defendant is guilty of first degree murder, the state must establish, as a matter of fact, that the killing was intentional. Usually the defendant will introduce evidence that the killing was unintentional. All the evidence addresses the same issue—intent. In the sentencing process, aggravating and mitigating circumstances are established in much the same fashion as guilt is determined. When it weighs aggravating and mitigating circumstances, however, the sentencing authority contemplates not evidence relating to the same issue, but diverse and unrelated facts.

The youth of the defendant, or the lack of prior criminal activity, cannot be "weighed" in any meaningful sense against the aggra-

55. Prosecutorial discretion in the initial decision to seek the death penalty is one factor. See supra note 7. Additionally, the relative quality of the prosecution and defense counsel may influence the outcome. See News American, Feb. 4, 1983 at 1A.
vating facts. How does one find that the "fact" that the age of the defendant, whether 18 or 30 years, does or does not preponderate against an aggravating circumstance? How does one make such a determination if the defendant had a shoplifting conviction or embezzlement conviction ten years previous to the murder? To speak of weighing those factors against the aggravating circumstances is to employ an appealing but meaningless metaphor which in fact gives the mind no guidance in resolution of such an overwhelmingly important question. 60

Thus, statutorily prescribed safeguards, as a practical matter, can only imperfectly focus, and not eliminate preexisting discretion in capital sentencing. Moreover, conceptual difficulties preclude balancing diverse and unrelated facts in a truly meaningful and accurate way. Although eliminating discretion from capital sentencing is impossible, guiding and limiting discretion to the maximum possible extent is an attainable goal of capital statutes. In the context of capital sentencing, requiring the aggravating to outweigh the mitigating circumstances beyond a reasonable doubt would most effectively limit the factfinder's discretion, a limitation constitutionally required under Furman v. Georgia. 61 Further, that standard would most clearly convey the importance of insuring that the totality of the aggravating circumstances so overwhelm the mitigating circumstances as to compel the conclusion that the death penalty is appropriate. Analysis of analogous Supreme Court cases suggests that optimum assurance that the death penalty is appropriate is not only desirable, but constitutionally required.

IV. PROCEDURAL DUE PROCESS AND THE DEATH PENALTY

In Gardner v. Florida, 62 a plurality opinion, the Supreme Court found that sentencing procedures in a capital case "must satisfy the requirements of the Due Process Clause." 63 Although primarily focusing on the defendant's inability to confront and to discredit an undisclosed report, 64 the Court also recognized a fundamental difference between the death penalty and other punishments 65 and that "the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." 66 A correspondingly higher de-

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60. State v. Brown, 607 P.2d at 275 (Stewart, J., concurring in the judgment).
61. 408 U.S. 238 (1972).
63. Id. at 358. See also Bullington v. Missouri, 451 U.S. 430 (1981) (death sentencing proceeding like trial on question of guilt or innocence).
64. Id. at 356.
65. Id. at 357.
66. Id. at 357-58.
mand for sentencing reliability accompanies these qualitative differences.\textsuperscript{67} \textit{Gardner} creates a bridge between the eighth and fourteenth amendments. Although the death penalty may not constitute cruel and unusual punishment per se for the crime of first degree murder,\textsuperscript{68} insufficient procedural safeguards in a capital case may transform that sentence into a deprivation of life without due process.\textsuperscript{69}

Since \textit{Gardner}, the Court has heightened its scrutiny of capital proceedings under the due process clause and has demanded that state supreme courts do the same.\textsuperscript{70} Although the Supreme Court has never articulated expressly the standard of "super due process" for capital punishment, courts do employ such a process.\textsuperscript{71} Therefore, Supreme Court decisions on burden and standard of proof issues in non-capital sentencing proceedings and other contexts represent minimum procedural safeguards illustrative but not dispositive in capital sentencing.

A. Mathews v. Eldridge

In \textit{Mathews v. Eldridge},\textsuperscript{72} a recipient of Social Security disability benefits challenged on due process grounds the termination of those benefits without prior evidentiary hearing. Deciding that an evidentiary hearing was not required,\textsuperscript{73} the Supreme Court concluded that whether any procedure is constitutionally sufficient requires analysis of three specific factors:

