CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
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Class Four - Part One

MITIGATING CIRCUMSTANCES

He questioned himself if human society could have the right alike to crush its members, in the one case by its unreasonable carelessness, and in the other by its pitiless care; and to keep a poor man forever between a lack of work [and] an excess of punishment.

- Victor Hugo, *Les Miserables*

I think "empathy" is one of the most powerful words in this world. . . . A rich man would look at a poor man, not with sympathy, feeling sorrow for the unfortunate poverty, but also not with contempt . . . but with empathy, which means the rich man would put himself in the poor man's shoes, feel what the poor man is feeling, and understand what it is to be the poor man. Empathy breeds proper judgment. . . . Empathy gives you an inside view. It doesn't say "If that was me…," empathy says, "That is me."

- Final words of Ray Jasper before being executed by Texas on March 19, 2014

I am pleading for a time when hatred and cruelty will not control the hearts of men. When we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.

- Clarence Darrow, arguing for the lives of Nathan Leopold and Richard Loeb, Chicago, 1924

Sandra LOCKETT, Petitioner,
v.
State of OHIO.

United States Supreme Court
438 U.S. 586, 98 S.Ct. 2954 (1978)

Burger, C.J., delivered the opinion of the Court with respect to the constitutionality of petitioner's conviction (Parts I and II), together with an opinion (Part III), in which Stewart, Powell, and Stevens, JJ., joined, on the constitutionality of the statute under which petitioner was sentenced to death, and announced the judgment of the Court. Blackmun, J., filed an opinion concurring in part and concurring in the judgment. Marshall, J., filed an opinion concurring in the judgment. Rehnquist, J., filed an opinion concurring in part and dissenting in part. White, J., filed an opinion concurring in part and dissenting in part.

Mr. Chief Justice BURGER delivered the opinion of the Court with respect to the constitutionality of petitioner's conviction (Parts I and II), together with an opinion (Part III), in which Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice STEVENS joined, on the constitutionality of the statute under which petitioner was sentenced to death, and announced the judgment of the Court.

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth amendments by sentencing Sandra Lockett to death pursuant to a statute that narrowly limits the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.

I

Lockett was charged with aggravated murder with the aggravating specifications (1) that the murder was "committed for the purpose of escaping detection, apprehension, trial, or punishment" for aggravated robbery, and (2) that the murder was "committed while . . . committing, attempting to commit, or fleeing immediately after committing or attempting to commit . . . aggravated robbery." That offense was punishable by death in Ohio. She was also charged with aggravated robbery. The State's case against her depended largely upon the testimony of a coparticipant, one Al Parker, who gave the following account of her participation in the robbery and murder.

Lockett became acquainted with Parker and Nathan Earl Dew while she and a friend, Joanne Baxter, were in New Jersey. Parker and Dew then accompanied Lockett, Baxter, and Lockett's brother back to Akron, Ohio, Lockett's home-town. After they arrived in Akron, Parker and Dew needed money for the trip back to New Jersey. Dew suggested that he pawn his ring. Lockett overheard his suggestion, but felt that the ring was too beautiful to pawn, and suggested instead that they could get some money by robbing a grocery store and a furniture store in the area. She warned that the grocery store's operator was a "big guy" who carried a "45" and that they would have "to get him real quick." She also volunteered to get a gun from her father's basement to aid in carrying out the robberies, but by that time, the two stores had closed and it was too late to proceed with the plan to rob them.

Someone, apparently Lockett's brother, suggested a plan for robbing a pawnshop. He and Dew would enter the shop and pretend to pawn a ring. Next Parker, who had some bullets, would enter the shop, ask to see a gun, load it, and use it to rob the shop. No one planned to kill the pawnshop operator in the course of the robbery. Because she knew the owner, Lockett was not to be among those entering the pawnshop, though she did guide the others to the shop that night.

The next day Parker, Dew, Lockett, and her brother gathered at Baxter's apartment. Lockett's brother asked if they were "still going to do it," and everyone, including Lockett, agreed to proceed. The four then drove by the pawnshop several times and parked the car. Lockett's brother and Dew entered the shop. Parker then left the car and told Lockett to start it again in two minutes. The robbery proceeded according to plan until the pawnbroker grabbed the gun when Parker announced the "stickup." The gun went off with Parker's finger on the trigger firing a fatal shot into the pawnbroker.

Parker went back to the car where Lockett waited with the engine running. While driving away from the pawnshop, Parker told Lockett what had happened. She took the gun from the pawnshop and put it into her purse. Lockett and Parker drove to Lockett's aunt's house and called a taxicab. Shortly thereafter, while riding away in a taxicab, they were stopped by the police, but by this time Lockett had placed the gun under the front seat. Lockett told the police that Parker rented a room from her mother and lived with her family. After verifying this story with Lockett's parents, the police released Lockett and Parker. Lockett hid Dew and Parker in the attic when the police arrived at the Lockett household later that evening.

Parker was subsequently apprehended and charged with aggravated murder with specifications, an offense punishable by death, and aggravated robbery. Prior to trial, he pleaded guilty to the murder charge and agreed to testify against Lockett, her brother, and Dew. In return, the prosecutor dropped the aggravated robbery charge and the specifications to the murder charge, thereby eliminating the possibility that Parker could receive the death penalty.

Lockett's brother and Dew were later convicted of aggravated murder with specifications. Lockett's brother was sentenced to death, but Dew received a lesser penalty because it was determined that his offense was "primarily the product of mental deficiency," one of the three mitigating circumstances specified in the Ohio death penalty statute.

Two weeks before Lockett's separate trial, the

prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery (offenses which each carried a maximum penalty of 25 years' imprisonment and a maximum fine of $10,000) if she would cooperate with the State, but she rejected the offer. Just prior to her trial, the prosecutor offered to permit her to plead guilty to aggravated murder without specifications, an offense carrying a mandatory life penalty, with the understanding that the aggravated robbery charge and an outstanding forgery charge would be dismissed. Again she rejected the offer.

At trial, the opening argument of Lockett's defense counsel summarized what appears to have been Lockett's version of the events leading to the killing. He asserted the evidence would show that, as far as Lockett knew, Dew and her brother had planned to pawn Dew's ring for $100 to obtain money for the trip back to New Jersey. Lockett had not waited in the car while the men went into the pawnshop but had gone to a restaurant for lunch and joined Parker, thinking the ring had been pawned, after she saw him walking back to the car. Lockett's counsel asserted that the evidence would show further that Parker had placed the gun under the seat in the taxicab and that Lockett had voluntarily gone to the police station when she learned that the police were looking for the pawnbroker's killers.

Parker was the State's first witness. His testimony related his version of the robbery and shooting, and he admitted to a prior criminal record of breaking and entering, larceny, and receiving stolen goods, as well as bond jumping. He also acknowledged that his plea to aggravated murder had eliminated the possibility of the death penalty, and that he had agreed to testify against Lockett, her brother, and Dew as part of his plea agreement with the prosecutor. At the end of the major portion of Parker's testimony, the prosecutor renewed his offer to permit Lockett to plead guilty to aggravated murder without specifications and to drop the other charges against her. For the third time Lockett refused the option of pleading guilty to a lesser offense.

Lockett called Dew and her brother as defense witnesses, but they invoked their Fifth Amendment rights and refused to testify. In the course of the defense presentation, Lockett's counsel informed the court, in the presence of the jury, that he believed Lockett was to be the next witness and requested a short recess. After the recess, Lockett's counsel told the judge that Lockett wished to testify but had decided to accept her mother's advice to remain silent, despite her counsel's warning that, if she followed that advice, she would have no defense except the cross-examination of the State's witnesses. Thus, the defense did not introduce any evidence to rebut the prosecutor's case.

* * *

The jury found Lockett guilty as charged.

Once a verdict of aggravated murder with specifications had been returned, the Ohio death penalty statute required the trial judge to impose a death sentence unless, after "considering the nature and circumstances of the offense" and Lockett's "history, character, and condition," he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she "was under duress, coercion, or strong provocation," or (3) the offense was "primarily the product of [Lockett's] psychosis or mental deficiency."

In accord with the Ohio statute, the trial judge requested a presentence report as well as psychiatric and psychological reports. The reports contained detailed information about Lockett's intelligence, character, and background. The psychiatric and psychological reports described her as a 21-year-old with low-average or average intelligence, and not suffering from a mental deficiency. One of the psychologists reported that "her prognosis for rehabilitation" if returned to society was favorable. The presentence report showed that Lockett had committed no major offenses although she had a record of several minor ones as a juvenile and two minor offenses as an adult. It also showed that she had once used heroin but was receiving treatment at a drug abuse clinic and seemed to be "on the road to success"

as far as her drug problem was concerned. It concluded that Lockett suffered no psychosis and was not mentally deficient.[2]

After considering the reports and hearing argument on the penalty issue, the trial judge concluded that the offense had not been primarily the product of psychosis or mental deficiency. Without specifically addressing the other two statutory mitigating factors, the judge said that he had "no alternative, whether [he] like[d] the law or not" but to impose the death penalty. He then sentenced Lockett to death.

* * *

III

Lockett challenges the constitutionality of Ohio's death penalty statute on a number of grounds. We find it necessary to consider only her contention that her death sentence is invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime. * * *

* * *

We begin by recognizing that the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country. Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account. * * * And where sentencing discretion is granted, it generally has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant – if not essential – [to the] selection of an appropriate sentence . . . ."

2. The presentence report also contained information about the robbery. It indicated that Dew had told the police that he, Parker, and Lockett's brother had planned the holdup. It also indicated that Parker had told the police that Lockett had not followed his order to keep the car running during the robbery and instead had gone to get something to eat.

