NOTES

CAPITAL SENTENCING AFTER WALTON v. ARIZONA: A RETREAT FROM THE "DEATH IS DIFFERENT" DOCTRINE

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The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.¹

INTRODUCTION

The underlying assumption of modern eighth amendment jurisprudence can be summarized simply: death is different.³ The United States Supreme Court first gave precedential weight to this distinction between death and other punishment in its landmark rul-

². The eighth amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
³. See generally B. NAKELL & K. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 29-37 (1987). The unique status of the death sentence was recognized long before the landmark decision in Furman v. Georgia. See Furman v. Georgia, 408 U.S. 238, 285-91 (1972) (Brennan, J., concurring) (summarizing prior doctrinal distinctions between death and lesser punishments and stating that because of unusual severity, enormity, and finality, death is in class by itself). For years, the Supreme Court distinguished capital cases from others when addressing the constitutional right to counsel. See, e.g., Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that in prosecution for rape, failure to provide adequate assistance of counsel violates due process guarantee); Betts v. Brady, 316 U.S. 455, 473 (1942) (holding that right to counsel may attach to charge that carries possible capital punishment, but no right attaches to criminal charges of differing magnitude); Bute v. Illinois, 333 U.S. 640, 674-75 (1948) (stating that convicting petitioner of non-capital offense without assistance of counsel does not violate due process of law). The general concern with capital cases centers on the finality of the punishment and the need for closer scrutiny than is necessary for a reversible punishment. See Andress v. United States, 333 U.S. 740, 752 (1948) (concluding that when doubts arise due to ambiguous jury instruction by lower court, such doubts should be resolved in favor of accused).
ing, Furman v. Georgia.\textsuperscript{4} Furman declared all existing death penalty statutes unconstitutional as a violation of the eighth amendment bar against cruel and unusual punishment.\textsuperscript{5} In a series of subsequent cases, the Court developed and refined its eighth amendment requirements under which states could adopt valid capital sentencing statutes.\textsuperscript{6}

The premise that death is qualitatively different from all other punishments represents the foundation upon which the Court fashioned two requirements to regulate the constitutionally valid application of capital punishment.\textsuperscript{7} The first requirement, introduced by

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  \item \textsuperscript{4} 408 U.S. 238 (1972) (per curiam). \textit{See infra} notes 29-34 and accompanying text (discussing the Court's decision in Furman and its distinction of death from all other punishment).
  \item \textsuperscript{5} Furman v. Georgia, 408 U.S. 238, 428-29 (Douglas, J., concurring) (finding existing death penalty procedures violative of eighth amendment because of arbitrary and inconsistent application); \textit{see also Comment, Dark Year on Death Row: Guiding Sentencer Discretion After Zant, 17 U.C. Davis L. Rev. 689, 689-90 (1984) [hereinafter Dark Years on Death Row] (noting effects of Furman on state capital punishment statutes and subsequent attempts to enact language to conform with Court's ruling).}
  \item \textsuperscript{7} \textit{See Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (Stevens, Stewart, Powell, J.J., concurring) (stating that five members of Court expressly recognized "death is different" doctrine in early eighth amendment cases that provided dual requirements for constitutionally valid capital sentencing procedures).}
\end{itemize}

As eighth amendment jurisprudence evolved in cases where capital sentencing was at issue, individual members of the Supreme Court began to adopt the concept that death should be treated differently from all other punishments. For example, Justices Brennan, Douglas, and Marshall each distinguished the death penalty from other punishment before Furman. See Parker v. North Carolina, 397 U.S. 790, 809-10 (1970) (Brennan, J., dissenting) (distinguishing plea bargain when death is potential penalty). Justice Brennan noted that when the possibility of capital punishment exists, the defendant is no longer on equal footing with the state. \textit{Id.} As a result, the defendant either pleads guilty to a lesser crime or runs the risk of a guilty verdict and the imposition of the death penalty. \textit{Id.}

Justice Stewart adopted the distinction for the first time in his Furman opinion which originated the first constitutional requirement of guided sentencing:

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  \item The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.
\end{itemize}


Justice Powell, who dissented from \textit{Furman} and directly disavowed the "death is different" construct, relied on the doctrine in two 1976 cases to formulate the second constitutional
Furman, stated that a valid capital sentence may not result from un-guided discretion. The second requirement, developed after Furman, mandated consideration of all relevant mitigating evidence to ensure an individualized sentencing determination.

These two limitations on capital sentencing procedure co-existed in one viable body of law based on the presumption that the penalty of death is unique among other state-imposed punishments. The requirement of individualized sentencing. See Gregg, 428 U.S. at 187 (joining opinion of Justice Stewart who argued for adoption of "death is different" doctrine); Woodson, 428 U.S. at 303-04 (citing Justice Stewart's and Justice Brennan's concurring opinions in Furman wherein both Justices distinguished death from other penalties). Justice Stevens, as a new member of the Court, also endorsed the doctrine in those 1976 cases. Gregg, 428 U.S. at 187; Woodson, 428 U.S. at 302-04.

Justice White, who originally refused to adopt the principle that death is different, later adopted it. See Turner v. Murray, 476 U.S. 28, 34-37 (1986) (recognizing qualitative difference of death from other punishment and citing other Justices for support).