First, the private interest that will be affected by the official action;

\begin{itemize}
  \item 69. \textit{Compare} plurality opinion of Justice Stevens in \textit{Gardner}, 430 U.S. at 358 ("it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause") \textit{with} Justice Rehnquist's dissent, \textit{id.} at 371 (use of particular sentencing procedures in death case, never previously found to violate due process, cannot convert death sentence into a cruel and unusual punishment).
  \item 70. \textit{See Eddings v. Oklahoma}, 455 U.S. 104 (1982) (sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence such as family history and emotional disturbance); \textit{Bullington v. Missouri}, 451 U.S. 430 (1981) (double jeopardy prohibited death sentence at second sentencing proceeding after jury had sentenced defendant to life imprisonment at first proceeding); \textit{Beck v. Alabama}, 447 U.S. 625 (1980) (death penalty may not be imposed when jury, in returning a guilty verdict for a capital offense, was not allowed to consider a lesser included offense); \textit{Godfrey v. Georgia}, 446 U.S. 420 (1980) (plurality opinion) (statutorily defined aggravating circumstance must not be so broadly and vaguely worded as to promote discriminatory and standardless sentencing); \textit{Lockett v. Ohio}, 438 U.S. 586 (1978) (plurality opinion) and \textit{Bell v. Ohio}, 438 U.S. 637 (1978) (plurality opinion) (sentencer cannot be precluded from considering any evidence as a mitigating circumstance).
  \item 71. \textit{See Radin, supra} note 9, at 1143.
  \item 72. 424 U.S. 319 (1976).
  \item 73. \textit{Id.} at 349.
\end{itemize}
second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.  

In subsequent cases, the Court established that these three factors must be balanced to determine the appropriate standard of proof under the due process clause. Analysis of these factors in the context of capital sentencing suggests that only the beyond a reasonable doubt standard of proof is sufficient at the final weighing stage.

1. Private Interests—Whether the threatened loss deserves nearly absolute certainty from the factfinder prior to deprivation depends “on both the nature of the private interest threatened and the permanency of the threatened loss.” Obviously, the defendant sentenced to death is “condemned to suffer [a] grievous loss.” The Supreme Court has recognized consistently that “death is a different kind of punishment from any other which may be imposed in this country . . . . From the point of view of the defendant, it is different in both its severity and its finality.” Because the potential deprivation is singularly enormous and irreversible, a defendant’s interest in his life is even more compelling than his liberty or property interests.

74. Id. at 335. The specific outcome in a given case may be difficult to predict using this test. First, it is impossible to predict the results of a “balancing test” without knowing the personal values of those doing the balancing. In addition, this method of due process is functional and thus case specific rather than systematic. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 502-03 (1978). But see Santosky v. Kramer, 455 U.S. 745, 757 (1982) (“This Court never has approved case-by-case determination of the proper standard of proof. Standards of proof . . . are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.”) (emphasis in original)).


78. Gardner v. Florida, 430 U.S. at 357 (plurality opinion of Stevens, J.); See also Eddings v. Oklahoma, 455 U.S. at 117-18 (O’Connor, J., concurring); Lockett v. Ohio, 438 U.S. at 604 (plurality opinion of Burger, C.J.); Coker v. Georgia, 433 U.S. 586, 598 (1977) (plurality); Gregg v. Georgia, 428 U.S. at 187 (plurality opinion of Stewart, J.); Woodson v. North Carolina, 428 U.S. at 305, (plurality opinion of Stewart, J.); id. at 323 (Rehnquist, J., dissenting).
2. *Risk of Error*—The probability of error is anticipated in any civil or criminal lawsuit, and implicates both individual and societal interests.\(^79\) The different standards of proof symbolize the relative societal value of these interests and communicate to the factfinder, albeit with quantitative imprecision, the degree of confidence that he must have in his conclusion.\(^80\) Furthermore, “[t]he standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”\(^81\) The preponderance of the evidence standard employed in most civil cases requires merely the belief “that the existence of a fact is more probable than its nonexistence”\(^82\) and reflects society’s belief that occasional mistaken judgments for plaintiffs are no worse than occasional mistaken judgments for defendants.\(^83\) Because society is only minimally concerned with the outcome, the parties share the risk of error nearly equally.\(^84\) On the other hand, demanding proof of guilt beyond a reasonable doubt represents societal recognition of the intensity of the criminal defendant’s interests in his life or liberty.\(^85\) As such, that standard signifies society’s efforts to exclude the risk of infringing erroneously on those individual interests by imposing almost the entire risk of error on the prosecution.\(^86\) “The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.”\(^87\)

In a death penalty case, the already existing conviction of first de-

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\(^80\). *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring).


\(^82\). *In re Winship*, 397 U.S. at 371 (Harlan, J., concurring), *quoting* F. James, Civil Procedure 250-51 (1965).