The opinions of this Court going back many years in dealing with sentencing in capital cases have noted the strength of the basis for individualized sentencing. For example, Mr. Justice Black, writing for the Court in *Williams v. New York* – a capital case – observed that the

> whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions – even for offenses today deemed trivial.

Ten years later, in *Williams v. Oklahoma*, another capital case, the Court echoed Mr. Justice Black, stating that

> "[i]n discharging his duty of imposing a proper sentence, the sentencing judge is authorized, *if not required*, to consider all of the mitigating and aggravating circumstances involved in the crime." (Emphasis added.)

* * *

Although legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases, the plurality opinion in *Woodson*, after reviewing the historical repudiation of mandatory sentencing in capital cases, concluded that

> in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires 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.

That declaration rested "on the predicate that the penalty of death is qualitatively different" from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. The mandatory death penalty statute in *Woodson* was held invalid because it permitted no consideration of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." The plurality did not attempt

to indicate, however, which facets of an offender or his offense it deemed "relevant" in capital sentencing or what degree of consideration of "relevant facets" it would require.

We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. 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 in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques – probation, parole, work furloughs, to name a few – and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

C

The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases. * * *

* * *

* * * Once a defendant is found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty must be imposed unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the sentencing judge determines that at least one of the following mitigating circumstances is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." *Ohio Rev.Code Ann.* §2929.04(B) (1975).

The Ohio Supreme Court has concluded that there is no constitutional distinction between the statute approved in *Proffitt*, and Ohio's statute, because the mitigating circumstances in Ohio's statute are "liberally construed in favor of the accused." and because the sentencing judge or judges may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established. But even under the Ohio court's construction of the statute, only the three factors specified in the statute can be considered in mitigation of the defendant's sentence. We see, therefore, that once it is determined that the victim did not induce or

facilitate the offense, that the defendant did not act under duress or coercion, and that the offense was not primarily the product of the defendant's mental deficiency, the Ohio statute mandates the sentence of death. The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision.

The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

* * *

Mr. Justice MARSHALL, concurring in the judgment.

* * *

When a death sentence is imposed under the circumstances presented here, I fail to understand how any of my Brethren – even those who believe that the death penalty is not wholly inconsistent with the Constitution – can disagree that it must be vacated. Under the Ohio death penalty statute, this 21-year-old Negro woman was sentenced to death for a killing that she did not actually commit or intend to commit. She was convicted under a theory of vicarious liability. The imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition. It makes no distinction between a willful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs.

Permitting imposition of the death penalty solely on proof of felony murder, moreover, necessarily leads to the kind of "lightning bolt," "freakish," and "wanton" executions that persuaded other Members of the Court to join Mr. Justice BRENNAN and myself in *Furman v. Georgia*, in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony-murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants. That the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the "evolving standards of decency," embodied in the Eighth Amendment, by reference to state "legislative judgment."

* * *

Mr. Justice WHITE, concurring in part and dissenting in part.

* * *

The Court has now completed its about-face since *Furman v. Georgia*. * * * Today, it is held, again through a plurality, that the sentencer may constitutionally impose the death penalty only as an exercise of his unguided discretion after being presented with all circumstances which the defendant might believe to be conceivably relevant to the appropriateness of the penalty for the individual offender.

* * * I greatly fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time of *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that "its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose." * * *

Mr. Justice REHNQUIST, concurring in part and dissenting in part.

* * *

I continue to view *McGautha* as a correct exposition of the limits of our authority to revise

state criminal procedures in capital cases under the Eighth and Fourteenth Amendments. Sandra Lockett was fairly tried, and was found guilty of aggravated murder. I do not think Ohio was required to receive any sort of mitigating evidence which an accused or his lawyer wishes to offer, and therefore I disagree with Part III of the plurality's opinion.

* * *

Notes

The Court also struck down a death sentence for the same reasons – lack of individualized consideration of mitigating factors – in the companion case of *Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977 (1978).

Justice White's expression that *Lockett* is a return to the unfettered discretion of the pre-*Furman* era echoes Justice Marshall's prediction of the same result as a result of the Court's decision regarding aggravating circumstances in *Zant v. Stephens.*

Monty Lee EDDINGS, Petitioner,
v.
OKLAHOMA.

United States Supreme Court
455 U.S. 104, 102 S.Ct. 869 (1982)

Powell, J., delivered the opinion of the Court. Brennan, J., and O'Connor, J., filed concurring opinions. Burger, C.J., filed opinion in which White, Blackmun and Rehnquist, JJ., joined.

Justice POWELL delivered the opinion of the Court:

Petitioner Monty Lee Eddings was convicted of first-degree murder and sentenced to death. Because this sentence was imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases," *Lockett v. Ohio*, we reverse.

I

On April 4, 1977, Eddings, a 16-year-old youth, and several younger companions ran away from their Missouri homes. They traveled in a car owned by Eddings' brother, and drove without destination or purpose in a southwesterly direction eventually reaching the Oklahoma Turnpike. Eddings had in the car a shotgun and several rifles he had taken from his father. After he momentarily lost control of the car, he was signalled to pull over by Officer Crabtree of the Oklahoma Highway Patrol. Eddings did so, and when the officer approached the car, Eddings stuck a loaded shotgun out of the window and fired, killing the officer.

* * * Eddings was then charged with murder in the first degree, and the District Court of Creek County found him guilty upon his plea of nolo contendere.

* * *

At the sentencing hearing, the State alleged three of the aggravating circumstances enumerated in the statute: that the murder was especially heinous, atrocious, or cruel, that the crime was committed for the purpose of avoiding or preventing a lawful arrest, and that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

In mitigation, Eddings presented substantial evidence at the hearing of his troubled youth. The testimony of his supervising Juvenile Officer indicated that Eddings had been raised without proper guidance. His parents were divorced when he was 5 years old, and until he was 14 Eddings lived with his mother without rules or supervision. There is the suggestion that Eddings' mother was an alcoholic and possibly a prostitute. By the time Eddings was 14 he no longer could be controlled, and his mother sent him to live with his father. But neither could the father control the boy. Attempts to reason and talk gave way to physical punishment. The Juvenile Officer testified that Eddings was frightened and bitter, that his father overreacted and used excessive physical punishment: "Mr. Eddings found the only thing

that he thought was effectful with the boy was actual punishment, or physical violence –hitting with a strap or something like this."[11]

Testimony from other witnesses indicated that Eddings was emotionally disturbed in general and at the time of the crime, and that his mental and emotional development were at a level several years below his age. A state psychologist stated that Eddings had a sociopathic or antisocial personality and that approximately 30% of youths suffering from such a disorder grew out of it as they aged. A sociologist specializing in juvenile offenders testified that Eddings was treatable. A psychiatrist testified that Eddings could be rehabilitated by intensive therapy over a 15- to 20-year period. He testified further that Eddings "did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it."[12] The psychiatrist suggested that, if treated, Eddings would no longer pose a serious threat to society.

At the conclusion of all the evidence, the trial judge * * * found that the State had proved each of the three alleged aggravating circumstances beyond a reasonable doubt. Turning to the evidence of mitigating circumstances, the judge found that Eddings' youth was a mitigating factor of great weight: "I have given very serious consideration to the youth of the Defendant when this particular crime was committed. Should I fail to do this, I think I would not be carrying out my duty." But he would not consider in mitigation the circumstances of Eddings' unhappy upbringing and emotional disturbance: "[T]he Court cannot be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. *Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background.*" Finding that the only mitigating circumstance was Eddings' youth and finding further that this circumstance could not outweigh the aggravating circumstances present, the judge sentenced Eddings to death.

The Court of Criminal Appeals affirmed the sentence of death. * * *

* * *

III

We now apply the rule in *Lockett* to the circumstances of this case. The trial judge stated that "in following the law," he could not "consider the fact of this young man's violent background." There is no dispute that by "violent background" the trial judge was referring to the mitigating evidence of Eddings' family history. From this statement it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence.

* * *

We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer * * * may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.[10]

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10. We note that the Oklahoma death penalty statute permits the defendant to present evidence "as to any mitigating circumstances." *Lockett* requires the

11. There was evidence that immediately after the shooting Eddings said: "I would rather have shot an Officer than go back to where I live."

12. The psychiatrist suggested that, at the time of the murder, Eddings was in his own mind shooting his stepfather – a policeman who had been married to his mother for a brief period when Eddings was seven. The psychiatrist stated: "I think that given the circumstances and the facts of his life, and the facts of his arrested development, he acted as a seven year old seeking revenge and rebellion; and the act – he did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it."

* * *

On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them. * * *

[Concurring opinion of **Justice O'CONNOR** not included.]

* * *

Chief Justice BURGER, with whom Justice WHITE, Justice BLACKMUN**,** and Justice REHNQUIST join, dissenting.

* * *

In its parsing of the trial court's oral statement, the Court ignores the fact that the judge was delivering his opinion extemporaneously from the bench, and could not be expected to frame each utterance with the specificity and precision that might be expected of a written opinion or statute. Extemporaneous courtroom statements are not often models of clarity. Nor does the Court give any weight to the fact that the trial court had spent considerable time listening to the testimony of a probation officer and various mental health professionals who described Eddings' personality and family history – an obviously meaningless exercise if, as the Court asserts, the judge believed he was barred "as a matter of law" from "considering" their testimony. Yet even examined in isolation, the trial court's statement is at best ambiguous; it can just as easily be read to say that, while the court had taken account of Eddings' unfortunate childhood, it did not consider that either his youth or his family background was sufficient to offset the aggravating circumstances that the evidence revealed. Certainly nothing in *Lockett* would preclude the court from making such a determination.

