255 S.E.2d 799 (S.C. 1979)
273 S.C. 194
The STATE, Respondent,
v.
Joseph Carl SHAW and James Terry Roach, Appellants.
No. 20973.
Supreme Court of South Carolina.
May 28, 1979

[273 S.C. 196] Kermit S. King, Dallas D. Ball, and W. Thomas Vernon, of Lewis, Lewis & Robinson, Columbia, for appellant Shaw.

Walter W. Brooks, John A. Mason, Barry B. George and John K. Grisso, Columbia and O. Grady Query, Charleston, for appellant Roach.

[273 S.C. 197] Atty. Gen. Daniel R. McLeod, Asst. Atty. Gen. Brian P. Gibbes and Sol. James C. Anders, Columbia, for respondent.

GREGORY, Justice:

Appellants Joseph Carl Shaw and James Terry Roach pled guilty to the murders of Thomas Taylor and Carlotta Hartness and each was sentenced to death. The case is before this Court on direct appeal and for mandatory review of the death sentences.

This is the first capital case reviewed under our current death penalty statutes, Section 16-3-20 through Section 16-3-28, 1976 Code of Laws of South Carolina, Cum.Supp.1978.

FACTUAL SETTING

Shaw, Roach, and Ronald Eugene Mahaffey spent the morning of Saturday, October 29, 1977, "shooting up" with drugs and drinking beer. At approximately 1:00 that afternoon the three decided, in Mahaffey's words, "to see if we could find a girl to rape."

Shaw, Roach, and Mahaffey drove to Polo Park, a baseball park, located off Alpine Road northeast of Columbia. There they saw a parked late model car occupied by Thomas Taylor, aged 17, and Carlotta Hartness, aged 14.

Shaw, who was driving, pulled up beside the parked car in such a way that Roach, who was in the front passenger's seat, was directly across from Taylor, the driver of the parked car. Mahaffey was in the back seat.

At a prearranged signal from Shaw, Roach leveled a .22 caliber rifle through the car window at Taylor and demanded money. Taylor gave the three his wallet.

Shaw and Mahaffey got out of their car and Mahaffey took the keys out of Taylor's car. Shaw ordered Ms. Hartness out of Taylor's car and forced her into the back seat **[273 S.C. 198]** of his car with Mahaffey. Shaw got back into his car, turned to Roach and said, "Ok, now." Roach then shot and killed young Taylor who was still sitting in his parked car.

Ms. Hartness was carried to a dirt road a short distance away where she was forced to disrobe. Shaw raped Ms. Hartness while Roach and Mahaffey looked through Taylor's wallet. Roach then raped Ms. Hartness. Shaw raped Ms. Hartness a second time while Mahaffey forced her to perform oral sex. Mahaffey then raped Ms. Hartness while Shaw forced her to perform oral sex.

Shaw asked who would shoot Ms. Hartness and Roach volunteered. Shaw instructed Ms. Hartness to put her face to the ground but she refused. Shaw drew a circle in the dirt and drew an "X" inside the circle and told Ms. Hartness to place her head in the circle. Ms. Hartness again refused and pleaded for her life. Shaw told Ms. Hartness a third time to place her head on the ground and she complied. Roach shot Ms. Hartness in the head, causing her body to convulse. Shaw then took the rifle from Roach and fired into Ms. Hartness's head, killing her.

Shaw, Roach, and Mahaffey left the scene, disposed of the rifle and bullets, and returned to Polo Park to satisfy themselves that Taylor was dead.

Later that night Shaw returned to the scene of Ms. Hartness's murder and mutilated her body by cutting her breasts and pubic area with broken glass and by inserting sticks in her vagina and anus.

Shaw, Roach, and Mahaffey were arrested on November 3, 1977. Each was indicted for two counts of murder, two counts of conspiracy, rape, kidnapping, and armed robbery. The State elected to seek the death penalty for Shaw and Roach and served the Notices required by Section 16-3-20(B) and Section 16-3-26(A), Cum.Supp.1978.

As the result of plea negotiations the State did not seek the death penalty against Mahaffey in exchange for his testimony against Shaw and Roach.

[273 S.C. 199] On December 12, 1977 Shaw pled guilty to all charges. Roach pled guilty to two counts of murder, rape, kidnapping and armed robbery, and pled Nolo contendere to two counts of conspiracy.

