The proscription against a mandatory death penalty has also received elaboration. The Court invalidated statutes making death the mandatory sentence for persons convicted of first-degree murder of a police officer,[96] and for prison inmates convicted of murder while serving a life sentence without possibility of parole.[97] If, however, actual sentencing authority is conferred on the trial judge, then it is not unconstitutional for a statute to require a jury to return a non-dispositive death "sentence" upon convicting for specified crimes.[98] Flaws related to those attributed to mandatory sentencing statutes were found in a state's structuring of its capital system to deny the jury the option of convicting on a lesser included offense, when doing so would be justified by the evidence.[99] Because the jury had to choose between conviction or acquittal, the statute created the risk that the jury would convict because it felt the defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when at that stage the jury should concen-

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volved torture, depravity of mind, or an aggravated battery to the victim"); Proffitt v. Florida, 428 U.S. 242, 255 (1976) (upholding "especially heinous, atrocious or cruel" aggravating circumstance as interpreted to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim"); Sochor v. Florida, 504 U.S. 527 (1992) (impermissible vagueness of "heinousness" factor cured by narrowing interpretation including strangulation of a conscious victim); Arave v. Creech, 507 U.S. 463 (1993) (consistent application of narrowing construction of phrase "exhibited utter disregard for human life" to require that the defendant be a "cold-blooded, pitiless slayer" cures vagueness); Bell v. Cone, 543 U.S. 447 (2005) (presumption that state supreme court applied a narrowing construction because it had done so numerous times).

[96] Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam) (involving a different defendant from the first Roberts v. Louisiana case, 428 U.S. 325 (1976).

[97] Sumner v. Shuman, 483 U.S. 66 (1987).

[98] Baldwin v. Alabama, 472 U.S. 372 (1985) (mandatory jury death sentence saved by requirement that trial judge independently weigh aggravating and mitigating factors and determine sentence). The constitutionality of this approach has been brought into question, however, by the Court's decision in Ring v. Arizona, 536 U.S. 584 (2002) that a judge's finding of facts constituting aggravating circumstances violates the defendant's right to trial by jury.

[99] Beck v. Alabama, 447 U.S. 625 (1980). The statute made the guilt determination "depend . . . on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue." Id. at 640. *Cf.* Hopper v. Evans, 456 U.S. 605 (1982). No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses is due to the defendant's refusal to waive the statute of limitations for those lesser offenses. Spaziano v. Florida, 468 U.S. 447 (1984). *See* Hopkins v. Reeves, 524 U.S. 88 (1998) (defendant charged with felony murder did not have right to instruction as to second degree murder or manslaughter, where Nebraska traditionally did not consider these lesser included offenses). *See also* Schad v. Arizona, 501 U.S. 624 (1991) (first-degree murder defendant, who received instruction on lesser included offense of second-degree murder, was not entitled to a jury instruction on the lesser included offense of robbery). In *Schad* the Court also upheld Arizona's characterization of first degree murder as a single crime encompassing two alternatives, premeditated murder and felony-murder, and not requiring jury agreement on which alternative had occurred.