* * *

To be sure, neither the Court of Criminal Appeals nor the trial court labeled Eddings' family background and personality disturbance as "mitigating factors." It is plain to me, however, that this was purely a matter of semantics associated with the rational belief that "evidence in mitigation" must rise to a certain level of persuasiveness before it can be said to constitute a "mitigating circumstance." * * *

II

It can never be less than the most painful of our duties to pass on capital cases, and the more so in a case such as this one. However, there comes a time in every case when a court must "bite the bullet."

* * *

Other Decisions on Mitigating Circumstances

The Court made clear in subsequent decisions that death sentences would be set aside where trial courts refused to admit evidence proffered as mitigating evidence or failed to make it clear to the juries that it could consider such evidence as mitigating factors.

The Court reversed the exclusion of evidence that defendant had adjusted well to incarceration between arrest and trial in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986).

However, the Court rejected a challenge by a Texas inmate to a trial court's failure to instruct the jury that evidence of his prison disciplinary record could be considered in mitigation; instead, the trial court gave only the questions set out in the Texas statute. *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320 (1988). The Supreme Court upheld the refusal to give the instruction on facts of the case, finding the evidence of his prison behavior could be considered in answering Texas' three statutory questions and any limitations created by the failure to instruct had no practical or constitutional effect.

The Court unanimously held in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), in an opinion by Justice Scalia the year after he joined the Court,

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sentencer to listen.

that a jury instruction often used in Florida which limited the jury's consideration to those mitigating factors set out in Florida's statute violated *Lockett*. In response, Florida amended its death penalty statute to provide for the consideration of "any other factors in the defendant's background that would mitigate against imposition of the death penalty."

As we will see, the Court's unanimity with regard to mitigating circumstances did not last long. Justice Scalia later announced that he would no longer follow *Lockett* and its progeny in *Walton v. Arizona* to be considered *infra*. Justice Thomas adopted the same position after he joined the Court in 1991.

In *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731 (1991), the Court held that the Florida Supreme Court erred, after finding that there was insufficient evidence to support two of the six aggravating circumstances found by the trial court, in failing to consider nonstatutory mitigating evidence in determining whether the trial court had properly overridden the jury's recommendation of life imprisonment and imposed the death penalty.

The trial court had not found any statutory mitigating factors, but the Court, in an opinion by Justice O'Connor, concluded that it had found non-statutory mitigating factors. The Florida Supreme Court, upon finding that two of the aggravating factors were invalid, was required to either reweigh the aggravating and mitigating factors (Florida is a "weighing state") or determine whether the error was harmless. Under either analysis, it was required to consider the non-statutory mitigating factors and it failed to do so.

Justice White, joined by Chief Justice Burger and Justices Scalia and Kennedy, dissented, arguing that in the case before the Court on habeas corpus review, the majority had given "far too little deference to state courts that are attempting to apply their own law faithfully and responsibly." *Id.* at 324.

Johnny Paul PENRY, Petitioner
v.
James A. LYNAUGH, Director, Texas Department of Corrections.

United States Supreme Court
492 U.S. 302, 109 S.Ct. 2934 (1989)

[The Supreme Court rejected Penry's argument that the Eighth Amendment prohibited the execution of all mentally retarded offenders (later overruled in *Atkins v. Virginia,* 536 U.S. 304 (2002)). However, the Court also examined Penry's claim that the special questions posed to the jury under Texas' death penalty statute prohibited the jury from considering his mental retardation as a mitigating factor. This case in referred to in subsequent cases as *Penry I*. Part III of Justice O'Connor's opinion, which follows, was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice Scalia dissented from that holding in an opinion in which Chief Justice Rehnquist and Justices White and Kennedy joined.]

Justice O'CONNOR delivered the opinion of the Court:

* * *

III

Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. * * *

* * *

Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment. We agree. Thus, we reject the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence.

The first special issue asks whether the defendant acted "deliberately and with the reasonable expectation that the death of the deceased . . . would result." Neither the Texas Legislature nor the Texas Court of Criminal Appeals have defined the term "deliberately," and the jury was not instructed on the term, so we do not know precisely what meaning the jury gave to it. Assuming, however, that the jurors in this case understood "deliberately" to mean something more than that Penry was guilty of "intentionally" committing murder, those jurors may still have been unable to give effect to Penry's mitigating evidence in answering the first special issue.

* * *

In the absence of jury instructions defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. Without such a special instruction, a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime "deliberately." Thus, we cannot be sure that the jury's answer to the first special issue reflected a "reasoned moral response" to Penry's mitigating evidence.

The second special issue asks "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The mitigating evidence concerning Penry's mental retardation indicated that one effect of his retardation is his inability to learn from his mistakes. Although this evidence is relevant to the second issue, it is relevant only as an aggravating factor because it suggests a "yes" answer to the question of future dangerousness. The prosecutor argued at the penalty hearing that there was "a very strong probability, based on the history of this defendant, his previous criminal record, and the psychiatric testimony that we've had in this case, that the defendant will continue to commit acts of this nature." Even in a prison setting, the prosecutor argued, Penry could hurt doctors, nurses, librarians, or teachers who worked in the prison.

Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future. * * * The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse.

The third special issue asks "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." On this issue, the State argued that Penry stabbed Pamela Carpenter with a pair of scissors not in response to provocation, but "for the purpose of avoiding detection." Penry's own confession indicated that he did not stab the victim after she wounded him superficially with a scissors during a struggle, but rather killed her after her struggle had ended and she was lying helpless. Even if a juror concluded that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult, that would not necessarily diminish the "unreasonableness" of his conduct in response to "the provocation, if any, by the deceased." Thus, a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special

issue if she also concluded that Penry's action was not a reasonable response to provocation.

* * *

In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. * * *

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice KENNEDY join, concurring in part and dissenting in part.

* * *

* * * In providing for juries to consider all mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, it seems to me Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence. The Court today demands that it be replaced, however, with a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he "lacked the moral culpability to be sentenced to death," "did not deserve to be sentenced to death," or "was not sufficiently culpable to deserve the death penalty." The Court seeks to dignify this by calling it a process that calls for a "reasoned moral response," – but reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional "moral response" that the Court demands be allowed – an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy. Not only have we never before said the Constitution requires this, but the line of cases following *Gregg* sought to eliminate precisely the unpredictability it produces.

The Court cannot seriously believe that rationality and predictability can be achieved, and capriciousness avoided, by "'narrow[ing] a sentencer's discretion to impose the death sentence,'" but expanding his discretion "'to decline to impose the death sentence.'" The decision whether to impose the death penalty is a unitary one; unguided discretion not to impose is unguided discretion to impose as well. In holding that the jury had to be free to deem Penry's mental retardation and sad childhood relevant for whatever purpose it wished, the Court has come full circle, not only permitting but requiring what Furman once condemned. "Freakishly" and "wantonly," have been rebaptized "reasoned moral response." I do not think the Constitution forbids what the Court imposes here, but I am certain it does not require it. I respectfully dissent.

THE TEXAS STATUTE AS AMENDED AFTER *PENRY*

Texas Code of Criminal Procedure Art. 37.071. Procedure in capital case.

* * *

Sec. 2. (a)(1) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. * * *

> (2) * * *, evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

> (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party * * * , whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(2) The court, on the written request of the attorney representing the defendant, shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life; and

(B) charge the jury in writing as follows:

"Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted."

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue

submitted under Subsection (e) of this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.

Life imprisonment without possibility of parole

The Texas statute was later amended to provide for life imprisonment without parole as the alternative to the death penalty. The words "without parole" were added to the question in section (e)(1). Section (e)(2) was amended as follows:

(2) The court shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life without parole; and

(B) charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.

Penry II

John Paul Penry was retried before the Texas statute was amended. The trial court attempted to comply with the Supreme Court's opinion by instructing the jury that it could answer any of the special questions "no" if it found sufficient mitigating circumstances to warrant a sentence of life imprisonment. Supreme Court granted review of the Fifth Circuit's denial of habeas corpus for Penry and rendered the opinion that follows.

Johnny Paul PENRY, Petitioner,
v.
Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division.

Supreme Court of the United States
532 U.S. 782, 121 S.Ct. 1910 (2001).

O'Connor, J., delivered the opinion of the Court with regard to Part III-B, which was joined by Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ. Thomas, J., filed an opinion concurring in part and dissenting in part, in which Rehnquist, C. J., and Scalia, J., joined.

Justice O'CONNOR delivered the opinion of the Court.

* * * We now consider whether the jury instructions at Penry's resentencing complied with our mandate in *Penry I.* * * *

I
* * *

Penry was retried in 1990 and again found guilty of capital murder. During the penalty phase, the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse. * * *

When it came time to submit the case to the jury, the court instructed the jury to determine Penry's sentence by answering three special issues – the same three issues that had been put before the jury in *Penry I.* Specifically, the jury had to determine whether Penry acted deliberately when he killed Pamela Carpenter; whether there was a probability that Penry would be dangerous in the future; and whether Penry acted unreasonably in response to provocation.

The court told the jury how to determine its answers to those issues:

[B]efore any issue may be answered "Yes," all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes." . . . [I]f any juror,

after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes," then such juror should vote "No" to that Special Issue.

The court explained the consequences of the jury's decision:

> [I]f you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

The court then gave the following "supplemental instruction":

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. * * * If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

A complete copy of the instructions was attached to the verdict form, and the jury took the entire packet into the deliberation room. The verdict form itself, however, contained only the text of the three special issues, and gave the jury two choices with respect to each special issue: "We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is 'Yes,'" or "We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is 'No.'"

After deliberating for approximately 2 ½ hours, the jury returned its punishment verdict. The signed verdict form confirmed that the jury had unanimously agreed that the answer to each special issue was "yes." In accordance with state law, the court sentenced Penry to death.

The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence. * * *

* * * Quoting the supplemental jury instruction given at Penry's second trial, the court overruled Penry's claim of error. The court stated that "a nullification instruction such as this one is sufficient to meet the constitutional requirements of *[Penry I]*."