A separate pre-sentence hearing was conducted as required by Section 16-3-20(B), Cum.Supp.1978, on December 14, 15 and 16, 1977. At this hearing evidence in extenuation, mitigation and aggravation was introduced. The trial judge found aggravating circumstances and imposed sentences of death upon both Shaw and Roach.

GUILT DETERMINATION

No issue is raised on appeal regarding the validity of appellants' guilty pleas. We have reviewed the record, however, and are satisfied the guilty pleas were properly taken. The able trial judge went the second mile to insure that the guilty pleas were given knowingly and voluntarily.

CONSTITUTIONAL CHALLENGES TO THE STATUTORY COMPLEX

Our present death penalty statutes, Section 16-3-20 through Section 16-3-28, Cum.Supp.1978, were enacted as Act No. 177 of the 1977 Acts of the General Assembly. Act No. 177 of 1977 was patterned after the death penalty statutes of our sister state Georgia.

The constitutionality of Georgia's death penalty statutes was considered by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). While opinions may differ as to the parameters of the Supreme Court's holding in Gregg, it is indisputable that in Gregg the Court approved Georgia's death penalty statutes.

We now consider whether this State's statutory death penalty procedure is sufficiently similar to Georgia's procedure to pass constitutional scrutiny.

[273 S.C. 200] South Carolina's statutory complex, which is found at Appendix A to this opinion, retains the death penalty only for the crime of murder. [1] A capital defendant's guilt or innocence is determined in the traditional manner, either by a judge or jury, in the first stage of a bifurcated trial.

Upon conviction or adjudication of guilt of a capital defendant of murder, a separate sentencing proceeding is conducted to determine whether the capital defendant shall be sentenced to death or life imprisonment. The sentencing proceeding is conducted before the trial jury, or if the capital defendant pled guilty or if the trial jury is waived by both the capital defendant and the State, the sentencing proceeding is conducted before the court. Section 16-3-20(B), Cum.Supp.1978.

"In the sentencing proceeding, the (trial) jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible." Section 16-3-20(B), Cum.Supp.1978. No similar limitation is imposed on evidence introduced in extenuation or mitigation of punishment by the capital defendant.

The capital defendant and his counsel are entitled to the closing argument regarding the sentence imposed.

In the assessment of the appropriate sentence to be imposed the judge is required to consider or include in his instructions to the trial jury for it to consider "any mitigating circumstances otherwise authorized or allowed by law and any of . . . (seven (7)

statutory) aggravating and (nine (9) statutory) mitigating circumstances which may be supported by the evidence." Section 16-3-20(C), Cum.Supp.1978. Although the statutory complex does not delineate the scope of non-statutory mitigating circumstances, **[273 S.C. 201]** it makes no provision for the consideration by the sentencing authority of any non-statutory aggravating circumstances.

Before a convicted capital defendant may be sentenced to death, the sentencing authority must find at least one aggravating circumstance beyond a reasonable doubt. The sentencing authority must designate in writing the aggravating circumstance or circumstances which it found. If the sentencing authority is the trial jury, this written finding must be signed by all members of the jury. The trial jury may recommend the death penalty only by unanimous decision. Section 16-3-20(C), Cum.Supp.1978.

The sentencing authority is not required by the statutory complex to find any mitigating circumstance in order to impose life imprisonment.

When the trial jury is the sentencing authority, its recommendation for punishment is binding on the court.

Regardless of whether the sentencing authority is the court or the trial jury, the court, prior to imposing the death penalty, is required to find as an affirmative fact that the death penalty is warranted under the evidence and is not imposed as the result of prejudice, passion, or any other arbitrary factor. [2] Section 16-3-20(C), Cum.Supp.1978.

Whenever the death penalty is imposed, the entire record and transcript of the trial, together with a separate report by the trial judge, are transmitted to this Court for sentence review. The report of the trial judge is in the form of a questionnaire prepared and supplied by this Court. Section 16-3-25(A), Cum.Supp.1978. The eleven page questionnaire is designed to elicit detailed information about the defendant, the crime, and the circumstances of the trial.

Upon reviewing the sentence, this Court is authorized to affirm the death penalty or set the sentence aside and remand**[273 S.C. 202]** for resentencing. Section 16-3-25(E), Cum.Supp.1978.

