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When Congress adopted the eighth amendment\(^1\) to the United States Constitution in 1791, all states, in accordance with the common law, automatically imposed a death sentence upon defendants convicted of murder.\(^2\) Although state death penalty laws were clear, juries were generally unwilling to support mandatory capital punishment.\(^3\) Thus, rather than returning verdicts that would necessarily result in death, juries would often find defendants not guilty, or guilty of lesser crimes.\(^4\) Accordingly, state legislatures began to narrow the types of offenses deemed capital.\(^5\) Unmoved by the legislatures' efforts, jurors continued to refuse to return guilty verdicts where death was the automatic punishment.\(^6\) In response to jury behavior, states, instead of further limiting the types of capital crimes, allowed juries unguided and unrestrained discretion to determine the type of punishment a defendant in a capital case would receive.\(^7\)

Prior to 1972, the United States Supreme Court rejected the argument that discretionary death penalty sentencing violated the due process clause.\(^8\)
of the fourteenth amendment. \footnote{8}{McGautha, 402 U.S. at 207-08. The McGautha Court found that granting the sentencer untrammeled discretion to impose death or life imprisonment did not violate the Constitution, reasoning that states were entitled to assume that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision." \textit{Id.} at 208. Moreover, the Court found that it was not possible "to identify before the fact those homicides for which the slayer should die." \textit{Id.} at 197.}

\footnote{9}{408 U.S. 238 (1972) (per curiam).}

\footnote{10}{See Gregg v. Georgia, 428 U.S. 153, 189 (1976). "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." \textit{Id.}; see also infra text accompanying notes 73-76.}

\footnote{11}{Furman, 408 U.S. at 248.}

\footnote{12}{\textit{Id.} at 256-57 (Douglas, J., concurring); \textit{id.} at 309-10 (Stewart, J., concurring); \textit{id.} at 313-14 (White, J., concurring).}

\footnote{13}{See McCleskey v. Kemp, 481 U.S. 279, 305 (1987) ("the State must establish rational criteria that narrow the decisionmaker's judgment"); California v. Brown, 479 U.S. 538, 541 (1987) ("death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion") (citing Gregg, 428 U.S. 153; Furman, 408 U.S. 238).}

\footnote{14}{Currently, the presence of one legislatively defined aggravating circumstance is required before a judge or jury can impose a death sentence. Special Project, \textit{Capital Punishment In 1984: Abandoning The Pursuit Of Fairness And Consistency,} 69 \textit{Cornell L. Rev.} 1129, 1137 (1984).}

\footnote{15}{See \textit{id.} at 1135 (noting that Furman and the cases following it "indicated that the level of sentencing discretion in capital cases must be suitably directed and limited so as to produce fair and reasonably consistent results"); \textit{supra} note 11 and accompanying text.}

\footnote{16}{438 U.S. 586 (1978).}
of the circumstances of the offense proffered by the defendant as a basis for a lesser sentence than death.\textsuperscript{17} Thus, \textit{Furman} and \textit{Lockett} present the sentencing authority with two conflicting principles to consider when deciding between life imprisonment or death. \textit{Furman} stands for the proposition that the sentencer's discretion to impose death must be statutorily guided to prevent arbitrary sentencing.\textsuperscript{18} Alternatively, \textit{Lockett} prevents defendants guilty of the same crime from receiving uniform treatment\textsuperscript{19} by allowing the sentencer discretion to decide whether any factors relating to the defendant or the crime show that the defendant does not " 'deserve to be [sentenced] to death.' "\textsuperscript{20} Although the \textit{Furman} and \textit{Lockett} principles are contradictory, the Court has failed to reconcile them.\textsuperscript{21} \textit{Walton v. Arizona}\textsuperscript{22} presented the United States Supreme Court with the opportunity to resolve the \textit{Furman-Lockett} conflict. The \textit{Walton} Court, however, failed to recognize the \textit{Furman-Lockett} conflict as the underlying issue. Rather, the Court examined Arizona's death penalty statute merely to determine whether it satisfied eighth and fourteenth amendment capital punishment jurisprudence.\textsuperscript{23}

In February of 1989, an Arizona jury tried and convicted Jeffrey Walton for the first degree murder of Thomas Powell.\textsuperscript{24} The jury determined that Walton and his two codefendants, Hoover and Ramsey, went to a bar intending to rob someone at random, steal his car, and then leave him in the

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 604. In a footnote, however, the Court implied that mandatory death sentences may still be justifiable to deter certain kinds of homicide, such as murder committed by a prisoner or escapee under a life sentence. \textit{Id.} n.11; \textit{see also} \textit{Roberts v. Louisiana}, 431 U.S. 633, 637 n.5 (1977) (leaving open the issue of under what circumstances mandatory capital punishment statutes may be applied to inmates serving life sentences). The \textit{Lockett} Court noted that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." \textit{Lockett}, 438 U.S. at 604 n.12.
\item \textsuperscript{18} \textit{Maynard v. Cartwright}, 486 U.S. 356, 362 (1988); \textit{supra} text accompanying notes 9-15.
\item \textsuperscript{19} \textit{Walton v. Arizona}, 110 S. Ct. 3047, 3062 (1990) (Scalia, J., concurring); \textit{supra} text accompanying notes 16-17.
\item \textsuperscript{20} \textit{Id.} at 3063 (quoting \textit{Penry v. Lynaugh}, 109 S. Ct. 2934, 2950 (1989)); \textit{see Lockett}, 438 U.S. at 604-05.
\item \textsuperscript{21} \textit{See Special Project, supra} note 14, at 1162. "As the number of factors that the sentencing authority may consider increases, guided discretion becomes a more difficult goal to attain." \textit{Id.}
\item \textsuperscript{22} 110 S. Ct. 3047 (1990).
\item \textsuperscript{23} \textit{Id.} at 3054-58. In \textit{Walton}, a five member majority voted to uphold the Arizona Supreme Court. \textit{Id.} at 3058. Justice White wrote the majority opinion, and was joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy. Justices Brennan, Marshall, Blackmun, and Stevens dissented. Five separate opinions were filed in the decision. \textit{Id.} at 3051.
\end{itemize}
desert while they fled the state. The three robbed Powell at gunpoint and forced him into his car, which they then drove into the Arizona desert. Ramsey promised Powell that he would not be hurt. After Walton and Hoover debated over Powell's fate, Walton marched Powell into the desert and shot him. When Walton was arrested a week later, he led police to the murder site, where they found Powell's body. A medical examiner determined that Powell had been blinded and rendered unconscious by the shot, but was not immediately killed. Instead, Powell regained consciousness, floundered about in the desert, and ultimately died approximately one day before his body was found.

After an Arizona jury found Walton guilty of first degree murder, he was sentenced in a separate hearing by a judge, as required by Arizona law. Under that law, the judge determines the existence of aggravating factors that weigh in favor of imposing the death penalty. Section 13-703(F) of the Arizona Criminal Code provides that the aggravating circumstances to be considered are:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
and mitigating circumstances and is required to impose a death sentence if he finds one or more enumerated aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency." The prosecution bears the burden of establishing aggravating circumstances beyond a reasonable doubt, while the defendant bears the burden of proving mitigating factors by a preponderance of the evidence. At the hearing, the judge found that Walton had shot Powell and that two of the statutorily delineated aggravating circumstances—that the defendant had committed the offense in "an especially heinous, cruel or depraved manner," and that

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.
8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.
9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.
10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

ARIZ. REV. STAT. ANN. § 13-703(F) (emphasis added).

35. Mitigating factors are those aspects of a defendant's character, background, record, offense, or any other circumstances proffered by the defendant that might serve as a basis for reducing the sentence, even though they do not constitute an excuse or justification for the crime. Section 13-703(G) provides that:

Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:
1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
5. The defendant's age.

ARIZ. REV. STAT. ANN. § 13-703(G).

36. Id. § 13-703(E).
37. Id. § 13-703(C); see State v. McMurtrey, 143 Ariz. 71, 72-73, 691 P.2d 1099, 1100-01 (1984) (en banc).
38. See ARIZ. REV. STAT. ANN. § 13-703(F)(6).
he had done so for pecuniary gain—were present. Then, after considering all of the mitigating factors urged by defense counsel, the court concluded that there were "no mitigating circumstances sufficiently substantial to call for leniency.”

On appeal, the Arizona Supreme Court affirmed Walton's conviction and death sentence. Among other claims, the court rejected Walton's contention that the statute failed to guide the sentencer's decision-making because the "especially heinous, cruel or depraved" aggravating circumstance language under Section 13-703(F) of the Arizona Criminal Code was unconstitutionally vague. The court also denied that the preponderance of the evidence standard for mitigating factors improperly limited the sentencer's discretion. In Adamson v. Ricketts, a case decided two months earlier, however, the United States Court of Appeals for the Ninth Circuit held the Arizona death penalty statute unconstitutional for precisely these reasons.

39. State v. Walton, 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989), aff'd, 110 S. Ct. 3047 (1990) (en banc). Walton told Hoover and Ramsey that he had shot Powell and that he had "'never seen a man pee in his pants before.'" Id. at 587, 769 P.2d at 1033. The Court found that Walton's reference to Powell's urinating on himself indicated Walton's "callous fascination with the murder," his "indifference to the suffering of the victim and... [his] sense of pleasure... in the killing." Id.

40. Id. at 588, 769 P.2d at 1034. The Court found that neither Walton's age, his purported lack of appreciation for the wrongfulness of his conduct, nor his claimed inability to foresee the consequences of his actions were mitigating circumstances sufficiently substantial to warrant leniency. Id. at 588-89, 769 P.2d at 1034-35.