In 1998, after his petition for state habeas corpus relief was denied, Penry filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas. The District Court rejected both of Penry's claims * * *. After full briefing and argument, the United States Court of Appeals for the Fifth Circuit denied a certificate of appealability.

* * *

III

* * *

B

Penry * * * contends that the jury instructions given at his second sentencing hearing did not comport with our holding in *Penry I* because they did not provide the jury with a vehicle for expressing its reasoned moral response to the mitigating evidence of Penry's mental retardation

and childhood abuse. * * *

The Texas court did not make the rationale of its holding entirely clear. On one hand, it might have believed that *Penry I* was satisfied merely by virtue of the fact that a supplemental instruction had been given. On the other hand, it might have believed that it was the substance of that instruction which satisfied *Penry I.*

While the latter seems to be more likely, to the extent it was the former, the Texas court clearly misapprehended our prior decision. *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to "consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence." 492 U.S., at 319 (emphasis added). * * * For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," that we can be sure that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence."

The State contends that the substance of the supplemental instruction satisfied *Penry I* because it provided the jury with the requisite vehicle for expressing its reasoned moral response to Penry's particular mitigating evidence. Specifically, the State points to the admittedly "less than artful" portion of the supplemental instruction which says:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue.* If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration,* rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special issues.*" (emphasis added).

We see two possible ways to interpret this confusing instruction. First, as the portions italicized above indicate, it can be understood as telling the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue. Viewed in this light, however, the supplemental instruction placed the jury in no better position than was the jury in *Penry I.* As we made clear in *Penry I,* none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and childhood abuse. In the words of Judge Dennis below, the jury's ability to consider and give effect to Penry's mitigating evidence was still "shackled and confined within the scope of the three special issues." Thus, because the supplemental instruction had no practical effect, the jury instructions at Penry's second sentencing were not meaningfully different from the ones we found constitutionally inadequate in *Penry I.*

Alternatively, the State urges, it is possible to understand the supplemental instruction as informing the jury that it could "simply answer one of the special issues 'no' if it believed that mitigating circumstances made a life sentence ... appropriate ... regardless of its initial answers to the questions." The Texas Court of Criminal Appeals appeared to understand the instruction in this sense, when it termed the supplemental instruction a "nullification instruction." Even assuming the jurors could have understood the instruction to operate in this way, the instruction was not as simple to implement as the State contends. Rather, it made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation.

The jury was clearly instructed that a "yes" answer to a special issue was appropriate only when supported "by the evidence beyond a reasonable doubt." A "no" answer was appropriate only when there was "a reasonable

doubt as to whether the answer to a Special Issue should be ... 'Yes.'" The verdict form listed the three special issues and, with no mention of mitigating circumstances, confirmed and clarified the jury's two choices with respect to each special issue. The jury could swear that it had unanimously determined "beyond a reasonable doubt that the answer to this Special Issue is 'Yes.'" Or it could swear that at least 10 jurors had "a reasonable doubt *as to the matter inquired about in this Special Issue* " and that the jury thus had "determin[ed] that the answer to this Special Issue is 'No.'" (emphasis added).

* * *

We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. * * *

The mechanism created by the supplemental instruction thus inserted "an element of capriciousness" into the sentencing decision, "making the jurors' power to avoid the death penalty dependent on their willingness" to elevate the supplemental instruction over the verdict form instructions. *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (plurality opinion). There is, at the very least, "a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration" of Penry's mental retardation and childhood abuse. The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

* * *

A clearly drafted catchall instruction on mitigating evidence * * * might have complied with *Penry I.* Texas' current capital sentencing scheme (revised after Penry's second trial and sentencing) provides a helpful frame of reference. Texas now requires the jury to decide "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." * * *

Thus, to the extent the Texas Court of Criminal Appeals concluded that the substance of the jury instructions given at Penry's second sentencing hearing satisfied our mandate in *Penry I,* that determination was objectively unreasonable. * * *

* * *

Justice THOMAS, with whom THE CHIEF JUSTICE and Justice SCALIA join, * * * dissenting in Part III-B.

* * *

As a habeas reviewing court, we are not called upon to propose what we believe to be the ideal instruction on how a jury should take into account evidence related to Penry's childhood and mental status. * * * We must decide merely whether the conclusion of the Texas Court of Criminal Appeals – that the sentencing court's supplemental instruction explaining how the jury could give effect to any mitigating value it found in Penry's evidence satisfied the requirements of *Penry v. Lynaugh,* 402 U.S. 302 (1989) *(Penry I)* – was "objectively unreasonable." *Williams v. Taylor,* 529 U.S. 362, 409 (2000). See also 28 U.S.C. § 2254 (d)(1) (1994 ed., Supp. V).

* * *

* * * The Texas court's instruction, read for common sense, or, even after a technical parsing, tells jurors that they may consider the evidence Penry presented as mitigating evidence and that, if they believe the mitigating evidence makes a death sentence inappropriate, they should answer "no" to one of the special issues. Given this straightforward reading of the instructions, it is objectively reasonable, if not eminently logical, to

conclude that a reasonable juror would have believed he had a "vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence."

It is true that Penry's proffered evidence did not fit neatly into any of the three special issues for imposing the death penalty under Texas law. But the sentencing court told the jury in no uncertain terms precisely how to follow this Court's directive in *Penry I.* * * * I simply do not share the Court's confusion as to how a juror could consider mitigating evidence, decide whether it makes a death sentence inappropriate, and respond with a "yes" or "no" depending on the answer.

* * *

Justices Scalia and Thomas depart from *Lockett v. Ohio*

In *Walton v. Arizona*, 497 U.S. 639 (1990), Justice Scalia elaborated on his disagreement with the Court's decision in *Penry I* and the broad definition of mitigation adopted in *Lockett v. Ohio* and the requirement that it be considered adopted in *Eddings v. Oklahoma*.

In *Walton*, the Court rejected several challenges to the Arizona death penalty statute, finding that the Arizona Supreme Court had applied a limited construction to statute's "especially heinous, cruel, or depraved" aggravating circumstance, and holding that the Eighth Amendment was not violated by requiring the defendant to prove mitigating circumstances by a preponderance of the evidence and requiring the court to impose the death sentence if it finds one or more aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

In an opinion concurring in part and concurring in the judgment that was joined by no other justice, **JUSTICE SCALIA** stated:

> Today a petitioner before this Court says that a state sentencing court (1) had unconstitutionally broad discretion to sentence him to death instead of imprisonment, and (2) had unconstitutionally narrow discretion to sentence him to imprisonment instead of death. An observer unacquainted with our death penalty jurisprudence (and in the habit of thinking logically) would probably say these positions cannot both be right. The ultimate choice in capital sentencing, he would point out, is a unitary one – the choice between death and imprisonment. One cannot have discretion whether to select the one yet lack discretion whether to select the other. Our imaginary observer would then be surprised to discover that, under this Court's Eighth Amendment jurisprudence of the past 15 years, petitioner would have a strong chance of winning on both of these antagonistic claims, simultaneously – as evidenced by the facts that four Members of this Court think he should win on both, * * *. But that just shows that our jurisprudence and logic have long since parted ways. I write separately to say that, and explain why, I will no longer seek to apply one of the two incompatible branches of that jurisprudence. * * *
>
> **I**
>
> **A**
>
> Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the States' administration of capital sentencing – effectively requiring capital sentencing proceedings separate from the adjudication of guilt, * * * dictating the type and extent of discretion the sentencer must and must not have, * * * requiring that certain categories of evidence must and must not be admitted, * * * undertaking minute inquiries into the wording of jury instructions to ensure that jurors understand their duties under our labyrinthine code of rules, * * * and prescribing the procedural forms that sentencing decisions must follow, * * *. The case that began the development of this Eighth Amendment jurisprudence was *Furman v. Georgia*, which has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted

in a random and capricious fashion.

* * *

Since the 1976 cases, we have routinely read *Furman* as standing for the proposition that "channelling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement," * * * and have insisted that States furnish the sentencer with "'clear and objective standards' that provide `specific and detailed guidance,' and that `make rationally reviewable the process for imposing a sentence of death[.]'" * * *

B

Shortly after introducing our doctrine requiring constraints on the sentencer's discretion to "impose" the death penalty, the Court began developing a doctrine forbidding constraints on the sentencer's discretion to "decline to impose" it. This second doctrine – counterdoctrine would be a better word – has completely exploded whatever coherence the notion of "guided discretion" once had.

* * * We invalidated [mandatory] statutes in *Woodson v. North Carolina*, and *Roberts v. Louisiana*, a plurality of the Court concluding that the sentencing process must accord at least some consideration to the "character and record of the individual offender." Other States responded to *Furman* by leaving the sentencer some discretion to spare capital defendants, but limiting the kinds of mitigating circumstances the sentencer could consider. We invalidated these statutes in *Lockett v. Ohio*, a plurality saying the Eighth Amendment requires that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death[.]" The reasoning of the pluralities in these cases was later adopted by a majority of the Court.