The mandatory sentence review is in addition to, but may be consolidated with, any direct appeal by the convicted capital defendant. Section 16-3-25(F), Cum.Supp.1978.

Mr. Justice Stewart, speaking for the Court in Gregg, summarized the procedural conditions necessary to impose the death penalty:

In summary, the concerns expressed in Furman (V. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)) that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated

proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. 428 U.S. at 195, 96 S.Ct. at 2935, 49 L.Ed.2d at 887.

Commenting on Gregg, supra, Chief Justice Burger, joined by Justices Stewart, Powell and Stevens, stated in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978):

The plurality (in Gregg) reasoned that to comply with Furman, sentencing procedures should not create "a substantial risk that the (death penalty will) be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia,* supra, 428 U.S. at 188, 96 S.Ct. (2909), at 2932 (49 L.Ed.2d 859). In the view of the plurality, however, Furman did not require that all sentencing discretion be eliminated, but only that it be "directed and limited," id., at 189, 96 S.Ct. (2909), at 2932 (49 L.Ed.2d 859), so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for **[273 S.C. 203]** distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not." Id., at 188, 96 S.Ct. (2909), at 2932 (49 L.Ed.2d 859). The plurality also concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit 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." *Woodson v. North Carolina,* supra, 428 U.S. (280) at 304, 96 S.Ct. (2978) at 2991 (49 L.Ed.2d 944), in order to ensure the reliability, under Eighth Amendment standards, of the determination that "death is the appropriate punishment in a specific case." Id., at 305, 96 S.Ct. (2978), at 2991 (49 L.Ed.2d 944); see *Roberts (Harry) v. Louisiana,* 431 U.S. 633, 637, 97 S.Ct. 1993, 1996, 52 L.Ed.2d 637 (5 Ohio Ops.2d 252) (1977); *Jurek v. Texas,* 428 U.S. 262, 271-272, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929 (1976). 438 U.S. at 601, 98 S.Ct. at 2963, 57 L.Ed.2d at 987-988.

The statutory death penalty complex adopted by the General Assembly in 1977 is constitutionally indistinguishable from the statutory complex approved by the United States Supreme Court in Gregg. The new death penalty procedures focus the sentencing authorities' attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. The guidance provided by the sentencing procedures reduces the likelihood that the sentencing authority will impose a sentence of death capriciously. Additionally, the requirement that the sentencing authority specify the factors it relied upon in reaching its decision ensures that meaningful appellate review will be available to every capital defendant.

[273 S.C. 204] A

Appellants Shaw and Roach contend, as did the capital defendant in Gregg, that the unbridled discretion of the Solicitor to extend mercy to any capital defendant renders the statutory complex facially invalid. This issue was decided adversely to appellants by Gregg and does not merit further consideration by this Court.

Appellants contend, however, that on the facts of this case the decision of the Solicitor to seek the death penalty against them was arbitrary and capricious in view of the Solicitor's decision not to seek the death penalty against Mahaffey. Appellants contend there was no basis for distinguishing them from Mahaffey for purposes of seeking the death penalty. We disagree.

While these three defendants are equally guilty of the crime of murder as defined by the laws of this State, they are not Ipso facto deserving of the same punishment. See Lockett v. Ohio, supra.

There is testimony in the transcript of record demonstrating that both Shaw and Roach were triggermen. There is no evidence that Mahaffey was a triggerman. This one fact is sufficient to distinguish Mahaffey from Roach and Shaw for purposes of the death penalty. Additionally, as the only witnesses to these crimes were killed, the State's case against Shaw and Roach would have been substantially impaired without Mahaffey's testimony.

The Solicitor chose to bargain with Mahaffey rather than Shaw or Roach because it was unlikely a death sentence would be imposed on Mahaffey. The decision of the Solicitor to not seek the death penalty for Mahaffey does not, on these facts, require a similar consideration for Shaw and Roach.

[273 S.C. 205] B

Appellants also contend the statutory complex is constitutionally defective because it does not assign numerical values to the aggravating and mitigating circumstances so that the sentencing authority can determine when the mitigating circumstances outweigh the aggravating circumstances. This issue was decided adversely to appellants in *Proffit v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

C

Appellants contend the statutory circumstances of aggravation have "no rational basis, but are merely arbitrary classifications decided upon by the drafters of the statute." Appellants do not challenge any particular circumstance of aggravation, but argue against the statutory complex as a whole.