41. Id. at 592, 769 P.2d at 1038.

42. Walton argued that Arizona's death penalty procedure was unconstitutional for several other reasons: it was facially invalid as cruel and unusual punishment; it allowed a judge, rather than a jury, to prescribe the sentence; it did not require the state to prove that aggravating factors outweighed mitigating factors beyond a reasonable doubt; it did not provide sufficient standards to determine how much weight should be given to the factors; it restricted the judge's discretion by requiring that a death sentence be imposed where certain findings were made; and it did not require the judge to enter a "special verdict" explaining his findings. Id. at 584, 769 P.2d at 1030.


44. Walton, 159 Ariz. at 584-85, 769 P.2d at 1030-31. The Arizona Supreme Court determined that Arizona's courts had provided the sentencer with sufficient guidance by limiting the reach of the "especially heinous, cruel or depraved" aggravating circumstance through narrow constructions of the statute's language. Id. at 586-88, 769 P.2d at 1032-34. For example, the court noted that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death." Id. at 586, 769 P.2d at 1032 (citing State v. Correll, 148 Ariz. 468, 479-80, 715 P.2d 721, 733 (1986) (en banc); State v. Gretzler, 135 Ariz. 42, 51, 659 P.2d 1, 10 (en banc), cert. denied, 461 U.S. 971 (1983)). In addition, the court stated "a crime is committed in an especially depraved manner when the perpetrator relishes the murder, evidencing debasement or perversion." Id. at 587, 769 P.2d at 1033 (citing Gretzler, 135 Ariz. at 51-52, 659 P.2d at 10-11).

45. Id. at 584-85, 769 P.2d at 1030-31 (citing Correll, 148 Ariz. at 483-84, 715 P.2d at 736-37).

46. 865 F.2d 1011 (9th Cir. 1988) (en banc), cert. denied, 110 S. Ct. 3287 (1990).
reasons. The United States Supreme Court granted certiorari to resolve the conflict between the two lower courts.

In Walton v. Arizona, Justice White, writing for the majority, concluded that the Arizona death penalty statute was constitutional, without confronting the Furman-Lockett tension. The Court maintained that although the "especially heinous, cruel or depraved" aggravating circumstance language of the Arizona criminal code might be vague on its face, it was not constitutionally deficient under Furman because the Arizona Supreme Court had narrowed the language of the statute to guide the sentencer sufficiently. In addition, the majority held that requiring the defendant to prove mitigating circumstances by a preponderance of the evidence did not violate the eighth and fourteenth amendments, because this burden in no way lightened the State's burden of proving the existence of aggravating circumstances. Finally, the majority contended that, because the Arizona statute was consistent with Lockett in allowing the court to consider mitigating circumstances, and did not impose death automatically, it was constitutional.

In a concurring opinion, Justice Scalia directly confronted the Furman-Lockett conflict, and declared that he would no longer uphold a challenge under the eighth amendment that the discretion of the sentencer had been unconstitutionally restricted. The issue before the Court, Justice Scalia reasoned, squarely presented the opportunity to resolve the Furman-Lockett conflict.
tension. He argued that *Lockett*’s mandate that a sentencer not be precluded from considering any mitigating factors was irreconcilable with *Furman*’s requirement that a sentencer’s discretion be constrained by specific standards to ensure consistent application of the death penalty.\(^{58}\) Recognizing that the *Lockett* and *Furman* doctrines were mutually exclusive, Justice Scalia announced his willingness to sacrifice the former for the latter.\(^{59}\)

Justice Blackmun, writing in dissent, argued that Arizona’s death penalty statute violated the Constitution for three reasons.\(^{60}\) First, by allowing the sentencer to consider only those mitigating circumstances the defendant proved by a preponderance of the evidence, Justice Blackmun contended that the statute necessarily violated *Lockett* by effectively precluding the sentencer from considering all mitigating evidence proffered by the defendant.\(^{61}\) Second, Justice Blackmun argued that the statute operated under an unconstitutional “presumption of death.”\(^{62}\) Third, he found that the “especially heinous, cruel or depraved” standard was unconstitutional under *Furman* because both the language and its prior judicial application failed to give the sentencing authority meaningful guidance in deciding who was to live and who was to die.\(^{63}\)

Although Justice Brennan joined in Justice Blackmun’s dissent, he also filed a separate dissenting opinion to accentuate his view that the death penalty is a cruel and unusual punishment that violates the eighth amendment under all circumstances.\(^{64}\) Justice Stevens joined Justice Blackmun, but wrote separately as well to dissent from the Court’s holding that it is not constitutionally necessary for a jury to determine the aggravating and mitigating circumstances before sentencing the defendant to death.\(^{65}\) Moreover, Justice Stevens criticized Justice Scalia’s concurring opinion, arguing that a rule that forbids unguided discretion in the initial stage of the sentencing process is entirely consistent with one that requires unlimited discretion in the final stage, before imposing death.\(^{66}\)

\(^{58}.\) *Id.* at 3063.

\(^{59}.\) *Id.* at 3067-68.

\(^{60}.\) *Id.* at 3070 (Blackmun, J., dissenting). Justices Brennan, Marshall, and Stevens joined in Justice Blackmun’s dissent.

\(^{61}.\) *Id.* at 3074.

\(^{62}.\) *Id.* at 3075-76 (citing Adamson v. Ricketts, 865 F.2d 1011, 1041 (9th Cir. 1988) (en banc), *cert. denied*, 110 S. Ct. 3287 (1990)).

\(^{63}.\) See *id.* at 3076-82.

\(^{64}.\) *Id.* at 3068 (Brennan, J., dissenting). Justice Marshall joined in Justice Brennan’s separate dissent.

\(^{65}.\) *Id.* at 3086-89 (Stevens, J., dissenting).

\(^{66}.\) *Id.* at 3092.
This Note examines the law prior to Walton v. Arizona, demonstrating how the Supreme Court has tried to develop an objective and consistent capital punishment scheme, while at the same time attempting to guarantee capital defendants the right to subjective and individualized sentencing. The Note then reviews the opinions issued in Walton and ultimately agrees with Justice Scalia that Furman and Lockett are rationally irreconcilable. This Note argues that the Supreme Court must reexamine the competing objectives underlying Furman and Lockett in order to give the states more rational and meaningful guidance regarding the imposition of death sentences.

I. THE ONGOING TUG OF WAR IN THE SUPREME COURT

A. Furman v. Georgia's Guided Discretion Through Aggravating Circumstances

Prior to 1972, jurors generally possessed unrestrained freedom to impose either the death penalty or life imprisonment in capital cases. Two of the opinions supporting the Supreme Court's per curiam judgment in Furman v. Georgia, however, dramatically changed the status of capital sentencing by holding that death penalty statutes that failed to guide the sentencer's discretion violated the eighth amendment. In Furman, the Court overturned three death sentences because the statutes under which the men were sentenced gave the jury complete discretion to inflict capital punishment. In a brief per curiam opinion, a majority of five Justices arrived at the narrow conclusion that a death sentence was unconstitutional in these cases. Each of the Justices comprising the majority wrote a separate opinion, and no two Justices concurred in any one opinion.

67. See supra notes 7-8 and accompanying text.
68. 408 U.S. 238 (1972) (per curiam).
69. See infra notes 74-77 and accompanying text.
70. Furman, 408 U.S. at 239.
71. Id. at 239-40. Justices Douglas, Brennan, Stewart, White, and Marshall filed separate opinions in support of the judgments. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist filed separate dissenting opinions. Id. at 240.
72. Id. at 239-40.
73. Id. at 240. Justices Brennan and Marshall found that imposing death upon an individual violated the cruel and unusual punishment clause under all circumstances and voted to reverse the defendants' death sentences for that reason alone. Id. at 305-06 (Brennan, J., concurring); id. at 370-71 (Marshall, J., concurring). Justices Douglas, Stewart, and White refused to hold the death penalty unconstitutional per se under the eighth and fourteenth amendments, but voted to reverse the death sentences for other reasons. See supra notes 74-76 and accompanying text. Justice Douglas' vote rested in part on his finding that the death penalty was being imposed in a potentially arbitrary way. 408 U.S. at 249 (Douglas, J., concurring) ("A penalty . . . should be considered “unusually” imposed if it is administered arbitrarily or discriminatorily" (quoting Goldberg & Dershowitz, Declaring The Death Penalty Unconstitutional, 83 HARV. L. REV. 1773, 1790 (1970))). In addition, Justice Douglas
The critical opinions were those of Justices Stewart and White. These Justices stressed that under the eighth amendment the death penalty could not be imposed when sentencing procedures lacked sufficient standards because such procedures created a substantial risk that death would be inflicted in an arbitrary, capricious, and unfair manner. Recognizing the unique finality that results when an individual is executed, Justice Stewart found that capital punishment schemes that allowed the penalty to be imposed "wantonly and . . . freakishly" violated the eighth and fourteenth amendments. Similarly, Justice White concluded that because capital defendants were being sentenced to death so infrequently, "there [was] no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not." Thus, Furman appeared to stand for the proposition that the sentencer's discretion must be statutorily guided and limited by objective standards in order for capital punishment schemes to function in a rational and consistent manner, as required by the eighth amendment. The Supreme Court cases following Furman have interpreted the decision in precisely this way.

Because the Furman decision was supported by so many different rationales, however, it created confusion among the states as to how the death penalty could be imposed without violating the eighth amendment. In effect, Furman invalidated thirty-nine of the forty death penalty statutes believed that the death penalty was also being administered in a discriminatory manner against "minorities whose numbers are few, who are outcasts of society, and who are unpopular." Id. at 245.