These decisions, of course, had no basis in *Furman*. One might have supposed that curtailing or eliminating discretion in the sentencing of capital defendants was not only consistent with *Furman*, but positively required by it – as many of the States, of course, did suppose. But in *Woodson* and *Lockett*, it emerged that uniform treatment of offenders guilty of the same capital crime was not only not required by the Eighth Amendment, but was all but prohibited. * * *

As elaborated in the years since, the *Woodson-Lockett* principle has prevented States from imposing all but the most minimal constraints on the sentencer's discretion to decide that an offender eligible for the death penalty should nonetheless not receive it. We have, in the first place, repeatedly rebuffed States' efforts to channel that discretion by specifying objective factors on which its exercise should rest. It would misdescribe the sweep of this principle to say that "all mitigating evidence" must be considered by the sentencer. That would assume some objective criterion of what is mitigating, which is precisely what we have forbidden. Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision any aspect of a defendant's character or record, or any circumstance surrounding the crime: that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised his mother. * * * Nor may States channel the sentencer's consideration of this evidence by defining the weight or significance it is to receive – for example, by making evidence of mental retardation relevant only insofar as it bears on the question whether the crime was committed deliberately. * * * Rather, they must let the sentencer "give effect," * * * to mitigating evidence in whatever manner it pleases. Nor, when a jury is assigned the sentencing task, may the State attempt to

impose structural rationality on the sentencing decision by requiring that mitigating circumstances be found unanimously, each juror must be allowed to determine and "give effect" to his perception of what evidence favors leniency, regardless of whether those perceptions command the assent of (or are even comprehensible to) other jurors.

To acknowledge that "there perhaps is an inherent tension" between this line of cases and the line stemming from *Furman*, * * * is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives," * * * is rather like referring to the twin objectives of good and evil. They cannot be reconciled. * * *

The Court has attempted to explain the contradiction by saying that the two requirements serve different functions: The first serves to "narrow" according to rational criteria the class of offenders eligible for the death penalty, while the second guarantees that each offender who is death-eligible is not actually sentenced to death without "an individualized assessment of the appropriateness of the death penalty." * * * But it is not "individualized assessment" that is the issue here. No one asserts that the Constitution permits condemnation en masse. The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not – whether it may insist upon a rational scheme in which all sentencers making the individualized determinations apply the same standard. * * * Since the individualized determination is a unitary one (does this defendant deserve death for this crime?) once one says each sentencer must be able to answer "no" for whatever reason it deems morally sufficient (and indeed, for whatever reason any one of 12 jurors deems morally sufficient), it becomes impossible to claim that the Constitution requires consistency and rationality among sentencing determinations to be preserved by strictly limiting the reasons for which each sentencer can say "yes." In fact, randomness and "freakishness" are even more evident in a system that requires aggravating factors to be found in great detail, since it permits sentencers to accord different treatment, for whatever mitigating reasons they wish, not only to two different murderers, but to two murderers whose crimes have been found to be of similar gravity. * * *

C

The simultaneous pursuit of contradictory objectives necessarily produces confusion. * * * For state lawmakers, the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow.

In a jurisprudence containing the contradictory commands that discretion to impose the death penalty must be limited but discretion not to impose the death penalty must be virtually unconstrained, a vast number of procedures support a plausible claim in one direction or the other. Conscientious counsel are obliged to make those claims, and conscientious judges to consider them. There has thus arisen, in capital cases, a permanent floodtide of stay applications and petitions for certiorari to review adverse judgments at each round of direct and collateral review, alleging novel defects in sentencing procedure arising out of some permutation of either *Furman* or *Lockett*. * * *

In my view, it is time for us to reexamine our efforts in this area and to measure them against the text of the constitutional provision on which they are purportedly based.

II

* * * When punishments other than fines are involved, the [Eighth] Amendment explicitly requires a court to consider not only whether the penalty is severe or harsh, but also whether it is "unusual." If it is not, then the Eighth Amendment does not prohibit it, no

matter how cruel a judge might think it to be. Moreover, the Eighth Amendment's prohibition is directed against cruel and unusual punishments. It does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment. * * * Thus, the procedural elements of a sentencing scheme come within the prohibition, if at all, only when they are of such a nature as systematically to render the infliction of a cruel punishment "unusual."

Our decision in *Furman v. Georgia*, * * * was arguably supported by this text. * * * [T]he critical opinions of Justice Stewart and Justice White in that case rested on the ground that discretionary capital sentencing had made the death sentence such a random and infrequent event among capital offenders ("wanto[n] and freakis[h]," as Justice Stewart colorfully put it) that its imposition had become cruel and unusual. * * *

The *Woodson-Lockett* line of cases, however, is another matter. As far as I can discern, that bears no relation whatever to the text of the Eighth Amendment. The mandatory imposition of death – without sentencing discretion – for a crime which States have traditionally punished with death cannot possibly violate the Eighth Amendment, because it will not be "cruel" (neither absolutely nor for the particular crime) and it will not be "unusual" (neither in the sense of being a type of penalty that is not traditional nor in the sense of being rarely or "freakishly" imposed). * * *

* * *

Despite the fact that I think *Woodson* and *Lockett* find no proper basis in the Constitution, they have some claim to my adherence because of the doctrine of stare decisis. I do not reject that claim lightly, but I must reject it here. My initial and my fundamental problem, * * *, is not that *Woodson* and *Lockett* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*. It is that which led me into the inquiry whether either they or *Furman* was wrong. I would not know how to apply them – or, more precisely, how to apply both them and *Furman* – if I wanted to. I cannot continue to say, in case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under *Woodson-Lockett* when I know that the Constitution positively favors constraints under *Furman*. Stare decisis cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.

* * *

I cannot adhere to a principle so lacking in support in constitutional text and so plainly unworthy of respect under stare decisis. Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted.

JUSTICE STEVENS responded in a dissenting opinion:

* * *

The cases that Justice Scalia categorically rejects today rest on the theory that the risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons who are eligible for the death penalty. When *Furman* was decided, Georgia included virtually all defendants convicted of forcible rape, armed robbery, kidnaping, and first-degree murder in that class. As the opinions in *Furman* observed, in that large class of cases race and other irrelevant factors unquestionably played an unacceptable role in determining which defendants would die and which would live. However, the size of the class may be narrowed to reduce sufficiently that risk of arbitrariness, even if a jury is then

given complete discretion to show mercy when evaluating the individual characteristics of the few individuals who have been found death eligible.

* * *

The Georgia Supreme Court itself understood the concept that Justice Scalia apparently has missed. In *Zant v. Stephens*, 462 U.S. 862 (1983), we quoted [an] excerpt from its opinion [previously set out in these materials] analogizing the law governing homicides in Georgia to a pyramid * * *

Justice Scalia ignores the difference between the base of the pyramid and its apex. A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex. After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to show mercy based on individual mitigating circumstances in the cases that remain.

Perhaps a rule that allows the specific facts of particular cases to make the difference between life and death – a rule that is consistent with the common-law tradition of case-by-case adjudication – provides less certainty than legislative guidelines that mandate the death penalty whenever specified conditions are met. Such guidelines would fit nicely in a Napoleonic Code drafted in accord with the continental approach to the formulation of legal rules. However, this Nation's long experience with mandatory death sentences * * * has led us to reject such rules. I remain convinced that the approach adopted by this Court in *Weems v. United States*, 217 U.S. 349 (1910), and in *Trop v. Dulles*, 356 U.S. 86 (1958), followed by Justice Stewart, Justice Powell, and myself in 1976, and thereafter repeatedly endorsed by this Court, is not only wiser, but far more just, than the reactionary position espoused by Justice Scalia today.

Justice Thomas, after joining the Court in 1991, expressed a similar view in a concurring opinion in *Graham v. Collins*, 506 U.S. 461 (1993). Gary Graham, like Penry, argued that the three special questions used in Texas before the statute was amended after the *Penry* decision did not permit the sentencer to consider his age, 17, at the time of the crime as a reason to reject the death penalty. The Supreme Court did not reach this question, however. Instead, it held that even if Graham were correct, he would not be entitled to retroactive application of the *Penry* decision to his case. In a concurring opinion not joined by any other justice, **JUSTICE THOMAS**, after agreeing that Graham would be barred from relief by retroactivity, discussed *Furman*, *Lockett*, *Eddings* and *Penry* as follows:

> It is important to recall what motivated Members of this Court at the genesis of our modern capital punishment case law. *Furman v. Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty – particularly in Southern States, and most particularly in rape cases. * * *
>
> * * *
>
> In sum, the Court concluded that in a standardless sentencing scheme there was no "rational basis," as Justice Brennan put it, to distinguish "the few who die from the many who go to prison." * * * It cannot be doubted that behind the Court's condemnation of unguided discretion lay the specter of racial prejudice – the paradigmatic capricious and irrational sentencing factor.
>
> * * *
>
> One would think * * * that by eliminating explicit jury discretion and treating all defendants equally, a mandatory death penalty scheme was a perfectly reasonable legislative response to the concerns expressed in *Furman*. * * * Justice White was surely correct in concluding that "a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal's character is

such that he deserves death." * * *

* * *

* * * Whatever contribution to rationality and consistency we made in *Furman*, we have taken back with *Penry*. In the process, we have upset the careful balance that Texas had achieved through the use of its special issues.

Penry held that the Texas special issues did not allow a jury to "consider and give effect to" mitigating evidence of mental retardation and childhood abuse because * * * the jury might have been "unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." * * * [T]hese notions – that a defendant may not be sentenced to death if there are mitigating circumstances whose relevance goes "beyond the scope" of the State's sentencing criteria, and that the jury must be able to express a "reasoned moral response" to all evidence presented – have no pedigree in our prior holdings. They originated entirely from whole cloth in two recent concurring opinions. See *Franklin [v. Lynaugh*,] 487 U.S., at 185 (O'CONNOR, J., concurring in judgment); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'CONNOR, J., concurring).