Justice Blackmun first endorsed the distinction when he joined Justice Stevens' opinion in Beck v. Alabama. See Beck v. Alabama, 447 U.S. 625, 637 (1980) (noting that "significant constitutional difference between the death penalty and lesser punishments" is that death requires imposition based on reason not emotion).

Justice O'Connor, shortly after joining the Court, also adopted the "death is different" doctrine:

Because sentences of death are 'qualitatively different' from prison sentences, . . . this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake. Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring).

8. See Furman, 408 U.S. at 254-57 (plurality opinion) (Douglas, J., concurring) (arguing that such discretion spares socially protected and imposes death on poor and despised); id. at 274-97 (Brennan, J., concurring) (arguing that human dignity is offended when state arbitrarily inflicts more severe punishment on some than on others).

9. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (concluding that state must allow capital sentencer to consider all relevant mitigating evidence, defined as any aspect of defendant's character, record, or aspects concerning offense). The post-Lockett doctrine, therefore, placed particular guidance requirements as to the consideration of aggravating factors presented by the prosecution, while affording great discretion to a capital sentencer in considering mitigating circumstances. See id. (stating that eighth and fourteenth amendments require sentencer to consider all relevant evidence of defendant's record or character and any circumstances of offense that would promote basis for sentence less than death).

In Eddings v. Oklahoma, the Court ratified the Lockett plurality decision by requiring a capital sentencer to consider all relevant mitigating evidence. See Eddings v. Oklahoma, 455 U.S. at 115, 115 n.10 (1982) (stating that Oklahoma statute at issue allows defendant to present evidence as to any mitigating factor, and Lockett requires sentencer to listen).

10. See Eddings, 455 U.S. at 110-15 (tracing history of developing death penalty jurisprudence in Supreme Court and holding that rule in Lockett followed from Court's early decisions). The doctrine that emerged after Lockett required the state to adopt a fair and consistent procedure for inflicting death, which responded to the Furman prohibition against arbitrary and capricious capital sentencing statutes and the requirement that the state consider any relevant mitigating factor. Id. at 112; see also Dark Year on Death Row, supra note 5, at 699 (discussing "Furman-Lockett" paradox and arguing two cases are reconcilable).

The arguable paradox of these two decisions resulted from the Furman requirement that the sentencing process remain free from arbitrary and capricious judgments. Id. This led to the enactment of sentencing guideline statutes and the requirement that specific aggravating factors be established before death could be authorized. See Model Penal Code §§ 210.6(3)-(4) (1980) (exemplifying statute enacted by several states in attempt to comply with Supreme Court's capital sentencing requirements); see also Gregg v. Georgia, 428 U.S. 153, 154 (1976) (upholding sentencing statute that required state to prove specified aggravating factors and to
unique status of death as a punishment mandated the provision of additional safeguards to ensure that the application of capital punishment was neither cruel nor unusual. In *Walton v. Arizona*, the Supreme Court departed from this principle after two decades of consistent application.

The Arizona statute involved in *Walton* included two provisions directly opposed to the "death is different" doctrine. The first provision precluded sentencer consideration of any mitigating evidence not established by a preponderance of the evidence. The second provision mandated a sentence of death unless the defendant could show mitigating circumstances sufficient to outweigh all aggravating factors established by the state. In effect, the defendant in *Walton* was forced to show why the death penalty was inappropriate. Mr. Walton failed to meet the requisite burden and, as a result, the death penalty was imposed.
result, was sentenced to death.\textsuperscript{18}

A plurality of the United States Supreme Court upheld the Arizona statute and affirmed Walton's capital sentence without a lengthy discussion.\textsuperscript{19} The plurality justified its departure from settled precedent by equating the defendant's burden at the capital sentencing hearing to that of a criminal defendant asserting an affirmative defense of insanity.\textsuperscript{20} By affirming Arizona's capital sentencing scheme on such slight precedent, the Court implicitly rejected the long-accepted notion that a sentence of death is unlike any other punishment.

This Note evaluates Walton v. Arizona in light of the United States Supreme Court's prior commitment to the "death is different" doctrine. Part I traces the evolution of capital sentencing jurisprudence from the landmark 1972 decision in Furman.\textsuperscript{21} In particular, Part I focuses on the emergence of the "death is different" doctrine as the foundation for the Court's regulation of capital sentencing procedures. Part II sets out the factual background of Walton and outlines the Supreme Court's decision.\textsuperscript{22} Part III analyzes Justice White's plurality opinion by examining it in the framework of the "death is different" doctrine and the relevant case law.\textsuperscript{23} Part III also criticizes Justice Scalia's concurrence in which he states that the requirement of individualized sentencing cannot co-exist with the dictates of Furman and is, therefore, no longer applicable.\textsuperscript{24} Part IV investigates the potential ramifications of Walton v. Arizona in the lower courts and on legislative attempts to expedite the capital sentencing

permits use of any mitigating factor defendant proffers as basis for sentence less than death); Gregg v. Georgia, 428 U.S. 153, 154 (1976) (affirming sentencing scheme that required state to establish aggravating circumstances, but allowed sentencer to consider any mitigating circumstance). Walton, however, upheld a statutory construction that mandated a sentence of death if aggravating and mitigating factors are of equal weight. Walton, 110 S. Ct. at 3075 (Blackmun, J., dissenting).