74. Id. at 306 (Stewart, J., concurring).
75. Id. at 310. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." Id. at 309. "[T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." Id. at 309-10.
76. Id. at 313 (White, J., concurring).
77. For example, in Gregg v. Georgia, 428 U.S. 153 (1976), the principal case following Furman, the plurality interpreted Furman as mandating that capital sentencing discretion "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id. at 189 (plurality opinion). Moreover, in Maynard v. Cartwright, 486 U.S. 356 (1988), the Court relied on Furman and its progeny to hold that "channeling and limiting of the sentencer's discretion in imposing the death penalty [was] a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Id. at 362.
78. Furman, 408 U.S. at 240; supra notes 73-76 and accompanying text.
79. See, e.g., Lockett v. Ohio, 438 U.S. 586, 599 (1978). States had attempted to satisfy Furman by enacting one of four types of statutes. See Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1699 (1974). Some states created a list of aggravating circumstances and required that at least one must be found before death could be inflicted. Id. Others specified both the aggravating and mitigating factors that could be considered. Id. Still others mandated death where at least one aggravating factor and no mitigating factors were found, but refused to allow capital punishment otherwise. Id.
tive at that time. Accordingly, state legislatures enacted new statutes that limited the sentencer’s discretion, but still permitted the death penalty for some crimes that caused a victim to lose his life.

The Supreme Court upheld Georgia’s post-Furman statute in Gregg v. Georgia, finding that Georgia had satisfied the concerns expressed in Furman by narrowing the class of murderers subject to capital punishment. After Furman, Georgia amended its statute by specifying ten aggravating circumstances. The statute provided that a jury could not impose a death sentence unless it had rendered a guilty verdict for first degree murder and found the existence of at least one of the delineated aggravating circumstances beyond a reasonable doubt. In addition, the statute permitted the sentencing authority to consider any other appropriate aggravating or mitigating circumstances. The statute further provided that, although the jury need not find any mitigating circumstances to make a mercy recommendation, at least one statutory aggravating circumstance had to be found before death could be imposed.

In Gregg, the defendant was sentenced to death under the new statute after being convicted of robbing and murdering a hitchhiker. In affirming

at 1699-1700. Finally, some states made death the mandatory punishment for certain specified crimes. Id. at 1700.

80. Furman, 408 U.S. at 411 (Blackmun, J., dissenting) (“Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided.”). Id.

81. See supra note 79 and accompanying text.


83. Id. at 195; see supra notes 74-77 and accompanying text.

84. Gregg, 428 U.S. at 206-07.


86. GA. CODE ANN. § 17-10-30(c) (1990).

The jury, if its verdict is a recommendation of death, shall designate... the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

Id.

87. Id. § 17-10-30(b).

In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances . . . .

Id. (emphasis added).

88. Id. § 17-10-30(b), (c).

89. Gregg, 428 U.S. at 158-61.
Gregg's death sentence, the Court, mirroring *Furman*, held that statutes that provided the sentencer with adequate information and guidance alleviated the danger of arbitrary and capricious death sentences.\(^9\) Because Georgia's statute confined and directed the jury's attention to the circumstances of the particular crime and to the characteristics of the person who committed the crime, the Court concluded that Georgia's statute satisfied *Furman's* goal of measured, consistent, and fair application of the death penalty.\(^9\)

The Supreme Court also upheld Florida's post-*Furman* death penalty statute in *Proffitt v. Florida*,\(^9\) finding it similar to the Georgia statute upheld in *Gregg*.\(^9\) In *Proffitt*, the defendant was sentenced to death after being convicted of the first degree murder of a man sleeping in the home that the defendant had broken into to commit burglary.\(^9\) Under Florida's scheme, if a defendant were found guilty of a capital offense, a separate sentencing hearing would be held before the jury and trial judge.\(^9\) The defense could proffer evidence of aggravating or mitigating circumstances at that hearing.\(^9\) In *Proffitt*, the jury had to consider whether mitigating circumstances of the crime and the defendant's character outweighed aggravating circumstances to determine whether the defendant should be sentenced to life imprisonment or death.\(^9\) The jury's verdict, however, was only advisory.\(^9\) Unlike Georgia's statute, the trial judge determined the actual sentence under Florida law.\(^9\) The trial judge also had to weigh the aggravating factors against the mitigating factors before determining whether death was an

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90. Id. at 195.
91. Id. at 198. The Court also noted, however, that each capital sentencing scheme must be examined individually before it could be found to uphold *Furman*. Id. at 195. Thus, merely enacting a statute similar to Georgia's would not guarantee a state that its construction was constitutional. Likewise, a state's adoption of a different type of procedure would not automatically be struck down. Id.
93. Id. at 251-53.
94. Id. at 244-47.
96. Proffitt, 428 U.S. at 248; Fla. Stat. Ann. § 921.141(1). Although the statute contained a list of mitigating factors, six justices approved the statute based on their assumption that the list was not exclusive. Justices Stewart, Powell, and Stevens, who comprised the plurality, noted that the list was not exclusive because although the Florida statute "provide[d] that 'aggravating circumstances shall be limited to . . . [eight specified factors]', . . . [t]here was no such limiting language introducing the list of statutory mitigating factors." Proffitt, 428 U.S. at 250 n.8 (emphasis in original) (citations omitted); see Fla. Stat. Ann. §§ 921.141 (5),(6). Justice White, Chief Justice Burger, and Justice Rehnquist accepted the plurality's interpretation of the statute. Proffitt, 428 U.S. at 260.
appropriate punishment in a particular case. Finding that the trial judge in Florida, like the jury in Georgia, was required to focus on the character of the offender and the characteristics of the crime before imposing a death sentence, the United States Supreme Court held that Florida's statute was constitutional under Furman and affirmed.

States such as Georgia and Florida interpreted the Furman decision to require the creation of additional standards to guide the sentencing decision. Other states, however, believed that Furman prescribed elimination of all discretion from the capital sentencing process. Accordingly, some

100. Id. at 251.
101. Id. at 251-52.
102. Id. at 259-60. The Supreme Court also upheld the Texas death penalty statute in Jurek v. Texas, 428 U.S. 262 (1976), even though the statute did not explicitly mention aggravating or mitigating circumstances. Id. at 270-72. In Jurek, the defendant was sentenced to death after being convicted of the kidnapping, forcible rape, and murder of a ten year old girl. Id. at 264-68. The Court found that the Texas statute required a separate proceeding to determine the sentence after a Texas jury has found a defendant guilty of one of the laws relating to capital punishment. Id. at 269 (citing TEX. CODE CRIM. PROC., art. 37.071(b) (Supp. 1975-1976) (current version at TEX. CODE CRIM. PROC. ANN., art. 37.071(b),(c) (Vernon 1981))).

The Texas statute provides that the jurors are required to answer yes or no to the following three questions:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b). The State imposes a death sentence if the jury finds that the State has proven beyond a reasonable doubt these three specific factors, which imply that at least one aggravating circumstance exists. Id. art. 37.071(e). The State sentences the defendant to life imprisonment if the jury finds that no aggravating circumstance can be implied. Id. A "yes" answer may be given only if all jurors agree. Id. art. 37.071(d)(1). A "no" answer may be given if 10 of 12 jurors agree. Id. art. 37.071(d)(2). Although Texas, unlike Georgia and Florida, had not adopted a list of statutory aggravating circumstances, the Court found that its method of narrowing the categories of murders for which a death sentence could ever be imposed served the same basic purpose. Jurek, 428 U.S. at 270. Texas' method required the sentencing authority to focus on the particular circumstances surrounding the crime. Id. at 271. Similarly, although the Texas statute did not explicitly speak of mitigating circumstances, the Court reasoned that requiring the State to prove the three factors listed above allowed the jury to consider particularized mitigating factors about the defendant's character. Id. at 272-73. Thus, the Court affirmed the defendant's death sentence. Id. at 277.

103. See Note, supra note 79, at 1701-08.
104. See THE DEATH PENALTY IN AMERICA, supra note 2, at 12. For example, California, Idaho, Indiana, Kentucky, Montana, New Hampshire, Nevada, New Mexico, New York, Oklahoma, Rhode Island, Wyoming, Louisiana, and Mississippi enacted new mandatory death penalties for certain types of homicide shortly after Furman was decided, while Delaware and North Carolina returned to their prior practice of mandatory capital punishment by simply removing all discretionary aspects from their statutes. Id.
states adopted mandatory death penalties for certain crimes.\textsuperscript{105} North Carolina, for example, amended its capital punishment statute in response to \textit{Furman} by replacing discretionary sentencing with mandatory death sentences.\textsuperscript{106}

In later cases, the Court made clear that \textit{Furman} did not command such a limited application. When challenged, the United States Supreme Court voided four mandatory death sentences in \textit{Woodson v. North Carolina},\textsuperscript{107} holding that the "respect for humanity underlying the Eighth Amendment"\textsuperscript{108} required both the capital offender's character and the circumstances surrounding the offense to be considered before imposing the death penalty.\textsuperscript{109}

In \textit{Woodson}, four individuals were sentenced to death for participating in the armed robbery of a convenience store, which resulted in the death of the store's cashier.\textsuperscript{110} The Court rejected the North Carolina statute because, rather than taking into account "‘the evolving standards of decency that mark the progress of a maturing society,'"\textsuperscript{111} the statute indiscriminately imposed a death sentence upon every person convicted of the specified offense.\textsuperscript{112} Noting that American juries had repeatedly refused to convict defendants charged with first degree murder where the death sentence

\textsuperscript{105} See, e.g., \textit{Woodson v. North Carolina}, 428 U.S. 280 (1976). Before \textit{Furman} was decided, North Carolina law provided that the jury had unbridled discretion to decide whether the convicted capital defendant should be sentenced to death or to life imprisonment. \textit{Id.} at 299-300 (plurality opinion). \textit{After Furman}, the Supreme Court of North Carolina held that the portion of the death penalty statute which gave the jury the option of returning a guilty verdict for first degree murder without imposing capital punishment was unconstitutional. \textit{State v. Waddell}, 282 N.C. 431, 444-45, 194 S.E.2d 19, 28 (1973); see \textit{Woodson}, 428 U.S. at 300; see also \textit{Rockwell v. Superior Court}, 18 Cal. 3d 420, 446-48, 556 P.2d 1101, 1116-18, 134 Cal. Rptr. 650, 666-67 (1976) (en banc) (Clark, J., concurring) (describing how California and other states responded to \textit{Furman} by enacting mandatory death penalty statutes).