\(^83\). *In re Winship*, 397 U.S. at 371 (Harlan, J., concurring).

\(^84\). Addington v. Texas, 441 U.S. at 423.

\(^85\). The demand for a higher degree of proof in criminal cases has existed since ancient times, but the specific “beyond a reasonable doubt” language did not occur until 1798. C. McCormick, *supra* note 39, at § 341.

\(^86\). Addington v. Texas, 441 U.S. at 423-24. The intermediate clear and convincing standard indicates a sufficiently compelling societal interest to warrant surer protection against erroneous infringement than that provided by the preponderance standard but not so compelling an interest as to demand proof beyond a reasonable doubt. *See* Santosky v. Kramer, 455 U.S. at 769-70 (permanent termination of parental rights); Addington v. Texas, 441 U.S. at 431-32 (involuntary civil commitment); Woodby v. Immigration and Naturalization Serv., 385 U.S. 276 (1966) (deportation); Schneiderman v. United States, 320 U.S. 118 (1943) (denaturalization). *See also* C. McCormick, *supra* note 39, at § 340 (discussing clear and convincing standard).

gree murder, established beyond a reasonable doubt, cannot minimize the risk at the weighing stage. Several aspects of the statutorily prescribed bifurcated proceedings illustrate the separate nature of the conviction and sentencing stages. Although some evidence presented at trial may relate to sentencing, additional evidence distinctly relevant to sentencing, such as mitigating circumstances, is usually presented at the sentencing stage.88 Also, the sentencing authority may be a different entity than the factfinder at trial.89 Proof beyond a reasonable doubt of guilt at one proceeding may have no effect on a different factfinder's certainty of different evidence in a separate proceeding. Additionally, conviction of first degree murder is a necessary but insufficient prerequisite for the death penalty90 because the state seeks to punish not just intentional killing, but the heinousness of that killing. To obtain a capital sentence, the prosecution must prove aggravating circumstances in addition to the elements of first degree murder. The separate sentencing proceeding recognizes the creation of a new risk, the risk of conviction of capital murder. Thus, the reasonable doubt standard already in place at the conviction stage cannot extend protection against error at the separate sentencing stage.91

Other factors that figure in any risk analysis are the severity and the irreversibility of erroneous deprivation.92 Obviously, the death penalty is in a class by itself in those terms. Furthermore, although a death penalty is probably more intently scrutinized for error on appellate review than a prison term, errors or new evidence can materialize after appellate review. The incarcerated defendant can be released once error is established. Life, unlike liberty, cannot be restored.

3. Governmental Interests—In criminal cases, capital punishment furthers societal interests in deterrence of future crimes and symbolic

89. Id. § 413(b).
90. Id. § 412(b).
91. Similarly, other protections, such as the rights to counsel and to confront witnesses, rules of evidence, and appellate review cannot compensate for an inadequate standard of proof. See Santosky v. Kramer, 455 U.S. at 757-58 n.9, where the majority rejected the appeal to evaluate the constitutionality of New York's statutory procedures for terminating parental rights as a "package," and remarked "[i]n the criminal context, . . . . the Court has never assumed that 'strict substantive standards or special procedures compensate for a lower burden of proof . . . . '" See also J. Nowak, R. Rotunda & J. Young, supra note 74, at 503-04 ("Perhaps the most important safeguard which is implied by the due process clause in criminal trials is the requirement that no one be found guilty of a criminal offense unless the charge has been proved beyond a reasonable doubt.") (citing Mullaney v. Wilbur, 421 U.S. 684 (1975)).
compensation for the victim and the community. Capital punishment accomplishes the latter purpose, retribution, by taking the defendant's life for the victim's. But, society seeks not only to punish the guilty but to protect the innocent. Justice Harlan presumed a fundamental societal value "that it is far worse to convict an innocent man than to let a guilty man go free." Although this assertion may not reflect current popular sentiment, surely society would only sanction a death sentence imposed under rigorous and reliable procedures designed to ensure that death was warranted in a given case. The beyond a reasonable doubt standard of proof would respect society's deterrent and retributive purposes and foster its confidence that the ultimate criminal penalty was imposed justly.