\textsuperscript{19} Walton, 110 S. Ct. at 3055-57.

\textsuperscript{20} See id. at 3055 (citing affirmative defense cases to justify imposition of preponderance burden on defendant at post-conviction capital sentencing hearing).

\textsuperscript{21} See infra notes 26-87 and accompanying text (tracing recent history of capital sentencing jurisprudence).

\textsuperscript{22} See infra notes 88-161 and accompanying text (discussing opinion of Supreme Court in Walton).

\textsuperscript{23} See infra notes 162-212 and accompanying text (analyzing Supreme Court decision).

\textsuperscript{24} See infra notes 209-12 and accompanying text (discussing Justice Scalia's concurrence).
process. This Note concludes that a plurality of the Supreme Court has begun to erode the fundamental distinction between the death penalty and all other punishments. This reversal of a firmly-established principle opens the door to fundamental changes in the constitutional protections designed to avoid unfair, biased, and capricious application of capital punishment.

I. THE EVOLUTION OF MITIGATING CIRCUMSTANCE JURISPRUDENCE

A. Prohibition on Arbitrary Sentencing

Prior to 1972, capital sentencers in the United States enjoyed unfettered discretion to decide the fate of criminal defendants. A judge or jury based its capital sentencing decision primarily on conclusions developed from evidence presented during the trial. This process of discretionary sentencing resulted in an extremely inconsistent application of the death penalty influenced, to a large degree, by racial discrimination.

In Furman v. Georgia, the United States Supreme Court ruled that the application of capital sentencing, in the absence of judicial guidance, represented an unconstitutional infringement of the eighth and fourteenth amendments. The effect of the five-to-four decision was to vacate the sentences of over 600 death row inmates


28. See Gross, Race & Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, 18 U.C. Davis L. Rev. 1275, 1282-84 (summarizing pre-Furman instances of discrimination in death penalty application). For instance, when the punishment for the crime of rape was death, 85% of those executed in the South for rape were African-American, and black men were 18 times more likely to be convicted of raping white women than white men. Id.; see also W. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982 57-58 (1984) (discussing disproportionate number of African-Americans executed for rape in South); B. Nakell & K. Hardy, The Arbitrariness of the Death Penalty 82 (1987) (citing empirical conclusions of racial discrimination in imposition of death sentence); Wolfgang & Reidel, Race, Judicial Discretion, and the Death Penalty, 407 Annals 119, 126-33 (1973) (presenting statistical evidence of sentencing discrimination against African-American defendants convicted of raping white victims).


and to invalidate all forty death penalty statutes then in existence.\textsuperscript{31}

The plurality’s reasoning in \textit{Furman} focused on the Georgia death penalty statute’s lack of guidance for capital sentencing juries.\textsuperscript{32} Under the Georgia law, a jury had complete discretion to determine whether a convicted criminal should serve a prison sentence or die.\textsuperscript{33} Recognizing the unique nature of the death penalty, the plurality held that any procedure permitting potential arbitrary or capricious application constituted a violation of the eighth amendment.\textsuperscript{34} \textit{Furman} thus established the principle that death is

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\textsuperscript{32} See \textit{Furman}, 408 U.S. at 257-58 (Douglas, J., concurring) (citing authority finding arbitrary capital sentencing procedure unconstitutional); \textit{Id.} at 274-75 (Brennan, J., concurring) (citing unguided discretion as cruel and unusual); \textit{Id.} at 309-10 (Stewart, J., concurring) (arguing that arbitrary sentencing leads to unconstitutional procedure); \textit{Id.} at 311-12 (White, J., concurring) (commenting that arbitrary and infrequent use of death penalty is cruel and unusual); see also \textit{Lockett v. Ohio}, 438 U.S. 586, 598 (1986) (finding constitutional state of discretionary sentencing was changed abruptly by \textit{Furman} opinions).

\textsuperscript{33} See \textit{Ga. Code Ann.} \textsection{} 26-1302 (Supp. 1971) (current version at \textit{Ga. Code Ann.} \textsection{} 16-6-1(b)) (delineating potential sentencing options without any guidance). The Georgia statute afforded a jury three sentencing options: (1) imprisonment for more than one year but less than twenty years; (2) imprisonment for life; or (3) death. \textit{Id.; see also Furman}, 408 U.S. at 308 n.8 (Stewart, J., concurring) (noting options available to Georgia sentencers).

\textsuperscript{34} See \textit{Furman}, 408 U.S. at 313 (plurality opinion) (White, J., concurring) (finding that death penalty is handed down infrequently and that there is no meaningful basis on which to distinguish who receives death sentence); see also Zimring & Hawkins, \textit{Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect}, 18 U.C. Davis L. Rev. 927, 929-44 (1985) (evaluating and critiquing opinions in \textit{Furman}).