\textsuperscript{106} See \textit{Woodson}, 428 U.S. at 299-300.

\textsuperscript{107} 428 U.S. 280 (1976).

\textsuperscript{108} \textit{Id.} at 304 (citing \textit{Trop v. Dulles}, 356 U.S. 86, 100 (1958) (plurality opinion)).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.} at 282-84.

\textsuperscript{111} \textit{Id.} at 301 (quoting \textit{Trop}, 356 U.S. at 101); see \textit{McGautha v. California}, 402 U.S. 183, 198 (1971) (discussing the creation of discretionary sentencing, which resulted from what the Court called an American "rebellion against . . . mandatory death sentence[s]") (1972). The \textit{Furman} Court agreed that America had rejected mandatory capital punishment. See \textit{Furman}, 408 U.S. 238, 245-47 (1972) (Douglas, J., concurring); \textit{id.} at 297-98 (Brennan, J., concurring); \textit{id.} at 339 (Marshall, J., concurring); \textit{id.} at 402-03 (Burger, C.J., with whom Blackmun, Powell, and Rehnquist, JJ., joined, dissenting); \textit{id.} at 413 (Blackmun, J., dissenting) (stating that statutes requiring automatic death penalties for certain crimes would be "regressive and of an antique mold").

\textsuperscript{112} \textit{Woodson}, 428 U.S. at 287. \textit{Woodson}, however, did not involve a mandatory death penalty statute limited to a narrow category of crime, such as murder by a prisoner sentenced to life imprisonment. Thus, the Court stated that it expressed no opinion regarding the consti-
automatically resulted,\textsuperscript{113} the Court found that North Carolina's mandatory death penalty statute\textsuperscript{114} failed to uphold societal values illustrated in legislative enactments\textsuperscript{115} and jury determinations.\textsuperscript{116} The Court set aside the death sentences, reasoning that North Carolina had misinterpreted \textit{Furman}.\textsuperscript{117} According to the \textit{Woodson} Court, \textit{Furman} held that arbitrary jury discretion must be replaced with objective and consistent standards to guide the imposition of death sentences;\textsuperscript{118} \textit{Furman} did not require that all defendants convicted of the same offense be sentenced to death without regard for the circumstances of the offense and the character of the offender.\textsuperscript{119} Finding that North Carolina's mandatory death penalty statute failed to guide the jury sufficiently in exercising its power to decide which capital defendants

\begin{itemize}
  \item 113. \textit{Woodson}, 428 U.S. at 289-93; see supra notes 3-7 and accompanying text.
  \item 114. \textit{Woodson}, 428 U.S. at 286. The Court quoted North Carolina's post-\textit{Furman} death penalty statute:

\begin{quote}
"A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death."
\end{quote}

\textit{Id.} (quoting N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975)).
  \item 115. \textit{Id.} at 293. Both the United States Congress and state legislatures have responded to jurors' aversion to mandatory capital punishment. Prior to \textit{Furman}, only one state had returned to automatic death penalty schemes after adopting discretionary sentencing. \textit{Id.} at 294-97 & n.30. Moreover, "it seems evident that the post-\textit{Furman} enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing." \textit{Id.} at 298.
  \item 116. \textit{Id.} at 293; see also \textit{Furman v. Georgia}, 408 U.S. 238, 291 (1972) (Brennan, J., concurring) (finding that "[t]he contemporary rarity of the infliction of [capital] punishment is . . . the end result of a long-continued decline").
  \item 117. \textit{Woodson}, 428 U.S. at 302-03 (concluding that although mandatory death penalty statutes may result in more death sentences, they do not satisfy \textit{Furman}'s requirement that arbitrary jury discretion be replaced with objective standards to guide and regulate the imposition of capital punishment).
  \item 118. \textit{Id.} at 303.
  \item 119. \textit{Id.} at 303-04.

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

\textit{Id.} at 304.
shall live and which shall die, the Court held the North Carolina statute unconstitutional under *Furman*.  

The Supreme Court, in *Sumner v. Shuman*, retested that mandatory death penalty statutes violated the eighth and fourteenth amendments. In *Sumner*, the defendant was sentenced to death under a Nevada statute enacted shortly after *Furman*. Nevada's mandatory capital sentencing statute eliminated discretionary sentencing by precluding the sentencer from determining whether any relevant mitigating circumstances existed that might justify imposing a lesser sentence. The defendant in *Sumner*, a prison inmate serving a life sentence without possibility of parole, was convicted of first degree murder. Only two elements had to be established at the time of trial to support a guilty verdict for capital murder: first, that the defendant had been convicted of murder while in prison; and second, that the defendant had been convicted of an earlier criminal offense which, at the time committed, resulted in a sentence of life imprisonment without possibility of parole.

Finding that similar offenses do not always call for identical punishments, the Court held unconstitutional, in light of changing societal standards, Louisiana's failure to consider the personal character of the offender and the circumstances of the particular offense. Additionally, the Court concluded that merely narrowing the scope of the capital offense and imposing death for limited categories of crime did not cure the unconstitutionality of mandatory sentencing. The Court held that, like North Carolina, Louisiana did not fulfill *Furman's* basic requirement that arbitrary jury discretion be replaced with objective standards to guide, regulate, and allow for the rational review of the imposition of capital punishment. Thus, the Court set aside the defendant's death sentence.

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120. *Id.* at 302-05. For almost identical reasons, the Court struck down Louisiana's death penalty statute in *Roberts v. Louisiana*, 428 U.S. 325 (1976), a case decided the same day as *Woodson*. In *Roberts*, the defendant was convicted of first degree murder for killing a gas station attendant during an armed robbery of a gas station. *Id.* at 327-28. Like North Carolina, Louisiana had responded to the Supreme Court's *Furman* decision by replacing discretionary capital sentencing with mandatory death sentences. *Id.* at 328-31. Under the revised Louisiana statute, all persons found guilty of first-degree murder, aggravated rape, aggravated kidnapping, or treason were automatically sentenced to death. *Id.* at 331. Moreover, where a guilty verdict was returned, any jury qualification or recommendation of mercy was deemed irrelevant. *Id.* Thus, the Court reasoned, Louisiana's capital sentencing procedure actually invited jurors to disregard their oaths and return a verdict for a less serious offense whenever they felt that death was an inappropriate punishment for a particular defendant. *Id.* at 334-35.


122. *Id.* at 77-78.

123. *Id.* at 70-71.

124. See *id.* at 78.

ity of parole. Upon the jury's finding that these two elements existed, the trial judge automatically imposed a death sentence.

The Court vacated the sentence, concluding that mandatory death penalty statutes were unconstitutional because "the fundamental respect for humanity underlying the Eighth Amendment require[d] that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence." Thus, while Furman required a more uniform application of capital punishment, the Court has simultaneously required that the sentencer consider case-specific criteria when assessing whether to inflict death upon a particular defendant. In the years following Furman, the Court attempted to balance the competing interests of a capital defendant's right to individualized sentencing, with the constitutional requirement that the death penalty be imposed in a rational and consistent manner. The Court struck down the mandatory capital sentencing statutes in Woodson and Sumner because, by not allowing mitigating evidence to be presented, North Carolina and Nevada failed to treat capital defendants as unique human beings. In contrast, the Court upheld the guided-discretion statutes in Gregg and Proffitt because they allowed the sentencer to consider relevant mitigating evidence surrounding both the offense and the individual offender. Thus, a new constitutional requirement appeared to emerge in these cases: while capital sentencing must be governed by statutory guidance under Furman, it must also be "humane and sensible to the uniqueness of the individual."

B. Lockett v. Ohio's Individualized Sentencing Through Mitigating Circumstances

Although the Supreme Court struck down the mandatory death penalty statute in Woodson, the plurality neither articulated the types of mitigat-

126. Sumner, 483 U.S. at 78.
127. Id.
128. Id. at 85.
129. See supra notes 90-91, 107-09 and accompanying text.
130. A defendant receives individualized sentencing where the sentencer considers the relevant aspects of the defendant's character and the nature of the offense alleged. In particular, the sentencer must consider any and all mitigating circumstances which are outlined in the state statute, as well as those which are not. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Roberts v. Louisiana, 431 U.S. 633, 637 (1977).
131. Supra notes 13-15, 75-77 and accompanying text.
133. Supra notes 82-102 and accompanying text.
135. Woodson, 428 U.S. at 304.
ing evidence the sentencer should consider, nor indicated how the factors should be considered.136

Confronted with these questions in Lockett v. Ohio,137 the Court held that in all but the rarest capital cases,138 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."139 The Court pronounced that the state must promulgate guidelines that enable the sentencer to look at any relevant mitigating factors, rather than an exclusive list of mitigating factors, when deciding whether to impose the death penalty.140 Lockett's requirement of individualized sentencing, however, made Furman's requirement of uniform sentencing through limited sentencer discretion impossible to achieve.

