judge,[86] be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused;[87] (2) that to prevent jury prejudice on the issue of guilt there be a separate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, be presented;[88] (3) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was fairly imposed both in light of the facts of the individual case and by com-

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[86] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important societal function in maintaining a link between contemporary community values and the penal system, but agreed that sentencing may constitutionally be vested in the trial judge. Gregg v. Georgia, 428 U.S. 153, 190 (1976). A definitive ruling came in Spaziano v. Florida, 468 U.S. 447 (1984), upholding a provision under which the judge can override a jury's advisory life imprisonment sentence and impose the death sentence. "[T]he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." Id. at 462–63. Consequently, a judge may be given significant discretion to override a jury sentencing recommendation, as long as the court's decision is adequately channeled to prevent arbitrary results Harris v. Alabama, 513 U.S. 504 (1995) (Eighth Amendment not violated where judge is only required to "consider" a capital jury's sentencing recommendation). The Sixth Amendment right to jury trial is violated, however, if the judge makes factual findings (*e.g.*, as to the existence of aggravating circumstances) on which a death sentence is based. Ring v. Arizona, 536 U.S. 584 (2002).

[87] Gregg v. Georgia, 428 U.S. 153, 188–95 (1976). Justice White seemed close to the plurality on the question of standards, id. at 207 (concurring), but while Chief Justice Burger and Justice Rehnquist joined the White opinion "agreeing" that the system under review "comports" with *Furman*, Justice Rehnquist denied the constitutional requirement of standards in any event. Woodson v. North Carolina, 428 U.S. 280, 319–21 (1976) (dissenting). In McGautha v. California, 402 U.S. 183, 207–08 (1971), the Court had rejected the argument that the absence of standards violated the Due Process Clause. On the vitiation of *McGautha*, *see Gregg*, 428 U.S. at 195 n.47, and Lockett v. Ohio, 438 U.S. 586, 598–99 (1978). In assessing the character and record of the defendant, the jury may be required to make a judgment about the possibility of future dangerousness of the defendant, from psychiatric and other evidence. Jurek v. Texas, 428 U.S. 262, 275–76 (1976). Moreover, testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. Barefoot v. Estelle, 463 U.S. 880 (1983). *But cf.* Estelle v. Smith, 451 U.S. 454 (1981) (holding Self-incrimination and Counsel Clauses applicable to psychiatric examination, at least when a doctor testifies about his conclusions with respect to future dangerousness).

[88] Gregg v. Georgia, 428 U.S. 153, 163, 190–92, 195 (1976) (plurality opinion). McGautha v. California, 402 U.S. 183 (1971), had rejected a due process requirement of bifurcated trials, and the *Gregg* plurality did not expressly *require* it under the Eighth Amendment. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters in Roberts v. Louisiana, 428 U.S. 325, 358 (1976), rejected bifurcation and viewed the plurality as requiring it. All states with post-*Furman* capital sentencing statutes took the cue by adopting bifurcated capital sentencing procedures, and the Court has not been faced with the issue again. *See* Raymond J. Pascucci, et al., *Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1224–25 (1984).