In addition, the government has a legitimate interest in avoiding the administrative and fiscal burdens that usually accompany additional or substitute procedures. Fiscal concerns are more defensible when the issue is whether an additional procedural safeguard is required at all than when a procedure is already in place and the sole question is the appropriate standard of proof. In the latter case, the only possible increased cost to the state is that of producing more evidence to prove that aggravating outweigh mitigating circumstances. Even this increase need not be substantial, however, because the beyond a reasonable doubt standard reflects the trier's subjective belief in the correctness of his conclusions rather than the quantum of evidence. Thus, "a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." Administrative burdens would be similarly unaffected. Trial courts are experienced in applying and instructing juries in applying the different standards of proof to different facts depending on the nature of the case. Finally, a strongly analogous non-capital sentencing Supreme Court decision illustrates the conceptual link between the burden and standard of proof and compels the conclusion that, to impose the death penalty, the prosecution should bear the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

94. In re Winship, 397 U.S. at 372 (Harlan, J., concurring).
95. Id. at 363-64.
98. C. McCormick, supra note 39, at § 339.
100. Id.
B. Mullaney v. Wilbur

In \emph{Mullaney v. Wilbur},\footnote{421 U.S. 684 (1975).} the Court reaffirmed the constitutional demand, first articulated in \emph{In re Winship},\footnote{397 U.S. 358, 364 (1970).} that the prosecution prove beyond a reasonable doubt every element of a criminal offense. Under Maine law, to reduce his conviction from murder to manslaughter, defendant Wilbur needed to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation and so rebut the presumption that he acted with malice aforethought. The defendant argued that because malice aforethought was an essential element of murder, and the sole distinction between murder and manslaughter, he could not be convicted under a presumption of implied malice or be required to negate malice by proving that he acted in the heat of passion on sudden provocation.\footnote{421 U.S. at 687.} The state contended that \emph{In re Winship} applied only to "fact[s] necessary to constitute the crime"\footnote{Id. at 697.} and not to an issue implicated only after the prosecution had already established beyond a reasonable doubt that the defendant was guilty of at least manslaughter.\footnote{Id.}

Flatly rejecting the state's formalistic interpretation of \emph{Winship}, the Court recognized that criminal justice is "concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."\footnote{Id. at 697-98.} The Court refused to limit \emph{Winship} to its facts, and so to allow a state to circumvent the due process protections under \emph{Winship} by redefining the elements of a crime as factors relating solely to the issue of punishment.\footnote{Id. at 698, 700.} Furthermore, by affirmatively shifting the burden of proof to the defendant, the state had increased the risk of erroneous conviction.\footnote{Id. at 701.} If the defendant failed to establish heat of passion by a preponderance, he could be sentenced for murder even though "the evidence indicate[d] that it [was] as likely as not that he deserve[d] a significantly lesser sentence."\footnote{Id. at 703 (emphasis in original).}

The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaugh-
ter may be of greater importance than the difference between guilt or innocence for many lesser crimes.\textsuperscript{110}

Thus, the Court held that due process required the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation once the defendant had raised the issue.\textsuperscript{111}

Strong analogies exist between the situations under Maine law in \textit{Mullaney v. Wilbur} and under the Maryland death penalty statute construed in \textit{Tichnell I} and \textit{II}. In \textit{Mullaney v. Wilbur}, proving manslaughter—that the killing was unlawful and intentional—was the preliminary requirement for proving murder.\textsuperscript{112} Similarly, proving first degree murder was, and is, the preliminary requirement for capital murder under the Maryland death penalty statute.\textsuperscript{113} As to these convictions, the prosecution bore the burden of proving all the elements of the crime beyond a reasonable doubt. In both cases, however, an additional "element" was necessary to escalate the offense, thus advancing the degree of criminal culpability. In \textit{Mullaney v. Wilbur}, the Supreme Court struck down a state law that required a defendant to rebut the presumption of malice by proving a fact—heat of passion on sudden provocation—by a preponderance of the evidence. Apparently, under \textit{Tichnell II} and perhaps the statute itself, to escape the death penalty, the Maryland defendant must prove that the mitigating circumstances outweigh the aggravating circumstances by a preponderance.\textsuperscript{114} Wilbur needed to reduce his offense from murder to manslaughter; Tichnell needed to reduce his offense from capital to first degree murder.

Under the Maryland statute, this final step, the weighing process, operates as a critical and dispositive element in capital murder. To relegate the weighing of aggravating circumstances against mitigating circumstances to a mere punishment issue ignores the significant differences in the resulting consequences between first degree and capital murder.\textsuperscript{115} The distinction between life imprisonment and the death

\textsuperscript{110} \textit{Id.} at 698.