The defendant in Lockett was sentenced to death because of her participation in the armed robbery of a pawnshop, which resulted in the death of the shop's operator.141 The Supreme Court, however, reversed the death sentence and remanded the case for further proceedings.142 The Ohio statute at issue in Lockett provided that a defendant found guilty of aggravated murder based on at least one of seven specified aggravating circumstances received a mandatory death sentence unless the defense established at least one of the statutorily enumerated mitigating circumstances143 by a preponderance of the evidence.144 The Court concluded that a limitation on the types of mitigating circumstances the sentencing authority may consider violated

137. 438 U.S. 586 (1978) (plurality opinion).
138. Id. at 604. In a footnote, the Lockett Court declared that it expressed no opinion as to whether a mandatory death sentence would be justified for certain types of homicide such as murder committed by a prisoner or escapee already under a life sentence. Id. at 604 n.11; see supra note 125.
139. Lockett, 438 U.S. at 604 (emphasis omitted). In a footnote, however, the Court stated that its opinion should not be understood as a limitation on a court's authority to exclude from consideration irrelevant evidence not relating to the defendant's character, prior record, or the circumstances of his offense. Id. at 604 n.12.
140. Id. at 604-08.
141. Id. at 589-94.
142. Id. at 608-09.
143. Id. at 607 (quoting OHIO REV. CODE ANN. § 2929.04(B) (Anderson 1975) (codified as amended at OHIO REV. CODE ANN. § 2929.04(B)-(C) (Anderson (1987)))).
144. Id. The Court listed the three mitigating circumstances in Ohio's statute:
   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.

Id.
the eighth and fourteenth amendments.\textsuperscript{145} In reaching this conclusion, the plurality first noted that although individualized sentencing was not constitutionally required, it had long been accepted.\textsuperscript{146} Next, the Court noted that the plurality opinion in \textit{Woodson} had found that the "'fundamental respect for humanity underlying the Eighth Amendment' " required both the capital offender's character and record, as well as the circumstances surrounding the particular offense, to be a "'constitutionally indispensable part of the process of inflicting the penalty of death.' "\textsuperscript{147} Finally, after comparing the narrowly worded Ohio statute with the broadly worded statutes previously upheld in \textit{Gregg} and \textit{Proffitt},\textsuperscript{148} the plurality declared that in limiting the factors the sentencer could consider, Ohio created an unconstitutional risk that death would be imposed where a less severe penalty was appropriate.\textsuperscript{149} Thus, \textit{Lockett} cemented a second constitutional requirement in the Court's capital punishment jurisprudence: A death penalty statute must not preclude the sentencer from considering any relevant mitigating factors when deciding whether to impose life imprisonment or death.\textsuperscript{150}

In \textit{Eddings v. Oklahoma},\textsuperscript{151} a majority of the Court accepted the \textit{Lockett} plurality's holding and implicitly criticized the uniformity mandated in \textit{Furman} by declaring that "'a consistency produced by ignoring individual differences [was] a false consistency.' "\textsuperscript{152} The defendant in \textit{Eddings} was sentenced to death after being convicted of the first degree murder of a police officer.\textsuperscript{153} The Court vacated the defendant's death sentence, holding that a state's death penalty statute must allow the sentencer to consider any mitigating factor, and that the sentencer may not refuse to consider any relevant mitigating evidence.\textsuperscript{154} Thus, the Court held that, although the sentencer could decide how much weight to give a relevant mitigating factor, he could not decide to ignore potentially mitigating evidence.\textsuperscript{155} Noting that the Oklahoma statute at issue in \textit{Eddings} allowed the defendant to proffer any

\begin{itemize}
  \item \textsuperscript{145} \textit{Id.} at 608.
  \item \textsuperscript{146} \textit{Id.} at 602 (citing \textit{Williams v. New York}, 337 U.S. 241, 247-48 (1949)).
  \item \textsuperscript{147} \textit{Id.} at 604 (quoting \textit{Woodson v. North Carolina}, 428 U.S. 280, 304 (1976)).
  \item \textsuperscript{148} \textit{Id.} at 607.
  \item \textsuperscript{149} \textit{Id.} at 605.
  \item \textsuperscript{150} \textit{Id.} at 608.
  \item \textsuperscript{151} 455 U.S. 104 (1982).
  \item \textsuperscript{152} \textit{Id.} at 112.
  \item \textsuperscript{153} \textit{Id.} at 105-09.
  \item \textsuperscript{154} \textit{Id.} at 113-14.
  \item \textsuperscript{155} \textit{Id.} at 114-15.
\end{itemize}
mitigating circumstances as evidence," the Court declared that the sentencer's failure to consider mitigating factors violated 

Accordingly, in order for a state's death penalty statute to satisfy the eighth and fourteenth amendments under Supreme Court analysis, the statute must satisfy two somewhat conflicting principles. While Furman and Gregg require state legislatures to focus and guide sentencer discretion, the Woodson-Lockett line of cases insists that the sentencer be given broad discretion to determine the mitigating force of all the circumstances of each case.

Unable to resolve this paradox, commentators have criticized the Court's efforts to rid the capital punishment system of arbitrary and capricious sentencing. The line between society's right to consistent application of the death penalty and the defendant's right to individualized sentencing must be drawn somewhere. In Walton v. Arizona, the Supreme Court was given the opportunity to draw this line.


On May 14, 1973, Arizona became the fourteenth state in the country to revise its capital punishment scheme in response to Furman. Arizona's new legislation expanded the definition of first degree murder and re-

157. Eddings, 455 U.S. at 115 & n.10. Five years later, the Supreme Court further upheld the notion of individualized sentencing by unanimously invalidating a defendant's death sentence because the advisory jury was told not to consider, and the sentencing judge explicitly refused to consider, the non-statutory mitigating factors offered as evidence. Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987).

[T]he Court has asked virtually nothing of the states that they were not doing before Furman... It is as if the constitutional strictures on the death penalty are merely a matter of legal aesthetics. The state will satisfy the Court if it can describe its penalty scheme according to some rational-looking form—indeed some metaphor of rational form.

Weisberg, supra, at 354.
placed unbridled sentencing discretion with the capital sentencing procedure adopted by the Model Penal Code.\textsuperscript{164} Thus, guided by statute, an Arizona trial judge is the sole sentencing authority.\textsuperscript{165} After finding a defendant guilty of first degree murder,\textsuperscript{166} the judge conducts a separate sentencing hearing to determine whether the sentence should be death or life imprisonment.\textsuperscript{167} This hearing has three stages. First, the prosecution must try to prove beyond a reasonable doubt the existence of one or more aggravating circumstances.\textsuperscript{168} Second, if the judge finds that such aggravating circumstances exist, the defendant must prove by a preponderance of the evidence the existence of any mitigating circumstances.\textsuperscript{169} Third, the court must weigh the aggravating circumstances against the mitigating circumstances.\textsuperscript{170} The judge then returns a special verdict setting forth his findings as to each of the aggravating and mitigating circumstances.\textsuperscript{171} If he finds that one or more of the enumerated aggravating circumstances exists, and does not find any mitigating circumstances sufficiently substantial to warrant leniency, the judge must impose a death sentence.\textsuperscript{172}

In February 1989, an Arizona jury tried and convicted Jeffrey Walton for the first degree murder of Thomas Powell.\textsuperscript{173} After the trial judge found that Walton had committed the murder in an "especially heinous, cruel or depraved" manner, that he had done so for pecuniary gain, and that no mitigating circumstances existed which were sufficiently substantial to warrant

\begin{itemize}
  \item \textsuperscript{164} See State v. Gretzler, 135 Ariz. 42, 53-54, 659 P.2d 1, 12-13, cert. denied, 461 U.S. 971 (1983) (en banc). Arizona followed the "alternative formulation" method of the Model Penal Code. See \textit{Model Penal Code} § 210.6(2) (1980). In this formulation, the trial judge is the sole sentencing authority. \textit{Id}.
  \item \textsuperscript{166} See supra note 32.
  \item \textsuperscript{167} \textit{Ariz. Rev. Stat. Ann.} § 13-703(B); see supra note 33 and accompanying text.
  \item \textsuperscript{168} \textit{Ariz. Rev. Stat. Ann.} § 13-703(C).
  \item \textsuperscript{169} \textit{Id.} "The Arizona Supreme Court has construed the statute to require that any mitigating circumstances must be proved by a preponderance of the evidence." Walton v. Arizona, 110 S. Ct. 3047, 3071 (1990) (Blackmun, J., dissenting) (citing State v. McMurtry, 143 Ariz. 71, 73, 691 P.2d 1099, 1101 (1984) (en banc)).
  \item \textsuperscript{170} \textit{Ariz. Rev. Stat. Ann.} § 13-703(E). "In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis . . . the court shall take into account the aggravating and mitigating circumstances . . . ." \textit{Id}.
  \item \textsuperscript{171} \textit{Id.} § 13-703(D).
  \item \textsuperscript{172} \textit{Id.} § 13-703(E).
  \item \textsuperscript{173} See State v. Walton, 159 Ariz. 571, 576, 769 P.2d 1017, 1022 (1989) (en banc), aff'd, 110 S. Ct. 3047 (1990); supra notes 25-33 and accompanying text.
\end{itemize}
leniency, the trial judge sentenced Walton to death,\textsuperscript{174} and the Arizona Supreme Court affirmed.\textsuperscript{175}

Before the United States Supreme Court, Walton contended that the Arizona death penalty statute was unconstitutional under four alternative theories: first, it allowed a judge rather than a jury to find facts prescribing a death sentence;\textsuperscript{176} second, it prevented the consideration of all mitigating circumstances by requiring that mitigating circumstances first be proved by a preponderance of the evidence;\textsuperscript{177} third, the statute imposed an unconstitutional presumption of death;\textsuperscript{178} and fourth, the statute contained the vague "especially heinous, cruel or depraved" aggravating circumstance language that failed to guide adequately the sentencer's decision-making.\textsuperscript{179} In essence, Walton argued that under Arizona's statute the sentencer had unbridled discretion because the statutory language defining aggravating circumstances was unconstitutionally vague. On the other hand, Walton asserted that the sentencer had too little discretion because the statute precluded the sentencer from considering mitigating factors which Walton had failed to prove by a preponderance of the evidence. Thus, the Walton Court had full opportunity to confront the Furman-Lockett dichotomy.