Although the justices agreed that the death penalty is different from other sentences, each espoused a different theory about when a death penalty statute violated the eighth amendment protection against cruel and unusual punishment. See Zimring & Hawkins, \textit{Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect, supra, at 929-44} (analyzing reasoning of five concurring opinions in \textit{Furman}). Justice Douglas, for example, found the capital sentence to be “unusual” and, therefore, unconstitutional under the eighth amendment, but only if the selection process permitted discrimination based on the defendant’s religion, race, wealth, social status, or class. See \textit{Furman}, 408 U.S. at 256-57 (plurality opinion) (Douglas, J., concurring) (finding existing death penalty statutes “pregnant with discrimination” and, therefore, repugnant to eighth and fourteenth amendments). Justice Stewart also found Georgia’s statute cruel and unusual because of its arbitrary and unpredictable application. See \textit{id.} at 309 (Stewart, J., concurring) (likening random application of death penalty to possibility of being struck by lightning). Justice White believed the statute failed as a deterrent and mandated the pointless and needless extinction of life. See \textit{id.} at 312 (White, J., concurring) (arguing that because death penalty is so infrequently and arbitrarily administered it does not serve deterrent purpose).

Justices Brennan and Marshall concluded in separate opinions that the death penalty, by definition, is at odds with the cruel and unusual punishment clause of the eighth amendment and is per se unconstitutional. \textit{Id.} at 350 (Brennan, J., concurring), 360 (Marshall, J., concurring). Justice Brennan’s concurrence in \textit{Furman} stated his reasons for finding the death penalty unconstitutional in any form. See \textit{id.} at 269 (Brennan, J., concurring) (arguing that Court has fundamental duty to enforce Bill of Rights by checking actions of legislature when prescribing punishment and that failure to do so would reduce cruel and unusual clause to “little more than good advice”). The Court had previously employed “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments should be constitutionally proscribed under the eighth amendment. Trop v. Dulles, 356 U.S.
qualitatively different from other penalties.

B. The Development of Guidance Standards

Although Furman invalidated all existing capital sentencing statutes, the Court did not hold the penalty of death per se unconstitutional. The Furman plurality also failed to indicate how much judicial guidance was necessary for a death penalty statute to satisfy the eighth amendment. Because the Furman decision did not provide specific requirements, state legislatures seeking to reinstate the death penalty opted for one of two different statutory constructions.

Twenty-eight states responded quickly to the Furman decision with new death penalty statutes incorporating varying degrees of sentencing guidance to remove the capricious and arbitrary elements from the process of sentencing. One contingent of states enacted legislation making the sentence of death mandatory for particular capital crimes such as felony murder, contract murder, mur-

86, 100-01 (1958) (plurality opinion) (arguing that words of eighth amendment are not precise and their "scope is not static"). In Furman, Justice Brennan extended Trop and concluded that the eighth amendment bans the imposition of any punishment "degrading to the dignity of human beings." Furman, 238 U.S. at 271 (Brennan, J., concurring).

Justices Brennan and Marshall have cited their belief that the death penalty is per se unconstitutional in over 1,700 subsequent capital sentencing cases and application for stays of execution. See, e.g., Bertolotti v. Dugger, 111 S. Ct. 2, 2 (1990) (Marshall, J., dissenting) (arguing for stay of execution because death penalty is cruel and unusual punishment in all cases); Boggs v. Muncy, 111 S. Ct. 2, 2 (1990) (Brennan & Marshall, JJ., dissenting) (adhering to view that death penalty is cruel and unusual punishment); Collins v. Arkansas, 429 U.S. 808, 808 (1976) (Brennan & Marshall, JJ., dissenting) (arguing that for reasons set out in Gregg death penalty is cruel and unusual).

35. See Furman, 408 U.S. at 310-11 (Douglas, J., concurring) (declining to address ultimate question of whether death sentence is constitutional in any form). Justice White concurred only in the capital sentencing cases immediately before the Court rather than ruling on the death penalty's general eighth amendment status. Id. at 311 (White, J., concurring). Similarly, Justice Stewart found that the death penalty offended the eighth and fourteenth amendments only when "wantonly and freakishly" applied. Id. at 310 (Stewart, J., concurring).

36. See Lockett v. Ohio, 438 U.S. 586, 599 (1978) (plurality opinion) (concluding that "the variety of opinions supporting the judgment in Furman engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment"); see also Note, Mills v. Maryland: The Supreme Court Guarantees the Consideration of Mitigating Circumstances Pursuant to Lockett v. Ohio, 38 Cath. U.L. Rev. 907, 917 (1989) (remarking on state statutory response to ambiguity created by Furman); Survey, The Supreme Court, 1989 Term: Leading Cases, 104 Harv. L. Rev. 139, 139 (1990) (describing as ambiguous range of statutes deemed to be constitutional under Furman).

37. See Gregg v. Georgia, 428 U.S. 153, 179-81 (1976) (Stewart, Powell, Stevens, JJ., concurring) (noting varying legislative responses to Furman in attempt to create less arbitrary capital sentencing process). Three years after the Supreme Court invalidated all death penalty statutes in Furman, 35 states and the federal government had enacted new capital punishment laws. Id. at 179 n.23.