\textsuperscript{111} \textit{Id.} at 704. By framing the holding in the negative, the Court appeared to defer to the Maine Supreme Judicial Court's construction of state homicide law. Because that construction allowed the prosecution to rest on a presumption of implied malice aforethought, the Supreme Court did not demand that the prosecution prove malice beyond a reasonable doubt. \textit{Id.} at 688, 690-91.

\textsuperscript{112} \textit{Id.} at 685.

\textsuperscript{113} MD. ANN. CODE art. 27, § 413(a).

\textsuperscript{114} Tichnell \textit{v. State}, 290 Md. at 61, 427 A.2d at 1000; MD. ANN. CODE art. 27, § 413(h). \textit{See supra} notes 45-49 and accompanying text.

\textsuperscript{115} \textit{Cf.} Mullaney \textit{v. Wilbur}, 421 U.S. at 698 (significant differences between conviction of murder and manslaughter).
penalty is obviously "of greater importance than the difference between guilt or innocence for many lesser crimes."\textsuperscript{116} Furthermore, under the statutory preponderance of the evidence standard at the weighing stage, the defendant can be sentenced to death even though the evidence indicated that it was as likely as not that he deserved life imprisonment.\textsuperscript{117}

V. Conclusion

To pass constitutional muster under \textit{Mullaney}, the state should bear the burden of proving that the aggravating outweigh the mitigating circumstances beyond a reasonable doubt because that element is "necessary to constitute the crime with which [the defendant] is charged,"\textsuperscript{118} namely capital murder. To ensure this result, the Court of Appeals should clarify definitively that it meant what it said in \textit{Tichnell I}—that the prosecution bears the burden of proving that aggravating circumstances outweigh mitigating circumstances. Unfortunately, this judicial remedy is destined to inadequacy. First, it cannot prevent a later court from reading the ambiguous statutory language requiring that the "mitigating circumstances outweigh the aggravating circumstances"\textsuperscript{119} to burden the defendant. More important, the court cannot construe away the constitutionally deficient preponderance of the evidence standard the statute expressly provides for the weighing process. Thus, courts and juries will continue to determine, by a mere preponderance, whether death is appropriate in a given case. The General Assembly could more effectively eliminate the existing ambiguity and inadequacy by amending the statute to provide that in the weighing process, the state shall bear the burden of proving beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances.

Commentators have advanced numerous arguments to abolish the death penalty. Most posit that capital punishment is morally offensive and unlikely to deter future capital felonies.\textsuperscript{120} Despite well-founded

\begin{footnotesize}
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\item[116.] \textit{Id.}
\item[117.] \textit{Id.} at 703. \textit{See also} C. McCormick, supra note 39, at § 339 (discussing formulations of the preponderance standard).
\item[118.] \textit{In re} Winship 397 U.S. at 364, quoted in \textit{Mullaney} v. Wilbur, 421 U.S. at 697.
\item[119.] \textit{Md. Ann. Code} art. 27, § 413(h).

On a more practical note, states incur enormous financial costs to impose the death
\end{enumerate}
\end{footnotesize}
reasons for that view, capital punishment appears to be a permanent fixture in most American jurisdictions, especially since the Supreme Court apparently has concluded that the death penalty is not per se cruel and unusual punishment in violation of the eighth amendment. Nevertheless, unreliable or ineffective capital sentencing procedures, because they increase the risk of error and inadequately protect the defendant's interests, may violate due process of law under the fourteenth amendment. In the context of the death penalty the standard of proof functions as more than an academic exercise. Its practical value at minimizing risk is obvious where, as in Winship, a trial judge's ability to distinguish between the two standards enabled him to make a finding by a preponderance that he might not have made beyond a reasonable doubt. Symbolically, the reasonable doubt standard indicates society's cognizance of the moral significance of the death penalty and its demand that the ultimate criminal sanction be imposed under the most exacting degree of factual certainty that minimizes the risk of error and the appearance of arbitrariness.

penalty. State tax dollars finance the prosecution, usually the defendant's representation by the public defender, mandatory appellate review, and resentencing proceedings for each case. In a death penalty case, the average defense alone costs about $100,000. Baltimore Sun, Apr. 21, 1982, at D11, col. 1. Despite these expenditures, the last Maryland execution was in 1961. Baltimore Sun, Nov. 28, 1982, at A1, col. 3.


124. 397 U.S. at 367. But see Addington v. Texas, 441 U.S. at 424 ("[E]fforts to analyze what lay jurors understand concerning the differences among these three tests or the nuance of a judge's instructions on the law may well be largely an academic exercise. . . ").