\textbf{A. The Majority's Rationale: The Furman-Lockett Tension Remains Unresolved}

Although the Furman-Lockett conflict was before the Court in Walton, the majority did not acknowledge it. Instead, the majority rendered an opinion narrowly tailored to Walton's criticisms of the Arizona statute.\textsuperscript{180} Justice White, writing for the majority, first found that the fact that a judge, rather than a jury, was statutorily directed to make factual findings relating to mitigating or aggravating circumstances did not render Arizona's death penalty statute unconstitutional.\textsuperscript{181} Moreover, the majority rejected Wal-

\begin{itemize}
\item \textsuperscript{174} Walton, 159 Ariz. at 576, 769 P.2d at 1022; see supra notes 32-40 and accompanying text.
\item \textsuperscript{175} Walton, 159 Ariz. at 592, 769 P.2d at 1038; see supra notes 41-45 and accompanying text.
\item \textsuperscript{176} Walton v. Arizona, 110 S. Ct. 3047, 3054 (1990).
\item \textsuperscript{177} Id. at 3055.
\item \textsuperscript{178} Id. at 3056.
\item \textsuperscript{179} Id. at 3056-57.
\item \textsuperscript{180} Id. at 3054-58.
\item \textsuperscript{181} Id. at 3054-55 (citing Clemons v. Mississippi, 110 S. Ct. 1441, 1446 (1990) (holding that the Constitution does not require a jury to impose a death sentence or make the findings leading to its imposition)); see Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (holding that the sixth amendment does not require a jury to make specific findings for death sentences).
\end{itemize}
ton's contention that aggravating factors are "elements of the offense" in Arizona, thereby requiring the assistance of a jury's determinations.

Walton also failed to persuade the Court that the Arizona statute was unconstitutional because it imposed on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. Noting that the Lockett Court itself refrained from expressing whether "it violate[d] the Constitution to require defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases," the majority held that states were free to specify how mitigating circumstances were to be proved. Moreover, the Court noted that the statute did not violate Walton's constitutional rights by requiring him to prove mitigating circumstances sufficiently substantial to warrant leniency, because the state fully retained its burden of proving the existence of aggravating circumstances.

Relying on recent Supreme Court precedent, the majority also found that Arizona's death penalty statute did not create an unconstitutional presumption that death was the proper sentence merely because the Arizona statute required the court to impose the death penalty upon a finding of one or more aggravating circumstances not counterbalanced sufficiently by mitigating circumstances. In addition, the majority concluded that the death sentence under Arizona's statute was not unconstitutionally mandatory in

182. Walton, 110 S. Ct. at 3054-55 (relying on Poland v. Arizona, 476 U.S. 147, 156 (1986) (holding that aggravating circumstances are merely standards to guide the decision between a death sentence or life imprisonment, rather than separate penalties or offenses)).
183. Id. at 3055-56.
184. Id. at 3055 (quoting Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978)).
185. Id. Justice Scalia, although concurring in part, did not join in the majority's discussion of Lockett v. Ohio. See infra notes 198-223 and accompanying text.
186. Walton, 110 S. Ct. at 3055. The Court relied on several cases: Martin v. Ohio, 480 U.S. 228, 233-36 (1987) (upholding Ohio's method of imposing on a capital defendant the burden of proving by a preponderance of the evidence that she was acting in self-defense when the murder was committed); Patterson v. New York, 432 U.S. 197, 210-11 (1977) (requiring a defendant to prove the affirmative defense of extreme emotional disturbance by a preponderance of the evidence); Leland v. Oregon, 343 U.S. 790, 799 (1952) (requiring the defense of insanity to be proved beyond a reasonable doubt by a capital defendant).
187. Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990) (holding that because the Pennsylvania statute did not prevent the sentencer from considering any type of mitigating evidence, "[t]he requirement of individualized sentencing in capital cases [was] satisfied by allowing the jury to consider all relevant mitigating evidence"); Boyde v. California, 110 S. Ct. 1190, 1196 (1990) (noting that because there was no constitutional mandate that juries have unrestrained sentencing discretion, "[s]tates are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty") (quoting Franklin v. Lynaugh, 487 U.S. 164, 181 (plurality opinion) (1988)).
188. Walton, 110 S. Ct. at 3056.
light of Woodson and Sumner because it was not automatically imposed upon defendants convicted of certain types of murder.\textsuperscript{189}

Finally, the majority held that although Arizona's "especially heinous, cruel or depraved" aggravating circumstance language was facially vague,\textsuperscript{190} the Arizona Supreme Court's gloss on the statutory language sufficiently narrowed the definition to pass constitutional muster. The Arizona Supreme Court had provided that "‘a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death,'"\textsuperscript{191} and "‘a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing.'"\textsuperscript{192} In support of its holding that the language was limited, the majority noted that Arizona's construction was similar to the construction of the "especially heinous, atrocious, or cruel" aggravating circumstance the Court had previously approved in Profitt v. Florida.\textsuperscript{193}

Based on its presumption that Arizona trial judges apply the law in making their decisions,\textsuperscript{194} the majority refused to analyze previous Arizona Supreme Court decisions to determine whether the judge who sentenced Walton to death had limited the construction of the aggravating factor in a constitutional way.\textsuperscript{195} Thus, the majority concluded that Walton's death sentence was not "‘wantonly and freakishly' imposed,"\textsuperscript{196} in violation of Supreme Court precedent.\textsuperscript{197}

\textbf{B. Justice Scalia's Concurrence: Sacrificing Lockett For Furman}

While the majority refused to address the Furman-Lockett conflict, Justice Scalia directly confronted the question of whether Lockett and Furman can coexist.\textsuperscript{198} Walton's argument, Justice Scalia reasoned, required the Court

\begin{footnotesize}
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\item \textsuperscript{189} \textit{Id.}; see supra note 187 and accompanying text.
\item \textsuperscript{190} \textit{Walton}, 110 S. Ct. at 3057.
\item \textsuperscript{191} \textit{Id}.
\item \textsuperscript{192} \textit{Id.} at 3058 (quoting State v. Walton, 159 Ariz. 571, 587, 769 P.2d 1017, 1033 (1989), aff'd, 110 S. Ct. 3047 (1990)).
\item \textsuperscript{193} \textit{Id.}; see Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).
\item \textsuperscript{194} \textit{Walton}, 110 S. Ct. at 3057. "If the Arizona Supreme Court has narrowed the definition of the 'especially heinous, cruel or depraved' aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition." \textit{Id}.
\item \textsuperscript{195} \textit{Id.} at 3058 (declining to challenge the proportionality review of the Arizona Supreme Court as erroneous, after concluding that the challenged factor "ha[d] been construed by the Arizona courts in a manner that furnishe[d] sufficient guidance to the sentencer").
\item \textsuperscript{196} \textit{Id.} (quoting McCleskey v. Kemp, 481 U.S. 279, 308 (1987)).
\item \textsuperscript{197} See supra notes 74-77 and accompanying text.
\item \textsuperscript{198} \textit{Walton}, 110 S. Ct. at 3058-68 (Scalia, J., concurring).
\end{itemize}
\end{footnotesize}
to address the Furman-Lockett tension because the petitioner complained that the sentencer had too much discretion and, simultaneously, too little discretion to impose a death sentence. Justice Scalia reasoned that, because the question of whether to impose life imprisonment or the death penalty is a unitary one, holding that a sentencer has both too much and, at the same time, too little discretion is paradoxical. Yet, Justice Scalia recognized, that paradox is precisely what Furman and Lockett, taken together, mandate. Accordingly, although Justice Scalia concurred with the judgment and most of the majority's reasoning, he wrote separately to demonstrate that Lockett should yield to Furman.

Justice Scalia first reviewed Furman, Lockett and the subsequent cases interpreting those decisions. Furman, Justice Scalia found, has always stood for the constitutional principle that the sentencer's discretion must be channeled and guided when determining whether to impose a death sentence. Alternatively, Justice Scalia acknowledged that Lockett 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. Thus, while the former principle constrains the sentencer's discretion to impose the death penalty, the latter principle forbids constraints on the sentencer's discretion to decline to impose capital punishment.

Justice Scalia found that the plurality decision in Lockett, which a majority of the Court later adopted in Eddings, had no basis in Furman. The curtailment of discretion stressed in Furman, Justice Scalia noted, was all but prohibited in Lockett, which required that a sentencer conduct an unconstrained evaluation of both the offender and the offense before sentencing a defendant to death. This latter principle, Justice Scalia reasoned, had

199. Id. at 3058.
200. Id. at 3058-59.
201. Id. at 3059-64.
202. Id. at 3059.
203. Id. at 3059-64.
204. Id. at 3060-61; Maynard v. Cartwright, 486 U.S. 356, 362 (1988).
205. Walton, 110 S. Ct. at 3061-63 (Scalia, J., concurring); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).
206. Walton, 110 S. Ct. at 3062 (Scalia, J., concurring).
207. Id. "In short, the practice which in Furman had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in Woodson and Lockett renamed the discretion not to sentence to death and pronounced constitutionally required." Id.
208. Id. at 3063; see Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989) (plurality opinion) (stating that "so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy
allowed states to impose only the most minimal constraints on the sentencer's discretion\textsuperscript{209} because Supreme Court precedent forbids states from creating exclusive lists of mitigating circumstances.\textsuperscript{210} Finding that \textit{Lockett}'s requirement destroys the uniformity, predictability, and stability that \textit{Furman} mandates, Justice Scalia turned to the text of the Constitution to determine which principle should be followed.\textsuperscript{211}

Justice Scalia first noted that the Framers had intentionally drafted the cruel and unusual punishment clause of the eighth amendment in the conjunctive.\textsuperscript{212} Thus, he reasoned, even if a penalty was considered cruel, it could not be said to violate the eighth amendment unless it was also found to be unusual.\textsuperscript{213} Moreover, finding that the procedural aspects of capital sentencing were controlled by the eighth amendment's prohibition against cruel and unusual punishments only insofar as cruel punishments were inflicted in an arbitrary manner,\textsuperscript{214} Justice Scalia held that when a state adopts a non-mandatory capital sentencing scheme, the sentencer's discretion must be governed, in advance, by objective standards.\textsuperscript{215}