Together, these notions render meaningless any rational standards by which a State may channel or focus the jury's discretion and thus negate the central tenet of *Furman* and all our death penalty cases since 1972. * * *

Any determination that death is or is not the fitting punishment for a particular crime will necessarily be a moral one, whether made by a jury, a judge, or a legislature. But beware the word "moral" when used in an opinion of this Court. This word is a vessel of nearly infinite capacity – just as it may allow the sentencer to express benevolence, it may allow him to cloak latent animus. A judgment that some will consider a "moral response" may secretly be based on caprice or even outright prejudice. When our review of death penalty procedures turns on whether jurors can give "full mitigating effect" to the defendant's background and character, and on whether juries are free to disregard the State's chosen sentencing criteria and return a verdict that a majority of this Court will label "moral," we have thrown open the back door to arbitrary and irrational sentencing. * * *

* * *

* * * It is manifest that "'the power to be lenient [also] is the power to discriminate.'". * * *

We have consistently recognized that the discretion to accord mercy – even if "largely motivated by the desire to mitigate" – is indistinguishable from the discretion to impose the death penalty.

Penry reintroduces the very risks that we had sought to eliminate through the simple directive that States in all events provide rational standards for capital sentencing. For 20 years, we have acknowledged the relationship between undirected jury discretion and the danger of discriminatory sentencing – a danger we have held to be inconsistent with the Eighth Amendment. When a single holding does so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, it cannot command the force of stare decisis.

In my view, *Penry* should be overruled.

* * *

In my view, we should enforce a permanent truce between *Eddings* and *Furman*. We need only conclude that it is consistent with the Eighth Amendment for States to channel the sentencer's consideration of a defendant's arguably mitigating evidence so as to limit the relevance of that evidence in any reasonable manner, so long as the State does not deny the defendant a full and fair opportunity to apprise the sentencer of all constitutionally relevant circumstances. * * *

* * * Ultimately, we must come back to a recognition that "the States, and not this Court, retain 'the traditional authority' to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance," since "[t]his Court has no special expertise in deciding whether particular categories of evidence are too speculative or insubstantial to merit consideration by the sentencer."[1] Accordingly, I also propose that the Court's appropriate role is to review only for reasonableness a State's determinations as to which specific circumstances – within the broad bounds of the general categories mandated under *Eddings* – are relevant to capital sentencing.

Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigating relevance "beyond the scope" of the State's sentencing criteria. It may be evidence of voluntary intoxication or of drug use. Or even – astonishingly – evidence that the defendant suffers from chronic "antisocial personality disorder" – that is, that he is a sociopath. We cannot carry on such a business, which makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman*.

Again, **JUSTICE STEVENS** responded in a dissenting opinion:

* * * I cannot agree with Justice Thomas in the remarkable suggestion that the Court's decision in *Penry v. Lynaugh* somehow threatens what progress we have made in eliminating racial discrimination and other arbitrary considerations from the capital sentencing determination.

In recent years, the Court's capital punishment cases have erected four important safeguards against arbitrary imposition of the death penalty. First, notwithstanding a minority view that proportionality should play no part in our analysis, we have concluded that death is an impermissible punishment for certain offenses. * * *

Second, as a corollary to the proportionality requirement, the Court has demanded that the States narrow the class of individuals eligible for the death penalty, either through statutory definitions of capital murder, or through statutory specification of aggravating circumstances. This narrowing requirement, like the categorical exclusion of the offense of rape, has significantly minimized the risk of racial bias in the sentencing process. * * *

Third, the Court has condemned the use of aggravating factors so vague that they actually enhance the risk that unguided discretion will control the sentencing determination. * * *

Finally, at the end of the process, when dealing with the narrow class of offenders deemed death-eligible, we insist that the sentencer be permitted to give effect to all relevant mitigating evidence offered by the defendant, in making the final sentencing determination. * * * [T]he requirement that sentencing decisions be guided by consideration of relevant mitigating evidence reduces still further the chance that the decision will be based on irrelevant factors such as race. *Lockett* itself illustrates this point. A young black woman, Lockett was sentenced to death because the Ohio statute "did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in

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1. In a footnote, Justice Thomas pointed out that "Congress has instructed the United States Sentencing Commission to study the difficult question whether certain specified offender characteristics "have any relevance" in sentencing. * * * Congress has also concluded that a defendant's education, vocational skills, employment record, and family and community ties are inappropriate sentencing factors. * * * Similar guidelines, it seems to me, could be applied in capital sentencing consistent with the Eighth Amendment, as long as they contributed to the rationalization of the process."

the crime." When such relevant facts are excluded from the sentencing determination, there is more, not less, reason to believe that the sentencer will be left to rely on irrational considerations like racial animus.

I remain committed to our "mitigating" line of precedent, as a critical protection against arbitrary and discriminatory capital sentencing that is fully consonant with the principles of *Furman*. Nothing in Justice Thomas' opinion explains why the requirement that sentencing decisions be based on relevant mitigating evidence, as applied by *Penry*, increases the risk that those decisions will be based on the irrelevant factor of race. More specifically, I do not see how permitting full consideration of a defendant's mental retardation and history of childhood abuse, as in *Penry*, or of a defendant's youth, as in this case, in any way increases the risk of race-based or otherwise arbitrary decisionmaking.

Robert James TENNARD, Petitioner,
v.
Doug DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.

United States Supreme Court.
542 U.S. 274, 124 S.Ct. 2562 (2004)

O'Connor, J., delivered the opinion of the Court, in which Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., Scalia, J., and Thomas, J., filed dissenting opinions.

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Penry v. Lynaugh,* 492 U. S. 302 (1989) *(Penry I),* we held that the Texas capital sentencing scheme provided a constitutionally inadequate vehicle for jurors to consider and give effect to the mitigating evidence of mental retardation and childhood abuse the petitioner had presented. The petitioner in this case argues that the same scheme was inadequate for jurors to give effect to his evidence of low intelligence. The Texas courts rejected his claim, and a Federal District Court denied his petition for a writ of habeas corpus. We conclude that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong,"and therefore hold that a certificate of appealability should have issued.

I

Petitioner Robert Tennard was convicted by a jury of capital murder in October 1986. The evidence presented at trial indicated that Tennard and two accomplices killed two of his neighbors and robbed their house. Tennard himself stabbed one of the victims to death, and one of the accomplices killed the other victim with a hatchet.

During the penalty phase of the trial, defense counsel called only one witness – Tennard's parole officer – who testified that Tennard's Department of Corrections record from a prior incarceration indicated that he had an IQ of 67. * * * The government introduced evidence in the penalty phase regarding a prior conviction for rape, committed when Tennard was 16. The rape victim testified that she had escaped through a window after Tennard permitted her to go to the bathroom to take a bath, promising him she wouldn't run away.

The jury was instructed to consider the appropriate punishment by answering the two "special issues" used at the time in Texas to establish whether a sentence of life imprisonment or death would be imposed:

> Was the conduct of the defendant, Robert James Tennard, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society?

In his penalty-phase closing argument, defense

counsel relied on both the IQ score and the rape victim's testimony to suggest that Tennard's limited mental faculties and gullible nature mitigated his culpability[.]

* * *

In rebuttal, the prosecution suggested that the low IQ evidence was simply irrelevant to the question of mitigation[.]

* * *

The jury answered both special issues in the affirmative, and Tennard was accordingly sentenced to death.

Unsuccessful on direct appeal, Tennard sought state postconviction relief. He argued that, in light of the instructions given to the jury, his death sentence had been obtained in violation of the Eighth Amendment as interpreted by this Court in *Penry I*. In that case, we had held that "It is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." * * *

The Texas Court of Criminal Appeals rejected Tennard's *Penry* claim. Writing for a plurality of four, Presiding Judge McCormick observed that the definition of mental retardation adopted in Texas involves three components "(1) subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; *and* (3) onset during the early development period," and concluded: "[Tennard's] evidence of a low IQ score, standing alone, does not meet this definition. Qualitatively and quantitatively, [Tennard's] low IQ evidence does not approach the level of Johnny Paul Penry's evidence of mental retardation. . . . [W]e find no evidence in this record that applicant is mentally retarded."

The plurality went on to consider whether Tennard would be entitled to relief under *Penry* even if his low IQ fell "within *Penry*'s definition of mental retardation." It held that he would not. The court explained that, unlike the evidence presented in Penry's case, "there is no evidence . . . [that Tennard's] low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes ... or control his impulses . . . ." It found there was "no danger" that the jury would have given the evidence "*only* aggravating effect in answering" the future dangerousness special issue, and that the low IQ and gullibility evidence was not beyond the jury's effective reach because the jury "could have used this evidence for a "no" answer" to the deliberateness special issue.

* * *

Tennard sought federal habeas corpus relief. The District Court denied his petition. * * *

* * *

The Court of Appeals for the Fifth Circuit * * * began by stating the test applied in the Fifth Circuit to *Penry* claims, which involves a threshold inquiry into whether the petitioner presented "constitutionally relevant" mitigating evidence, that is, evidence of a "'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,'" and evidence that "'the criminal act was attributable to this severe permanent condition.'"

* * * [The court] held that evidence of low IQ alone does not constitute a uniquely severe condition, and rejected Tennard's claim that his evidence was of mental retardation, not just low IQ, because no evidence had been introduced tying his IQ score to retardation. Second, it held that even if Tennard's evidence was mental retardation evidence, his claim must fail because he did not show that the crime he committed was attributable to his low IQ. Judge Dennis dissented, concluding that the Texas court's application of *Penry* was unreasonable and that Tennard was entitled to habeas relief.

* * * [We] granted certiorari.

II

* * *

This test for "constitutional relevance," characterized by the State at oral argument as a threshold "screening test," appears to be applied uniformly in the Fifth Circuit to *Penry* claims. Only after the court finds that certain mitigating evidence is "constitutionally relevant" will it consider whether that evidence was within "the 'effective reach of the jur[y].'" In the decision below, the Fifth Circuit concluded that Tennard was "precluded from establishing a *Penry* claim" because his low IQ evidence bore no nexus to the crime, and so did not move on to the "effective reach" question.