38. See Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1699-1712 (1974) (summarizing death penalty statutes adopted immediately after Furman and evaluating various approaches to sentencing discretion).
der while serving a life sentence, and murder of a peace officer.\textsuperscript{39} Other states that enacted capital sentencing statutes chose schemes mandating a balancing test using specific mitigating and aggravating factors.\textsuperscript{40} These statutory constructions were heavily influenced by the Model Penal Code which curtailed sentencer discretion by focusing a sentencer's consideration on particular factors.\textsuperscript{41}

By 1976, four years after \textit{Furman} invalidated all death penalty statutes, more than 460 inmates were on death row after being sentenced under one of the two new capital sentencing schemes.\textsuperscript{42} In the 1975 October term, the United States Supreme Court granted certiorari to five cases challenging recently-enacted death penalty statutes.\textsuperscript{43} The plurality opinions written by Justices Stewart, Powell, and Stevens included Delaware, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Wyoming, California, and Montana.\textsuperscript{39} Id. at 1710 n.140. The states enacting aggravating/mitigating test included Arizona, Florida, Nebraska, and Tennessee. Id.

\textsuperscript{40} Id. at 1704 n.92. The states enacting aggravating/mitigating test included Arizona, Florida, Nebraska, and Tennessee. Id.

\textsuperscript{41} See id. at 1699-1700 (outlining variations of mitigating/aggravating factor balancing statutes). Some of the aggravating factors included: (1) the defendant engaged in the murder of another person at the time this murder was committed; (2) the defendant knowingly created a risk of death to many persons; and (3) the murder was committed for pecuniary gain. These factors are then weighed against mitigating factors, such as: (1) the defendant had no prior criminal record; (2) the murder was committed under circumstances that the defendant believed provided moral justification; and (3) the youth of the defendant at the time of the crime. Id. The American Law Institute's (ALI) Advisory Committee originally voted 18-2 to abolish the death penalty entirely. See \textit{MODEL PENAL CODE} § 210.6, comment 1, at 111 (1980). Realizing that many states would reject abolition, the ALI concluded that it should address the specific issues arising from the application of capital sentencing. Id. Thirteen years before \textit{Furman} was decided, the Model Penal Code Committee found unguided discretion to be the greatest danger in the capital sentencing process. ALI Proceedings 152, 170 (1959). As such, the ALI constructed a list of aggravating and mitigating factors to be considered in a sentencing procedure. See \textit{MODEL PENAL CODE} § 210.6(3)-(4) (1980) [hereinafter M.P.C.] (outlining aggravating and mitigating circumstances). While the circumstances enumerated in section 210.6 were not meant to be exhaustive, the ALI sought to "identify the main circumstances of aggravation and mitigation that should be weighed and weighed against each other when they are presented in a concrete case." M.P.C. § 210.6, comment 5, at 135 (emphasis in original). The ALI placed great emphasis on curtailing sentencer discretion when invoking the death penalty. Id. As a result, the Model Penal Code required the finding of at least one of the enumerated aggravating factors, but allowed broader discretion in the mitigating factor analysis. See M.P.C. § 210.6(2) (mandating that sentencer "shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated ... and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.").


\textsuperscript{43} See id. (upholding statute that required state to prove at least one of ten aggravating factors beyond reasonable doubt and permitted consideration of mitigating circumstances before death is imposed); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding statute that required trial judge to weigh eight aggravating factors against seven statutory mitigating factors to determine whether death sentence should be imposed); Jurek v. Texas, 428 U.S. 262 (1976) (affirming state statutory scheme that mandated death if jury answered three questions affirmatively concerning manner in which defendant committed murder); Woodson v. North Carolina, 428 U.S. 280 (1976) (striking down statute that mandated death for first degree
ell, and Stevens in each of these cases formed the nucleus of modern death penalty jurisprudence.44

1. Proscription of mandatory capital sentencing provisions

In response to Furman, many state legislatures sought to avoid eighth amendment limitations by enacting statutes that mandated capital sentences for certain enumerated offenses. The North Carolina legislature was among those to provide for an entirely mandatory procedure in order to avoid further constitutional curtailments.45 In Woodson v. North Carolina,46 the Supreme Court struck down the North Carolina statute.47 A plurality of the court found the mandatory provision a violation of the eighth and fourteenth amendments.48

Drawing from the decision in Furman, the Woodson plurality concluded “that death is a punishment different from all other sanctions in kind rather than degree.”49 Based on this conclusion, the plurality found that a sentence of death may be imposed only after consideration of relevant characteristics specific to the individual offender and to the crime for which he or she was convicted.50 Mandatory provisions also conflicted with the Court’s requirement that extra care be imposed on all applications of capital

murther); Roberts v. Louisiana, 428 U.S. 325 (1976) (striking down statute that mandated death for five categories of homicide).


45. The North Carolina statute required the sentence of death for all defendants convicted of first degree murder:

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starvation, 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 punished with death . . .


48. Id. at 305.

49. Id. at 303-04. The plurality expanded on the emerging “death is different” doctrine and required heightened due process as a result. Id. at 304-05. The death sentence, even when compared with a 100-year prison term, was considered qualitatively different because of its finality. Id. at 305. The plurality in Woodson concluded that the unique status of capital punishment mandated a corresponding heightened need for reliable application. Id. Thus, a failure of reliable application renders the sentence cruel and unusual. Id.

50. Id. at 304 (finding that, at minimum, sentencer must consider relevant factors relating to defendant’s character, record, and offense).
punishment.  

The Court concluded that the eighth amendment guarantee against cruel and unusual punishment required the state to employ civilized standards reflected by contemporary norms when exercising its power to punish.  

The plurality, citing evidence of unfavorable public sentiment regarding mandatory death sentences, concluded that such a statutory scheme was inconsistent with the requirements of the eighth and fourteenth amendments.  