Justice Scalia then analyzed the \textit{Woodson-Lockett} line of cases in light of the eighth amendment, finding that they bore no relation to the text of the Constitution.\textsuperscript{216} Justice Scalia found that imposing mandatory death sentences, devoid of sentencer discretion, for crimes that states have traditionally punished with death, could not possibly violate the eighth amendment because such a sentence would be neither cruel nor unusual.\textsuperscript{217} Justice

\textsuperscript{209} \textit{Walton}, 110 S. Ct. at 3062 (Scalia, J., concurring).
\textsuperscript{210} \textit{Id.}; see, e.g., Hitchcock v. Dugger, 481 U.S. 393, 397 (1987) (petitioner was a loving uncle, had been raised in poverty, and had lost his father to cancer); Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (defendant's parents were divorced when he was a young child, and until he became a teenager, he had lived with his mother without rules or supervision).
\textsuperscript{211} \textit{Walton}, 110 S. Ct. at 3066 (Scalia, J., concurring). "[I]t 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." \textit{Id.}
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.}; Gardner v. Florida, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting) ("The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed.").
\textsuperscript{215} \textit{Walton}, 110 S. Ct. at 3066-67 (Scalia, J., concurring) (citing Maynard v. Cartwright, 486 U.S. 356 (1988)).
\textsuperscript{216} \textit{Id.} at 3067.
\textsuperscript{217} \textit{Id.} "It is quite immaterial that most States have abandoned the practice of automatically sentencing to death all offenders guilty of a capital crime, in favor of a separate procedure in which the sentencer is given the opportunity to consider the appropriateness of death in the individual case." \textit{Id.} Justice Scalia found it even less relevant that "mandatory capital sentencing is (or alleged to be) out of touch with 'contemporary community values' regarding the
Scalia rejected the argument that mandatory capital sentencing schemes would necessarily increase the jury nullification which had plagued absolute discretionary schemes.\(^{218}\) He found that if juries would ignore their instructions in mandatory schemes, there is no reason to believe that they would not do the same with the legislatively guided standards that \textit{Furman} requires.\(^{219}\)

Finally, even the doctrine of stare decisis did not prevent Justice Scalia from declaring that he would no longer vote to uphold an eighth amendment claim that the sentencer's discretion had been unconstitutionally restricted.\(^{220}\) Justice Scalia argued that upholding \textit{Woodson-Lockett} did nothing to promote predictability, certainty, and stability in the law, or to protect the expectations of those who have relied on existing rules, the objects of the stare decisis doctrine.\(^{221}\) In fact, Justice Scalia believed that the \textit{Woodson-Lockett} line of caselaw had actually frustrated the Court's goal of obtaining a rational, consistent, and uniform scheme of capital punishment,\(^{222}\) and had only resulted in confusion among states as to what is constitutionally required under the eighth amendment.\(^{223}\)

\section*{C. Justice Blackmun's Rationale: Arizona's Death Penalty Statute Found Unconstitutional}

Justice Blackmun, writing in dissent, found that the Arizona death penalty statute violated Supreme Court precedent for three reasons.\(^{224}\) First, he found that Arizona's statute, which allowed the sentencer to consider only those mitigating circumstances proved by a preponderance of the evidence, prevented individualized sentencing under \textit{Lockett}.\(^{225}\) Second, Justice Blackmun argued that the requirement that the defendant bear the burden of establishing mitigating circumstances sufficiently substantial to warrant leniency imposed an unconstitutional presumption of death on capital defendants in Arizona.\(^{226}\) Third, he contended that the "especially heinous, cruel or deprived" aggravating circumstance, as construed by the Arizona

\(^{218}\) \textit{Id.}
\(^{219}\) \textit{Id.}
\(^{220}\) \textit{Id.}
\(^{221}\) \textit{Id.} at 3068.
\(^{222}\) \textit{Id.}
\(^{223}\) \textit{Id.}
\(^{224}\) \textit{Id.} at 3070 (Blackmun, J., dissenting); see \textit{supra} note 60 and accompanying text.
\(^{225}\) \textit{Walton}, 110 S. Ct. at 3070-74 (Blackmun, J., dissenting).
\(^{226}\) \textit{Id.} at 3075-76.
Supreme Court, provided no meaningful guidance to the sentencer in violation of *Furman.*

Justice Blackmun objected to the majority's failure to explain how the Arizona statute, which precluded the sentencer from considering all mitigating circumstances that the defendant had not been able to prove by a preponderance of the evidence, could be reconciled with the constitutional principles established in *Lockett.*

Noting that the "'qualitative difference'" between death and all other punishments required the greatest degree of reliability, Justice Blackmun found that constitutional standards could be satisfied only if defendants were allowed to present relevant mitigating evidence in an unrestricted manner.

Justice Blackmun also found that placing the burden of proving mitigating circumstances that are "'sufficiently substantial to call for leniency'" on the defendant imposed an unconstitutional presumption of death because the Arizona Supreme Court previously had held that a defendant's mitigating evidence could not be given any weight if the defendant failed to prove the existence of a mitigating factor by a preponderance of the evidence. Therefore, Justice Blackmun concluded that the majority's reliance on these cases was both improper and misleading.

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227. *Id.* at 3081-82.
228. *Id.* at 3071.
229. *Id.* at 3070 (quoting *Woodson* v. North Carolina, 428 U.S. 280, 305 (1976)).
230. *Id.* at 3070-71. Justice Blackmun criticized the majority's almost exclusive reliance on noncapital cases, which allowed the state to place the burden of proving affirmative defenses upon the defendant, when discussing this aspect of Arizona's death penalty scheme. *Id.* at 3071-72; see supra note 186 and accompanying text. Noting that individualized sentencing under Supreme Court analysis has never been analogized to cases outside the sphere of capital sentencing, and given the fact "'that death is a punishment different from all other sanctions in kind rather than degree,'" Justice Blackmun concluded that the majority's reliance on these cases was both improper and misleading. *Walton*, 110 S. Ct. at 3072 (Blackmun, J., dissenting) (quoting *Woodson*, 428 U.S. at 303-04).
232. "[T]he 'existence' of a mitigating factor frequently is not a factual issue to which a 'yes' or 'no' answer can be given." *Id.* at 3072 (citing *Stebbing* v. Maryland, 469 U.S. 900 (1984) (Marshall, J., dissenting from denial of certiorari)).

To preclude the sentencer from considering such potentially influential evidence—as does the statute by denying any weight to evidence if the defendant does not convince the jury that a factor 'exists' by a preponderance of the evidence—is to bar, as a matter of law, consideration of all mitigating evidence and influence and thus to violate *Lockett* and *Eddings.*

*Stebbing*, 469 U.S. at 903 (Marshall, J., dissenting).
evidence met this test only where the mitigating factors "outweigh[ed]" the aggravating factors. Moreover, because the statute required the trial judge to impose death where the mitigating and aggravating factors are found to be of equal weight, he argued that the eighth amendment's requirement of a "determination that death is the appropriate punishment" was violated.

Finally, Justice Blackmun found that Arizona's "especially heinous, cruel or depraved" aggravating circumstance language was unconstitutionally vague, failing to guide and limit the sentencer's discretion as required by Furman. He criticized the majority's failure to examine the Arizona Supreme Court's application of the aggravating factor and concluded that if it had, the Court would have found that "there... appear[ed] to be few first-degree murders which the Arizona Supreme Court would not define as especially heinous or depraved—and those murders which [did] fall outside... [were] likely to be covered by some other aggravating factor."

234. Id.
236. See Walton, 110 S. Ct. at 3075 (Blackmun, J., dissenting).
237. Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion)). Justice Blackmun's dissent in Walton concluded that the presumption of death inherent in Arizona's statute was forbidden by the Constitution, as it allowed "doubtful cases" to fall on the side of the death penalty. Id. at 3076.
238. Id. at 3075. Justice Blackmun also found that the majority's reliance on Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990) and Boyde v. California, 110 S. Ct. 1190 (1990) was misplaced because the statutes upheld in those cases allowed a death sentence to be imposed only where the aggravating circumstances were found to outweigh the mitigating circumstances, or where there were no mitigating circumstances. Walton, 110 S. Ct. at 3075 (Blackmun, J., dissenting).
239. Walton, 110 S. Ct. at 3081-82 (Blackmun, J., dissenting); see supra notes 74-77 and accompanying text.
240. Walton, 110 S. Ct. at 3078 (Blackmun, J., dissenting).
241. Id. at 3080 (emphasis in original). Justice Blackmun first noted that although various Arizona cases had set forth definitions for "heinous," "cruel" and "depraved," they had done so by using terms and phrases that were just as vague and broad. Id. at 3078-80. Justice Blackmun then cited to a plethora of Arizona Supreme Court cases to illustrate that Arizona's "especially heinous, cruel or depraved" aggravating circumstance language encompassed nearly every type of homicide imaginable. Id.; see State v. Wallace, 151 Ariz. 362, 368, 728 P.2d 232, 238 (1986) (en banc) (victim was very young), cert. denied, 483 U.S. 1011 (1987); Id. at 368, 728 P.2d at 238 (killer had no motive for committing the murder); State v. Chaney, 141 Ariz. 295, 312, 686 P.2d 1265, 1282 (1984) (en banc) (defendant used little force, prolonging victim's suffering); State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983) (en banc) (defendant used more force than was necessary to kill victim); State v. Jeffers, 135 Ariz. 404, 430, 661 P.2d 1105, 1131 (en banc) (killer had a very strong motive, such as hatred or revenge), cert. denied, 464 U.S. 865 (1983); State v. Zaragoza, 135 Ariz. 63, 69, 659 P.2d 22, 28 (en banc) (victim was extremely old), cert. denied, 462 U.S. 1124 (1983).
Justice Blackmun agreed with the majority's presumption that the trial judge who sentenced the petitioner to death had been aware of the Arizona Supreme Court's construction and interpretation of the aggravating circumstance. He criticized the majority, however, for failing to recognize that the judge's knowledge of Arizona precedent was irrelevant because the precedent was incapable of guiding the sentencer's discretion. Finding that both the legislature and the Arizona Supreme Court had failed to narrow sufficiently the application of the "especially heinous, cruel or depraved" language, Justice Blackmun concluded that the defendants were sentenced to death in an arbitrary and capricious manner.