The Fifth Circuit's test has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for "constitutional relevance" before considering whether the jury instructions comported with the Eighth Amendment. * * *

When we addressed directly the relevance standard applicable to mitigating evidence in capital cases in *McKoy v. North Carolina,* 494 U. S. 433, 440-441 (1990), we spoke in the most expansive terms. We established that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard – "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'" – applies. We quoted approvingly from a dissenting opinion in the state court: "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" Thus, a State cannot bar "the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death."

Once this low threshold for relevance is met, the "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. * * *

The Fifth Circuit's test is inconsistent with these principles. Most obviously, the test will screen out any positive aspect of a defendant's character, because good character traits are neither "handicap[s]" nor typically traits to which criminal activity is "attributable." In *Skipper v. South Carolina,* 476 U. S. 1, 5 (1986), * * * [w]e observed that even though the petitioner's evidence of good conduct in jail did 'not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such [evidence] . . . would be "mitigating" in the sense that [it] might serve "as a basis for a sentence less than death." Such evidence, we said, of "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is . . . by its nature relevant to the sentencing determination." * * *

In Tennard's case, the Fifth Circuit invoked both the "uniquely severe" and the "nexus" elements of its test to deny him relief under *Penry I.* * * * Neither ground provided an adequate reason to fail to reach the heart of Tennard's *Penry* claims.

We have never denied that gravity has a place in the relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability. * * * However, to say that only those features and circumstances that a panel of federal appellate judges deems to be "severe" (let alone "uniquely severe") could have such a tendency is incorrect. Rather, the question is simply whether the evidence is of such a character that it "might serve 'as a basis for a sentence less than death.'"

The Fifth Circuit was likewise wrong * * * on the ground that Tennard had not adduced evidence that his crime was attributable to his low IQ. In *Atkins v. Virginia,* we explained that impaired intellectual functioning is inherently mitigating: "[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal." Nothing in our opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. Equally,

we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence–and thus that the *Penry* question need not even be asked–unless the defendant also establishes a nexus to the crime.

* * *

CHIEF JUSTICE REHNQUIST, dissenting.

* * *

The District Court conducted the proper inquiry by examining whether Tennard's evidence of low intelligence was "'within the effective reach'"of the jury. And the District Court came to the correct result; that is, the special issues allowed the jury to give some mitigating effect to Tennard's evidence of low intelligence.

* * *

JUSTICE SCALIA, dissenting.

I have previously expressed my view that this "right" to unchanneled sentencer discretion has no basis in the Constitution. I have also said that the Court's decisions establishing this right do not deserve *stare decisis* effect, because requiring unchanneled discretion to say *no* to death cannot rationally be reconciled with our prior decisions requiring canalized discretion to say *yes*. * * *

* * * [T]he opinion for the Court * * * finds failings in the Fifth Circuit's framework for analyzing *Penry* claims as if this Court's own jurisprudence were not the root of the problem. "The simultaneous pursuit of contradictory objectives necessarily produces confusion."

* * *

JUSTICE THOMAS, dissenting.

Petitioner must rely on *Penry v. Lynaugh*, 492 U. S. 302 (1989), to argue that Texas' special issues framework unconstitutionally limited the discretion of his sentencing jury. I have long maintained, however, that *Penry* did "so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, [that] it cannot command the force of *stare decisis*." * * *

Robert Tennard entered a guilty plea and was spared the death penalty on May 15, 2009, after 20 years of Texas' death row.

Smith v. Texas I and *II*

In *Smith v. Texas*, 543 U.S. 37 (2004) (*Smith I)*, the Supreme Court summarily reversed a decision of the Texas Court of Criminal Appeals upholding LaRoyce Lathair Smith's death sentence because he had offered "no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." *Id.* at 45 quoting *Ex parte Smith*, 132 S.W.3d 407, 414 (Tex. Crim. App. 2004). The Texas court had also held that even if Smith had offered mitigating evidence, the jury was allowed to considered it because it was given a "nullification instruction" that told it to answer one of the special questions in the negative to give effect to the mitigating evidence. The Court rejected the instruction on the basis of its decision in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). Justices Scalia and Thomas dissented.

Nevertheless, the Texas Court of Criminal Appeals denied relief once more on remand, holding that Smith had not preserved the *Penry II* challenge to the nullification charge, and that under state law, this procedural defect required him to show not merely some harm, but egregious harm, a burden he could not meet. The Supreme Court again granted *certiorari* and again reversed, holding that the Texas Court of Criminal Appeals had made errors of federal law that could not be the predicate for requiring Smith to show egregious harm. *Smith v. Texas*, 550 U.S. 297 (2007) (*Smith II*).

Writing for the Court, Justice Kennedy stated, "Smith argued, and this Court agreed, that the special issues prevented the jury from considering his mitigating evidence; and the nullification charge failed to cure that error." 550 U.S. at 314. He concluded:

> The Court of Criminal Appeals is, of course, required to defer to our finding of *Penry* error, which is to say our finding that Smith has shown there was a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of his mitigating evidence."

Id. at 316. Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, dissented, arguing that Smith had failed to raise a proper objection to the trial court's attempt to cure the constitutional defect with the nullification instruction and, therefore, the Texas Court of Criminal Appeals had based its opinion on an adequate and independent state law ground. Thus, the dissenters argued, Smith's case should have been dismissed for want of jurisdiction.

Discovering and Presenting Mitigating Circumstances

Because of the wide scope of mitigation, lawyers representing a people facing the death penalty must conduct thorough investigations of the life and background of their clients, including mental health, cultural issues and other factors about the client. Many of those who commit crimes which make them eligible for the death penalty were neglected and abused during childhood, suffer from mental disorders, are intellectually disabled, experienced head injuries, observed traumatic events (such as combat during military service[1] or family or neighborhood violence), or have other life experiences which may be considered in mitigation.

The defense teams have a responsibility to learn everything about their client from before birth until trial – their entire social history including every aspect of the family, school, medical, community and institutional history, any mental health history, whether there are any mental limitations or learning impairments, any environmental factors that had an impact on them and other aspects of his life and background. Once that work is done and the information carefully assessed, often with the assistance of social workers, psychologist, psychiatrists, and other experts, the broad admissibility of mitigating circumstances provides an opportunity to tell the story of the client's life.

However, defense lawyers must not only present the evidence to juries but convince juries that the evidence is a basis for a sentence less than death. All states that have capital punishment also have allow juries to impose life imprisonment without the possibility of parole, and some allow the consideration of life imprisonment with the possibility of parole or a term of years.

A juror in one capital case said after trial that the jury had great empathy for some evidence that had been offered by the defense at the penalty phase, "but we didn't know what to do with it!"[2] In addition, whether some evidence is mitigating may be in the eye of the beholder. Some jurors see mitigating circumstances as the "abuse excuse." Mental illness or a horrific childhood may appear to be mitigating to some people, but it may be indicative of future dangerousness for others. So the defense team must first ask itself, why is it offering this evidence? Lawyers must effectively communicate to the jury how the evidence helps answer the question of what punishment to impose and does so in a way that favors life imprisonment instead of death. Jurors' answers to questions on jury questionnaires or questions asked by the lawyers during in jury selection may identify the jurors who may be most

1. *See*, *e.g.*, *Porter v. McCollum*, 558 U.S. 30 (2009) (counsel held ineffective for failing to present Porter's heroic and traumatic experiences in battles during the Korean War).

2. Scott Sundby, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY at 79 (2005). Professor Sundby's book describes the jury's decision making in one capital trial, provides examples from other cases, and describes findings of the numerous studies of how juries make decisions in capital cases by a number of scholars in law and social science as part of the Capital Jury Project. Many articles on their findings are cited by Professor Sundby and a list of articles and books produced as part of the Capital Jury Project is included as an appendix to the book.

hostile to consideration of mitigating factors (*e.g.*, those who would vote for death in any case involving a murder with aggravating factors), as well as jurors who may be more open to considering the evidence as mitigating and relevant to the life-death decision.

Mitigating evidence is usually offered to put whatever crimes the client has committed in the context of the defendant's entire life. As we have seen, Justice O'Connor, writing for the Court has said "the sentence imposed at the penalty stage should reflect *a reasoned moral response* to the defendant's background, character, and crime."[3] The jury is not to deciding whether a person will live or die based on a single incident or series of events; it is to judge the whole life – a whole person – and deciding whether that life may continue or will be extinguished. Defense lawyers must make it clear that mitigating evidence is not offered to excuse or justify or explain away the crime(s), but to put the crimes in the context of the whole life of a person who is more than the worst thing he has ever done. For a description of mitigation work, *see* Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008).

The American Bar Association has issued *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* that are published in 36 HOFSTRA L. REV. 677 (2008), accompanied by 14 articles and essays regarding developments in the law, the investigation required, and other aspects of mitigating circumstances.

Professor Craig Haney of University of California Santa Cruz, who has investigated backgrounds for defendants and testified an as expert witness in many capital cases, describes how jurors become conditioned before and during jury service to impose death in an article and book, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447 (1997), and DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM (2005).

Jury Instructions Regarding the Consideration of Mitigating Circumstances

In *California v. Brown*, 479 U.S. 538 (1987), the Supreme Court held that a jury instruction, given at the penalty phase, stating that jurors "must not be swayed by mere . . . sympathy" or by mere sentiment, conjecture, passion, prejudice, public opinion or public feeling does not violate the Eighth and Fourteenth Amendment requirement that the sentencer be allowed to consider any relevant mitigating evidence regarding the defendant's character or record and the circumstances of the offense.

In *Mills v. Maryland*, 486 U.S. 367 (1988), the Court considered the question of whether a state could require jurors to be unanimous with regard to whether a mitigating circumstance has been established. The argument was illustrated by a hypothetical situation quoted by the Court in its opinion:

> If eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found. Consequently, there is nothing to weigh against any aggravating circumstance found and the judgment is death even though eleven jurors think the death penalty wholly inappropriate.