We are not impressed with this argument. The General Assembly has retained the death penalty only for murder, and only then when the murder is committed under at least one of seven (7) specific aggravating circumstances. The list of aggravating circumstances adopted by the General Assembly is not arbitrary on its face, and appellants do not contend that any particular circumstance of aggravation has been rendered arbitrary by its application to them. We resolve this issue adversely to appellants.

We conclude, therefore, that Section 16-3-20 through Section 16-3-28, Cum.Supp. 1978, are constitutional, and that a sentence of death may be lawfully imposed pursuant to the statutory complex.

[273 S.C. 206] METHOD OF EXECUTION

Appellants next challenge the method of execution employed in this state.

Section 24-3-530, 1976 Code, provides that all persons who are convicted of a capital crime and receive a sentence of death "shall suffer such penalty by electrocution."

The argument that the use of electrocution as a means of inflicting the death penalty constitutes cruel and unusual punishment has been decided adversely to appellants by the United States Supreme Court in In re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890). See also: *McElvaine v. Brush*, 142 U.S. 155, 12 S.Ct. 156, 35 L.Ed. 971 (1891); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), reh. denied, 330 U.S. 853, 67 S.Ct. 673, 91 L.Ed. 1295; Anno. 51 L.Ed.2d 886; Anno. 30 A.L.R. 1452.

INTRODUCTION OF EVIDENCE

At the pre-sentence hearing appellants objected to the introduction by the State of any evidence in aggravation of punishment. Appellants argued that their pleas of guilty established the circumstances of aggravation of kidnapping, rape and armed robbery beyond a reasonable doubt and thereby rendered any evidence in aggravation inflammatory and prejudicial.

The Supreme Court has indicated that before a death sentence may be imposed, the attention of the sentencing authority must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. Gregg, supra. The sentencing authority should have as much information before it as possible:

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential**[273 S.C. 207]** in capital cases. *Lockett v. Ohio,* supra, 438 U.S. at 605, 98 S.Ct. at 2965, 57 L.Ed.2d at 990.

In (*Stanislaus) Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) the Supreme Court struck down Louisiana's mandatory death penalty statute because it did not permit consideration of the circumstances of the particular offense. Speaking for the Court, Mr. Justice Stewart stated:

The constitutional vice of mandatory death sentence statutes lack of focus on the circumstances of the particular offense and the character and propensities of the offender is not resolved by Louisiana's limitation of first-degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single

category of killings during the commission of a specified felony, . . . underscores the rigidity of Louisiana's enactment . . . . 428 U.S. at 333, 96 S.Ct. at 3006, 49 L.Ed.2d at 981-982.

Here, the only information possessed by the sentencing authority prior to the introduction by the State of evidence in aggravation was that appellants were guilty of murder committed while in the commission of rape, kidnapping, and armed robbery, The diversity of circumstances under which murder can be committed while in the commission of rape, kidnapping, and armed robbery requires that the sentencing authority be given as much information as possible about the circumstances of the particular crime.

The trial judge correctly permitted the State to introduce evidence to establish the circumstances of aggravation.

It is further contended, however, that certain specific items of evidence were improperly admitted at the pre-sentence hearing.

The State was permitted, over appellants' objections, to introduce seven photographs into evidence at the pre-sentence hearing.

[273 S.C. 208] Three of the photographs show Ms. Hartness's body as it was found at the scene of her murder. The fourth photograph shows a close-up view of the disfigurement to her left breast, and the fifth photograph shows a close-up view of the disfigurement to her pubic area. The sixth photograph is of a piece of glass that was removed from Ms. Hartness's pubic area. The seventh photograph is of a feminine tampon as it was found at the scene of the murder.

These photographs illustrate not only the scene of the crime as found by the law enforcement officers, but they also depict the post-mortem abuse of Ms. Hartness's body by Shaw.

Appellants argue the photographs should not have been admitted at the pre-sentence hearing because post-mortem abuse is not a statutory circumstance of aggravation.

Appellants have misinterpreted the statutory complex.

The General Assembly adopted this State's current death penalty statutes in an attempt to comply with the guidelines laid down by the United States Supreme Court in Gregg. Perhaps the most emphasized of these guidelines is the need for an individualized sentence, considering both the circumstances of the crime and the individual defendant.