Therefore, the Court in Woodson concluded that simply converting a capital sentencing statute from discretionary to mandatory sentencing did not cure the constitutional defects enunciated in Furman.  

The plurality suggested that mandatory sentences would result in excessively discretionary sentencing similar to that found invalid in Furman because juries would acquit guilty defendants to avoid the automatic imposition of a capital sentence.

51. See id. (stating consideration of character or record of defendant along with circumstances surrounding offense represent constitutionally indispensable parts of capital sentencing process).

52. Id. at 288 (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)). The Court examined historical usage, legislative enactments, and prior jury determinations to measure contemporary norms reflecting public opinion. Id. (citing Gregg, 428 U.S. at 176-82 (Stewart, Powell, Stevens, JJ., concurring)).

53. See id. at 289-98 (finding historical public dissatisfaction with mandatory death penalty statutes because they resulted in limited application and frequent refusal by jurors to convict defendants in capital crimes cases).

54. See id. at 301 (finding eighth amendment received much of its meaning from evolving standards of decency in maturing society).

55. See id. at 303 (concluding that North Carolina's statute failed to fulfill basic requirement enunciated in Furman).

56. Id. at 302-03 (noting that mandatory statutes force juries to "consider the grave consequences of a conviction in reaching a verdict" and, therefore, afford sentencers too much discretion). The Court invalidated a second mandatory statute with a similar analysis in the companion case of Roberts v. Louisiana, 428 U.S. 325 (1976). Unlike the North Carolina statute's expansive application at issue in Woodson, Louisiana's mandatory death penalty statute provided a narrower definition of first-degree murder. Roberts, 428 U.S. at 332 (Stewart, Powell, Stevens, JJ., concurring). The Louisiana statute limited first-degree murder to five categories of homicide: (1) killing in connection with the commission of certain felonies; (2) killing of a fireman or a peace officer in the performance of his or her duties; (3) killing for remuneration; (4) killing with the intent to inflict harm on more than one person; and (5) killing by a person with a prior murder conviction or under a current life sentence. LA. CODE CRIM. PROC. ANN. Arts. 809, 814(A)(1) (West 1975) (current version at LA. CODE CRIM. PROC. ANN. Arts. 809, 814(A)(1) (West 1981)). Applying the Woodson logic based on the "death is different" doctrine, the Roberts plurality concluded that this provision encouraged jurors to disregard their oaths and convict certain defendants of lesser offenses to avoid the imposition of a capital sentence. Roberts, 428 U.S. at 334-35
Woodson v. North Carolina strengthened eighth amendment protections and clearly affirmed the "death is different" doctrine. Of the two post-Furman statutory options, Woodson invalidated only the provisions that mandated capital sentencing for certain offenses. The second statutory construction was addressed by three cases decided concurrently.

2. Balancing mitigating and aggravating factors as an acceptable means for employing capital punishment

In the aftermath of Furman, roughly half the states adopting a new death penalty statute chose a variation on the Model Penal Code which required the sentencer to employ enumerated mitigating and aggravating factors when considering capital punishment. The Georgia legislature adopted just such a statute in response to Furman. The new Georgia statute included the following modifications: limiting the number of crimes subject to capital punishment; requiring the state to prove at least one enumerated aggravating factor; allowing the jury to hear the defendant's arguments in mitigation; and mandating an automatic appeal process after the imposition

(Stewart, Powell, Stevens, J., concurring). The Roberts plurality placed great emphasis on the amount of discretion afforded the sentencing jury under the Louisiana statutory construction. Id. at 385-36. In addition to inviting a jury to disregard their instructions and enter a guilty verdict to a lesser offense, the Louisiana statute failed to provide any additional mandatory review of the sentence to avoid arbitrary results. Id. Because the mandatory death penalty constructions failed to afford the extra care required by the unique status of capital punishment, all similar statutes were invalidated under the eighth and fourteenth amendments. See id. (noting terminal deficiency in Louisiana's failure to provide mandatory appellate review). Because the plurality of Justices Stewart, Powell, and Stevens would not uphold a mandatory death penalty statute, and because Justices Brennan and Marshall found capital punishment per se unconstitutional, any statute that could not satisfy the plurality test was destined to fail if challenged in the Supreme Court.

57. See Booth v. Maryland, 482 U.S. 496, 509 n.12 (1987) (employing Woodson plurality's position that death is different to conclude that admissibility of victim impact statements in capital sentencing may be different than admissibility of statements relevant to other punishments); Zant v. Stephens, 456 U.S. 410, 423 (1982) (Marshall, J., dissenting) (quoting Woodson as origin of "death is different" doctrine); see also, Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring) (citing Woodson for precedent that "sentences of death are qualitatively different from prison sentences").