The Court concluded "that there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration,

3. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

and consequently require the jury to impose the death penalty, is one we dare not risk." In *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Court held that North Carolina's death penalty statute which requires sentencing jury to find a mitigating factor unanimously before it can consider it violates *Mills*.

In *Smith v. Spisak*, 130 S.Ct. 676 (2010), the Court reversed a finding of a *Mills* violation by the Court of Appeals for the Sixth Circuit in a case tried in Ohio. The Court held, "the instructions did not say that the jury must determine the existence of each individual mitigating factor unanimously. Neither the instructions nor the forms said anything about how – or even whether – the jury should make individual determinations that each particular mitigating circumstance existed." Because the instructions and forms differed significantly from those in *Mills*, there was not a violation of "clearly established Federal law" as required to grant habeas corpus relief under 28 U.S.C. § 2254 (d)(1).

The Court held in *Buchanan v. Angelone*, 522 U.S. 269 (1998), that the Eighth Amendment does not require that capital jury be instructed on concept of mitigating evidence generally, nor that any definitional instruction be given on a particular statutory mitigating factor.

In *Buchanan*, the trial judge instructed the jury that before it could fix the penalty at death, the prosecution prove beyond a reasonable doubt an aggravating factor, in this case that the conduct was "vile, horrible and inhuman." The instruction next stated that if the jury so found, "then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment."

Buchanan requested four instructions on particular mitigating factors – no significant history of prior criminal activity; extreme mental or emotional disturbance; significantly impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the law's requirements; and his age – listed as facts in mitigation of the offense in the Virginia Code, each stating that if the jury found the factor to exist, "then that is a fact which mitigates against imposing the death penalty, and you shall consider that fact in deciding whether to impose a sentence of death or life imprisonment." Buchanan also proposed an instruction stating that, "In addition to the mitigating factors specified in other instructions, you shall consider the circumstances surrounding the offense, the history and background of [Buchanan] and any other facts in mitigation of the offense." The court refused to give these instructions.

In rejecting Buchanan's claim that the trial court's failure to provide the jury with express guidance on the concept of mitigation violated his Eighth and Fourteenth Amendment right to be free from arbitrary and capricious imposition of the death penalty, the Supreme Court held that while "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence, * * * the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." The Court applied the standard in used in *Boyde v. California*: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

The Court found the instructions – and lack of instructions – afforded jurors an opportunity to consider mitigating evidence by directing them to base their decision on "all the evidence." The Court also found that "the entire context in which the instructions were given" – after two days of testimony about the family background and emotional problems of Buchanan – "expressly informed the jury that it could consider mitigating evidence."

Justice Bryer, joined by Justices Stevens and Ginsburg, dissented. Observing that the majority found that the instruction "or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the

Defendant at life imprisonment" advised the jury that it was to consider mitigating evidence, Justice Bryer responded:

> I believe that these words, read in the context of the entire instruction, do the opposite. In context, they are part of an instruction which seems to say that, if the jury finds the State has proved aggravating circumstances that make the defendant eligible for the death penalty, the jury may "fix the punishment . . . at death," but if the jury finds that the State has not proved aggravating circumstances that make the defendant eligible for the death penalty, then the jury must "fix the punishment . . . at life imprisonment." To say this without more – and there was no more – is to tell the jury that evidence of mitigating circumstances (concerning, say, the defendant's childhood and his troubled relationships with the victims) is not relevant to their sentencing decision.

He concluded that there was a reasonable likelihood that "the jury understood and 'applied the challenged instruction' in a way that prevented it from considering 'constitutionally relevant evidence.'"

Weeks v. Angelone, 528 U.S. 225 (2000), involved a similar jury instruction:

> If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two [aggravating circumstances], and as to that alternative, you are unanimous, then you may fix the punishment . . . at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at [life] imprisonment.

During its deliberations, the jury asked the judge whether it was required to impose death penalty if it found an aggravating factor proved beyond reasonable doubt. The judge did not answer the question, but directed the jury to the foregoing instruction. The Supreme Court held, 5-4, that there was not a reasonable likelihood that the jury was precluded from considering mitigating circumstances.

Justice Stevens, writing for four members of the Court in dissent, expressed the view that:

> [t]he record in this case establishes, not just a "reasonable likelihood" of jury confusion, but a virtual certainty that the jury did not realize that there were two distinct legal bases for concluding that a death sentence was not "justified." The jurors understood that such a sentence would not be justified unless they found at least one of the two alleged aggravating circumstances. Despite their specific request for enlightenment, however, the judge refused to tell them that even if they found one of those circumstances, they did not have a "duty as a jury to issue the death penalty."

The Supreme Court has held that the Constitution does not require that the jury be instructed on how to weigh the sentencing factors. *Tuilaepa v. California*, 512 U.S. 967 (1994). The Court upheld California's death penalty laws which provide that eligibility for the death penalty is based on a determination of whether the defendant is guilty of first-degree murder accompanied by one or more statutorily enumerated "special circumstances," and whether death is imposed is based upon the jury's consideration of various statutory factors – including the circumstances of the crime, the defendant's prior record, and the defendant's age. The Court held that the fact that the three challenged sentencing factors are open-ended does not render the sentencing scheme unconstitutionally vague; nor does the fact that the jury is not instructed how to weigh the sentencing factors render them unconstitutional.

Statutes Requiring Imposition of Death

The Supreme Court has upheld statutes which required a jury to impose a death sentence if it makes certain findings. In *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), the Court upheld a statute which provided that death is to be imposed if the jury unanimously finds at least one aggravating circumstance and no mitigating cir-

cumstances, or finds the aggravating circumstances outweigh the mitigating circumstances. The Court held this was not an unconstitutional mandatory death penalty so long as jury is able to consider and give effect to all relevant mitigating evidence.

The Court also held that the Eight Amendment was not violated by a California penalty phase instruction that provided that if jury concludes that aggravating circumstances outweigh the mitigating circumstances, it "shall" impose a sentence of death. *Boyde v. California*, 494 U.S. 370 (1990). The Court found that in light of other instructions also given to the jury there was no "reasonable likelihood" that jurors construed penalty phase instruction to consider circumstances which "extenuate gravity of crime" in a way that prevented its consideration of relevant mitigation evidence.

In *Walton v. Arizona*, 497 U.S. 639 (1990), the Court upheld the Arizona statute which placed the burden upon defendant to prove mitigating circumstances and to establish that they sufficiently substantial to call for leniency in order to avoid the death penalty. The Court applied *Walton* in holding that a Kansas law which requires the imposition of the death penalty if the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise does not violate the Constitution. *Kansas v. Marsh,* 548 U.S. 163 (2006).

The Kansas law provides if a jury unanimously finds that aggravating circumstances are not outweighed by mitigating circumstances, the death penalty shall be imposed. Thus, if the jury found the two of equal weight, it would be required to impose death. In upholding the statute, the Court said:

> Even if, as Marsh contends, *Walton* does not directly control, the general principles set forth in our death penalty jurisprudence would lead us to conclude that the Kansas capital sentencing system is constitutionally permissible. Together, our decisions in *Furman* v. *Georgia* and *Gregg* v. *Georgia* (joint opinion of Stewart, Powell, and Stevens, JJ.), establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed.
>
> The use of mitigation evidence is a product of the requirement of individualized sentencing. In *Lockett* v. *Ohio,* 438 U. S. 586, 604 (1978), a plurality of this Court held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original.) The Court has held that the sentencer must have full access to this " 'highly relevant' " information.
> * * *
>
> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

The majority pointed out the weighing instruction given in *Marsh* was "analytically indistinguishable" from a jury instruction upheld in *Boyde v. California*, 494 U. S. 370, 378 (1990), which read:

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However, if you determine that the mitigating circumstances outweigh the

aggravating circumstances, you *shall impose* a sentence of confinement in the state prison for life without the possibility of parole.

The Court concluded in *Blystone, Boyde* and *Marsh* that the mandatory language of the instruction did not prevent the jury from rendering an individualized sentencing determination because it did not prevent the jury from considering all relevant mitigating evidence.

The Court also rejected Marsh's argument that the Kansas statute create a general presumption in favor of the death penalty because it required that if the State fails to meet its burden to demonstrate the existence of aggravating circumstance(s) beyond a reasonable doubt, a sentence of life imprisonment must be imposed.

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented. Justice Souter distinguished *Blystone* and *Boyde* as allowing state to require imposition of death upon a jury finding that aggravating circumstances outweighed mitigating ones. Because the death penalty must be reserved for "the worst of the worst" and therefore the sentencing proceeding must be structured to eliminate the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty, he concluded that a "tie breaker in favor of death" did not satisfy the Eighth Amendment. He stated:

> The determining fact [requiring death] is not directly linked to a particular crime or particular criminal at all; the law operates merely on a jury's finding of equipoise in the State's own selected considerations for and against death. Nor does the tie breaker identify the worst of the worst, or even purport to reflect any evidentiary showing that death must be the reasoned moral response; it does the opposite. The statute produces a death sentence exactly when a sentencing impasse demonstrates as a matter of law that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal, in a combination heinous enough to demand death. It operates, that is, when a jury has applied the State's chosen standards of culpability and mitigation and reached nothing more than what the Supreme Court of Kansas calls a "tie." It mandates death in what that court identifies as "doubtful cases." The statute thus addresses the risk of a morally unjustifiable death sentence, not by minimizing it as precedent unmistakably requires, but by guaranteeing that in equipoise cases the risk will be realized, by "placing a 'thumb [on] death's side of the scale.'"

Justice Souter also expressed concern about the number of people sentenced to death who had been exonerated; Justice Scalia responded to those concerns in a concurring opinion.