In the ten years since Furman v. Georgia, the United States has recognized the right of states to adopt and follow different capital sentencing schemes so long as they protect the defendant from arbitrary and capricious imposing of the death sentence. The sentence may not be disproportionate to the crime. Sentencing may be done by a judge or jury. Prospective jurors may not be challenged for cause merely because their deliberations would be affected because a death penalty was possible, but only if they could not fulfill their oath. Habeas corpus petitions in capital cases are not open invitations to avoid finality of judgment and execution of the sentence, but are to find constitutional errors.

With Furman v. Georgia (1976:2726) and succeeding cases the United States Supreme Court settled the basic constitutional issue concerning the death penalty. It is not per se cruel and unusual punishment, and, therefore, does not violate the Eighth and Fourteenth Amendments. However, a sentence of death is unique and can be imposed only under the most strict guidelines. The guidelines must assure that a death sentence will not be arbitrarily imposed, nor the sentence disproportionate to that handed down in like cases. Care must be taken to assure a capital defendant has a fair and impartial jury hearing the case and that prospective jurors are not removed unless they are unable to faithfully and impartially apply the law.

Because of the unique character of the death penalty, the courts must look more closely at each case to assure the defendant has
received due process. However, finality of judgment must come and protective devices such as habeas corpus petitions must be properly used only to uncover constitutional errors.

Proportionality and the Death Sentence

The United States Supreme Court has been faced on occasions with the question of whether a penalty imposed for a criminal offense was too severe for the crime committed. The Court in Furman v. Georgia (1972:2726) made it clear that the death penalty was a unique form of punishment and was available for use under very limited circumstances. Since the Furman decision it has had to determine under what circumstances the death sentence may be disproportionate and excessive punishment, and to establish guidelines for determining proportionality.

Justice Stewart speaking for the plurality in Gregg v. Georgia (1976:2909) had been very careful to note that the analysis the United States Supreme Court applied to determine the per se constitutionality of capital punishment only applied to the death penalty as a sanction for the crime of murder. A year after the decision in Gregg the Court had to answer the question of whether other crimes were acceptable for the death penalty.

Justice White speaking for the plurality in Coker v. Georgia (1977:2861) noted that in Gregg the Court considered punishment excessive and unconstitutional if it made no measurable contribution to acceptable goals of punishment and was, therefore, nothing more than purposeless and needless imposition of pain and suffering or was grossly out of proportion to the severity of the crime. In Coker, the petitioner, an escapee from a Georgia correctional institution where he was serving a sentence for murder, rape and kidnapping; robbed, raped and kidnapped his victim. The Georgia statute challenged by the petitioner had been examined and found constitutional in Gregg. In that case it applied to murder, but the statute also provided the death penalty for rape. The question the Court faced, for the first time since Furman v. Georgia (1972:2726), was whether a death sentence could be imposed for a crime in which the victim was not killed. Justice White said the question was whether the punishment for the crime of rape of an adult woman was disproportionate and excessive. Therefore, forbidden by the Eighth and Fourteenth Amendments. The Court, in determining the excessiveness and disproportionality of the death sentence for rape, found in 1972 that sixteen states included rape as a capital offense. By 1976, after Furman, only three states, Georgia, Louisiana and North Carolina, included the rape of an adult woman as a capital offense. The death penalties in two states, North Carolina and Louisiana, were mandatory. The Supreme Court found both