The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding. The pre-sentence hearing is for the introduction of Additional evidence in extenuation, mitigation or aggravation of punishment. The statute does not

exclude from the consideration of the sentencing authority any evidence received at the guilt determination stage. To the contrary, the sentencing authority is required to consider all the evidence received at the guilt determination stage regarding the circumstances of the crime and the characteristics of the individual defendant together with Additional evidence, if any, in extenuation, mitigation or aggravation of punishment.

[273 S.C. 209] Here, the guilt determination stage consisted solely of the guilty pleas of appellants. No testimony was taken.

At the pre-sentence hearing testimony and other evidence, including the challenged photographs, was introduced by the State to give the sentencing authority as much information as possible about the particular circumstances of the crime. The challenged photographs were clearly admissible to illustrate the crimes committed against *Ms. Hartness. State v. Bellue,* 260 S.C. 39, 194 S.E.2d 193 (1973); *State v. Campbell,* 259 S.C. 339, 191 S.E.2d 770 (1972). They were also admissible to substantiate the State's assertion that Shaw returned to the scene of the Hartness murder.

The evidence that Shaw committed acts of post-mortem abuse to Ms. Hartness's body was likewise admissible not only as a circumstance of the crime, but also as evidence of Shaw's character. The acts of post-mortem abuse were of a violent sexual nature and bore a logical connection to the earlier rape of Ms. Hartness.

The photographs depicting the post-mortem abuse to Ms. Hartness's body were properly admitted into evidence and considered by the sentencing authority, not as additional evidence in aggravation of punishment, but as evidence of the circumstances of the crime and the characteristics of the individual defendant Shaw.

SENTENCE REVIEW

The sentences of death imposed against appellants must conform to the requirements of Section 16-3-20, Cum.Supp. 1978. The duty falls to this Court under Section 16-3-25, Cum.Supp. 1978, to review the entire record and transcript, the report of the trial judge, [3] and the arguments of counsel to determine (1) whether the sentences of death were imposed under the influence of passion, **[273 S.C. 210]** prejudice, or any other arbitrary factor; (2) whether the evidence supports the sentencing authority's findings of statutory aggravating circumstances; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Product of Passion

The sentences of death were imposed by the trial judge without the intervention of a jury. Before imposing sentence the trial judge found as an affirmative fact that the death penalty was warranted by the evidence and that its imposition was not influenced by passion, prejudice or any other arbitrary factor.

Appellants present no argument that the death sentences were imposed in violation of this requirement. We have carefully reviewed the sentences and are satisfied they were not influenced by passion, prejudice or any other arbitrary factor but were the products of sound and careful deliberation based on the evidence.

Circumstances of Aggravation

The sentencing authority imposed the sentences of death after finding the following three statutory circumstances of aggravation beyond a reasonable doubt:

1) Murder committed while in the commission of rape;

2) Murder committed while in the commission of kidnapping;

3) Murder committed while in the commission of armed robbery.

Appellants pled guilty to the offenses of murder, rape, kidnapping and armed robbery. The evidence supports their pleas of guilty as well as the finding of the sentencing authority that the murders were committed while in the commission of the other three crimes to which appellants pled guilty.

[273 S.C. 211] We have carefully reviewed the sentences and are satisfied that the evidence supports the sentencing authority's findings of statutory aggravating circumstances beyond a reasonable doubt.

Sentence Comparison

As an additional check against the random imposition of the death penalty, this Court is directed to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have compared the death sentences imposed upon appellants with the sentences imposed in all prior capital cases tried under the current death penalty statutes [4] and are satisfied that there are no similar cases against which the proportionality of the sentences imposed upon appellants can be measured.

The inability of this Court to compare this case with any other similar cases does not require, however, that appellants' sentences be set aside. Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases. The first case must stand alone, otherwise comparative sentence review would be forever impossible.

The current death penalty statutes comply with the guidelines set out by the United States Supreme Court in Gregg. We have considered and overruled each assignment of error by appellants and have completed the statutorily mandated sentence review.

Additionally, we have searched the record In favorem vitae for any prejudicial error and have found none.

[273 S.C. 212] Accordingly, the sentences of death imposed upon appellants Joseph Carl Shaw and James Terry Roach are affirmed.

AFFIRMED.

LEWIS, C. J., and LITTLEJOHN, NESS and RHODES, JJ., concur.