59. See supra notes 37-42 and accompanying text (discussing immediate legislative responses to Furman); see also Gregg, 428 U.S. at 193 n.44 (describing statutory construction using specific factors of aggravation and mitigation to guide sentencers).

tion of any death sentence.61

In Gregg v. Georgia,62 a plurality of the Court upheld Georgia’s modified death penalty statute.63 The Court concluded that capital punishment for the crime of murder did not represent a per se violation of the eighth amendment.64 The Georgia statute withstood constitutional scrutiny because it provided additional safeguards and focused sentencer consideration on specific factors.65 This heightened due process emphasized the special nature of capital sentencing and distinguished the Georgia statute from the mandatory construction previously invalidated in Woodson.66

Justices Stewart, Powell, and Stevens concluded that the mere accommodation of sentencing discretion did not, in and of itself, constitute a violation of the eighth and fourteenth amendment protections against cruel and unusual punishment.67 In Gregg, the Court clarified its concern for guided discretion in death penalty cases. Decisions to impose capital punishment, the Court reasoned, should not be made under a system that creates a substantial risk of prejudicial impulse or arbitrariness.68

Although Gregg and its two companion cases69 upheld the post-


64. Id. at 176-78.

65. Id. at 204-06 (examining Georgia statute’s mandatory appellate review designed to protect against capricious sentencing or prejudicial jury).

66. See id. at 206-07 (concluding that additional legislative guidelines in Georgia statute and mandatory appellate review satisfied eighth amendment requirements expressed in Furman); see also supra notes 45-48 and accompanying text (discussing Supreme Court’s holding in Woodson).

67. Id. at 199.

68. Id. at 193-95. Justices White, Rehnquist, and Chief Justice Burger concurred in the judgment, noting that the Georgia statute provided sufficient safeguards to guide juries in capital sentencing without the risk of arbitrary or capricious results. Id. at 222-23 (White, Rehnquist, J., Burger, C.J., concurring).

**Furman** capital sentencing statutes, the “death is different” doctrine

found that the specific delineation of mitigating and aggravating factors satisfied the requirements of the eighth and fourteenth amendments. *Proffit*, 428 U.S. at 251. By requiring that the sentencer consider specific aggravating and mitigating circumstances, the statute focused sentencer evaluation on the crime and the character of the convicted defendant. *Id.* at 251-52.

The Florida statute at issue in *Proffit* enumerated eight aggravating factors and seven mitigating factors. *Fla. Stat. Ann.* §§ 921.141(5), 921.141(6) (West Supp. 1976-77) (current version at *Fla. Stat. Ann.* §§ 921.141(5), 921.141(6) (West 1990)). The statute also required the trial judge to consider those factors in determining whether or not the death penalty was appropriate given the circumstances of the crime and the character of the defendant. *Id.* § 921.141(3). The Florida construction, like the Georgia statute upheld in *Gregg*, provided an additional safeguard of automatic appellate review of the trial judge’s capital sentence to ensure consistency with sentences previously imposed in similar cases. *Id.* § 921.141(4).

Unlike the Georgia statute, however, the Florida law did not require the appellate court to conduct any particular type of review. See *Proffit*, 428 U.S. at 250-51 (describing automatic review by Florida Supreme Court); *Fla. Stat. Ann.* § 921.141(4) (West Supp. 1976-1977) (current version at *Fla. Stat. Ann.* § 921.141(4) (West 1990)). Despite this lack of clarity, the Court was impressed with Florida’s automatic review procedure and its consideration of consistent sentencing in similar cases. *Proffit*, 428 U.S. at 251 (characterizing role of appellate review as guaranteeing that facts cited as justification for death sentence are consistent with prior applications) (quoting State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)). The Court also noted that the sentence review provision distinguished the Florida statute from those found unconstitutional because it diminished the risk of arbitrary or capricious capital sentencing. *Id.*

In the final companion case, *Jurek v. Texas*, 428 U.S. 262 (1976), the Court affirmed the capital sentence of a defendant convicted under a distinctive capital sentencing statute. The Texas statute at issue had three provisions all of which together satisfied the eighth amendment consistency with sentences previously imposed in similar cases.

The statute also required the appellate court to conduct any particular type of review. *See Proffit*, 428 U.S. at 250-51 (describing automatic review by Florida Supreme Court); *Fla. Stat. Ann.* § 921.141(4) (West Supp. 1976-1977) (current version at *Fla. Stat. Ann.* § 921.141(4) (West 1990)). Despite this lack of clarity, the Court was impressed with Florida’s automatic review procedure and its consideration of consistent sentencing in similar cases. *Proffit*, 428 U.S. at 251 (characterizing role of appellate review as guaranteeing that facts cited as justification for death sentence are consistent with prior applications) (quoting State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)). The Court also noted that the sentence review provision distinguished the Florida statute from those found unconstitutional because it diminished the risk of arbitrary or capricious capital sentencing. *Id.*

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Despite the lack of enumerated mitigating and aggravating factors, the Court in *Jurek* found the narrow statutory category of crimes suitable for capital sentencing sufficient to withstand constitutional scrutiny. *Jurek*, 428 U.S. at 276. The “interrogatory method” of judicial guidance conformed to eighth amendment requirements because it focused the jury’s consideration on express circumstances and on factors specific to the individual defendant. *Id.* at 273-74. The Texas statute permitted the imposition of a capital sentence only after a jury had answered all three of the following inquiries in the affirmative:

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.