Justice Brennan wrote a separate dissent to espouse his view that the death penalty is a cruel and unusual punishment under all circumstances because it "treats members of the human race as nonhumans." Moreover, Justice Brennan criticized Justice Scalia's dismissal of Lockett and its progeny, holding that if capital punishment is to exist, it must be not only "consistent and principled but also humane and sensible to the uniqueness of the individual."

Justice Stevens, who also joined in Justice Blackmun's dissent, wrote separately that the sixth amendment requires a jury to determine the facts that must be established prior to imposing the death penalty. Moreover, Justice Stevens criticized Justice Scalia's declaration that he would no longer regard Woodson, Lockett, and cases adopting the reasoning of those decisions as binding precedent. Justice Stevens contended that it was proper to reduce the risk of arbitrary imposition of the death penalty through the use of statutory channeled guidance, while allowing the sentencer complete discretion after considering the personal characteristics and circumstances of individuals found eligible for the death sentence. In reaching his conclusion, Justice Stevens relied on Zant v. Stephens, an opinion that he had authored seven years earlier.

further found that the Arizona Supreme Court's construction of "cruelty" had become so broad that murders found "especially cruel" were typical rather than exceptional, as the aggravating factor seemed to require only that the victim be conscious and aware of his danger for some period before his death. Walton, 110 S. Ct. at 3081 (Blackmun, J., dissenting).

243. Id. at 3082.
244. Id. at 3068 (Brennan, J., dissenting); see supra note 64 and accompanying text.
245. Walton, 110 S. Ct. at 3069 n.1 (Brennan, J., dissenting).
246. Id. at 3069 (quoting Eddings v. Oklahoma, 455 U.S. 104, 110 (1982)).
247. Id. at 3086 (Stevens, J., dissenting).
248. Id. at 3089-90.
249. Id. at 3090.
251. Walton, 110 S. Ct. at 3090-91.
Supreme Court’s “pyramid” analysis to review Zant’s death sentence. The pyramid consists of three divisible planes. The first plane above the base separates murder from all other homicide cases. The second plane separates from all murder cases those in which death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances. With certain specified exceptions, a defendant does not move above this plane unless at least one statutory aggravating circumstance exists. The third plane separates those cases in which death shall be imposed from all cases in which it may be imposed. The factfinder has absolute discretion to place any given case below this plane and not impose death. The plane itself is established by the factfinder. Therefore, Justice Stevens argued, because the type of offense at the bottom of the pyramid differs from those offenses categorized at the apex of the pyramid, “[a] rule that forbids unguided discretion at the base is completely consistent with the one that requires discretion at the apex.” Based on this analysis, Justice Stevens disagreed with Justice Scalia’s view that the question of life imprisonment versus death is a unitary one.

III. A RETURN TO A CRUEL AND UNUSUAL SCHEME OF CAPITAL PUNISHMENT

One of the goals of the eighth amendment’s cruel and unusual punishment clause is to impose the death penalty in a rational, uniform, and nonarbitrary manner. The United States Supreme Court recognized in Furman that this goal could be achieved by requiring states to create statutory guidelines to channel the sentencer’s discretion when determining whether to impose death or life imprisonment upon convicted murderers. A plurality of the Court later held in Lockett, however, that the unique finality of execution required that a sentencer have the discretion to impose a sentence less than death, after considering relevant mitigating evidence proffered by the defendant. Confusion among the states predictably resulted, as narrow discre-

252. Zant, 462 U.S. at 870-72.
253. Id. at 871.
254. Id.
255. Id.
256. Id.
257. Id.
258. Id.
259. Id.
260. Walton, 110 S. Ct. at 3092 (Stevens, J., dissenting); see supra text accompanying note 200.
261. See supra notes 74-77 and accompanying text.
262. See supra notes 137-40.
tion to impose death and broad discretion to impose life sentences are inherently irreconcilable standards.\textsuperscript{263}

In \textit{Walton v. Arizona}, the Court had the opportunity to resolve this tension. The majority, however, failed to address or even acknowledge that the tension exists. Rather, the majority focused solely on the validity of Arizona’s death penalty statute, finding that it satisfied “constitutional” requirements.\textsuperscript{264} The majority’s failure to confront the tension surrounding \textit{Furman} and \textit{Lockett}, the principal cases in the Court’s eighth amendment jurisprudence, has left the states with the same standard that existed prior to \textit{Furman}, specifically, because of the conflicting doctrines, no real standards at all.

Justice Scalia foresaw the confusion likely to result from yet another Supreme Court capital punishment case attempting to uphold the inconsistent principles established in \textit{Furman} and \textit{Lockett}, and directly confronted the underlying tension.\textsuperscript{265} Although Justice Scalia did not contend that the Court’s \textit{Woodson} and \textit{Lockett} cases were erroneous, he did find them irreconcilable with the Court’s \textit{Furman} decision.\textsuperscript{266} Finding that \textit{Furman} had a basis in the text of the United States Constitution, while the \textit{Woodson-Lockett} line of cases did not,\textsuperscript{267} Justice Scalia decided to adhere to the former at the latter’s expense.\textsuperscript{268}

Justice Scalia is correct that \textit{Furman} has a strong basis in the Constitution. Imposing the death penalty in an arbitrary and capricious fashion is cruel and unusual, in violation of the eighth amendment. Furthermore, his contention that \textit{Furman} and \textit{Lockett} cannot coexist is accurate, as the principles they stand for are rationally irreconcilable. While Justice Scalia is correct in urging the Court to address the \textit{Furman-Lockett} tension, his open dismissal of nearly two decades of eighth amendment jurisprudence by rejecting \textit{Lockett} requires additional consideration. Neither a majority of the Court nor a majority of the states is likely to accept the wholesale abandonment of \textit{Lockett} and its progeny given the respect states have for individualized sentencing.\textsuperscript{269} Nevertheless, Justice Scalia’s opinion may generate enough attention to convince the Court that \textit{Furman} and \textit{Lockett} must be

\begin{itemize}
\item \textsuperscript{263} \textit{Supra} notes 204-06.
\item \textsuperscript{264} \textit{Supra} notes 180-97.
\item \textsuperscript{265} Walton v. Arizona, 110 S. Ct. 947, 3058-68 (Scalia, J., concurring in part and concurring in the judgment).
\item \textsuperscript{266} \textit{Id.} at 3067.
\item \textsuperscript{267} \textit{Id.} at 3066-67.
\item \textsuperscript{268} \textit{Id.} at 3067-68.
\item \textsuperscript{269} See \textit{supra} text accompanying notes 132-34, 145-46.
\end{itemize}
reexamined together to give the states more rational and meaningful guidance in the area of capital sentencing.

Justice Stevens' criticism of Justice Scalia's inability to understand the concepts behind Furman and Lockett, as well as the "pyramid" concept of capital sentencing that Justice Stevens poses are unpersuasive. Justice Stevens argued that forbidding unguided discretion in the initial stage of the capital sentencing process is consistent with allowing complete, unrestrained discretion to show mercy at the final stage. This analysis, however, has no basis in the Furman line of cases because once a statutory aggravating circumstance is found, the sentencer has nothing to guide his decision to impose life imprisonment or death. After the threshold finding of one statutory aggravating circumstance is reached, that factor is entirely disregarded, and the sentencer is "left completely at large, with nothing to guide [him] but [his] whims and prejudices." Thus, Justice Stevens' "pyramid" concept is simply a return, with the mere requirement of one statutory aggravating circumstance, to the pre-Furman discretion which convinced the Court to begin regulating the sentencing of capital defendants in the first place.

IV. Conclusion

In the last two decades, the Supreme Court has devoted much of its attention to the statutory schemes by which states sentence capital defendants to death. When interpreting and analyzing these death penalty statutes, the Court has tried to develop an objective and consistent method for imposing capital punishment, while attempting to guarantee capital defendants the right to subjective and individualized treatment. The decision in Walton v. Arizona failed to further these goals. In upholding a state statute which fails to distinguish those offenses for which death is an appropriate penalty from those for which it is not, the majority violated Furman. Additionally, in upholding a state statute which prevents the consideration of any mitigating

270. Walton, 110 S. Ct. at 3090 (Stevens, J., dissenting).
271. Id. at 3090-92; supra text accompanying notes 249-60.
272. Walton, 110 S. Ct. at 3092 (Stevens, J., dissenting).
274. Id. at 910.
275. Walton, 110 S. Ct. at 3064 (Scalia, J., concurring). Justice Scalia argued that the Lockett rule, that the sentencer must consider any mitigating evidence proffered by the defendant, represented an "'about-face'" from Furman. Id. (quoting Lockett v. Ohio, 438 U.S. 586, 622 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgment)).
circumstances not proven by a preponderance of the evidence, the majority violated Lockett.

The majority's failure to address the conflicting principles governing state death penalty statutes and the narrow split between the Supreme Court justices in Walton v. Arizona are likely to further confuse, rather than resolve the concerns of, state legislatures as to what is constitutionally required when sentencing capital defendants to death. It is time for the Supreme Court to analyze and reconcile its Furman and Lockett decisions, as Justice Scalia did in his concurrence. As Supreme Court precedent exists now, there is no rational and consistent standard to guide the imposition of the death penalty. Respect for the eighth amendment surely requires more than this.

Lori L. Nader