If the jury found that any of the above considerations could not be answered affirmatively beyond a reasonable doubt, the defendant would be sentenced automatically to life imprisonment. *Tex. Code Crim. Proc. Ann.* § 37.071(c), (e) (Vernon Supp. 1975-1976) (current version at *Tex. Code Crim. Proc. Ann.* § 37.071(c), (e) (Vernon 1989)). Because the sentencer focused on the individualized circumstances of each case, the statutory construction adhered to the eighth amendment requirements set forth in *Furman* and *Woodson*. *Jurek*, 428 U.S. at
remained intact. The Court again prefaced its evaluation of death penalty statutes by indicating the fundamental distinction of that sentence from all others.\textsuperscript{70} The Court found that a state could conform to eighth amendment limitations by allowing sentencer consideration of enumerated aggravating and mitigating factors, thereby protecting against capricious or prejudicial decisions and affording a heightened version of due process.\textsuperscript{71} The Georgia statute, which contained an automatic appeal provision, did not extend unguided discretion to the capital sentencer.\textsuperscript{72} The Court upheld the Georgia statute because it provided for an individualized sentence by requiring the state to prove at least one enumerated aggravating factor specific to the crime at issue.\textsuperscript{73}

C. Requirement of Individualized Sentencing

After the Supreme Court handed down the five decisions in 1976, death penalty statutes had to satisfy two prongs of eighth amendment jurisprudence based on the premise that death is a qualitatively different form of punishment. First, a death penalty statute could not permit unguided sentencing discretion.\textsuperscript{74} Second, a capital punishment law was required to afford an individualized determination of punishment specific to the defendant and the crime committed.\textsuperscript{75} By requiring an individualized sentence for capital defendants, the Court affirmed and strengthened its prior doctrine distinguishing the nature of death from all other penalties.\textsuperscript{76} While this second eighth amendment prong originated in \textit{Woodson}, the
Court clarified the individualized sentencing requirement in *Lockett v. Ohio*. 77

Ohio responded to the *Furman* decision by enacting a statute with a modified version of the Model Penal Code aggravating/mitigating factor construction. 78 The Ohio statute required proof beyond a reasonable doubt of at least one of seven enumerated aggravating factors before the death penalty could be imposed. 79 After the state had proven one of the aggravating factors, the Ohio statute mandated a sentence of death unless the defendant could prove by a preponderance of the evidence one of three specific mitigating factors. 80

In a plurality opinion, the Court invalidated the Ohio death penalty statute because it unconstitutionally restricted the mitigating factors a jury could consider in making its sentencing determination. 81 Reiterating the special nature of a capital sentence first declared in *Woodson*, 82 the *Lockett* plurality clarified the eighth amendment requirement of individualized sentencing. 83 Taking the *Woodson* reasoning one step further, the *Lockett* plurality concluded that statutes could not limit the number of mitigating factors a jury may consider in making a sentencing determination without running afoul of the eighth amendment. 84 The Court based this new requirement on the fundamental concept that the death penalty is so extreme that it is differentiated from all other penalties. 85
After *Furman*, *Woodson*, and *Lockett*, the Court continued to develop eighth amendment guidelines. With each new development and clarification the Court was careful not to depart from the underlying principle that death is different. In *Walton v. Arizona*, however, a new Supreme Court summarily overruled fifteen years of precedent by rejecting the "death is different" doctrine.

II. *Walton v. Arizona*

A. Facts of the Case

On March 2, 1986, Jeffrey Walton, Robert Hoover, and Sherold Ramsey agreed to commit a robbery. That night, the three waited outside a Tucson, Arizona bar for a victim. The threesome robbed and murdered the first person to emerge.

A jury convicted Jeffrey Walton of first degree murder primarily through the immunized testimony of codefendant Ramsey, a convicted noncapital offender. Walton argued that noncapital cases provide many post-conviction remedies unavailable to the capital defendant including probation, parole, and work furloughs.

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Writing for a plurality of the Court, Justice Powell found that "[just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 113-14 (emphasis in original). The Court's expansion of the *Lockett* rule in *Eddings* was given further weight in subsequent applications. For example, in *Skipper* v. South Carolina, the Court concluded that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper*, 476 U.S. at 4 (quoting *Eddings*, 455 U.S. at 114). Finally, in *Mills* v. Maryland, the Court invalidated a capital sentencing statute, citing the *Lockett* rule that a capital sentencer may not be precluded from considering any relevant mitigating evidence. *Mills*, 486 U.S. at 384.

87. See *Eddings*, 455 U.S. at 117-18 (O'Connor, J., concurring) (emphasizing that death penalty is different from other sentences and requires extraordinary measures to guarantee that "sentence was not imposed out of whim, passion, prejudice, or mistake").


90. Id.

91. Id. Thomas Powell, an off-duty Marine home on leave, emerged from the bar and headed for his car. *Id.* Walton and his accomplices robbed Powell at gunpoint and ordered him to get in the back seat of the car. *Id.* Walton drove the car to a place known as Gates Pass where Powell was ordered out of the car and forced to lay down on the ground. Respondent's Brief on the Merits at 1, Walton v. Arizona, 110 S. Ct. 3047 (1990). Walton forced Powell to get up and marched him into the desert. After walking a short distance, Walton shot Powell once in the back of the head. *Walton*, 110 S. Ct. at 3052. The medical examiner's report indicated that the single shot was not fatal, but that Powell died from dehydration, starvation, and pneumonia several days after the shooting. *Id.*
victed felon, and Walton's own testimony. It was apparent that the jury was not certain whether Hoover or Walton had actually pulled the trigger, but the judge's instruction on felony-murder made that distinction irrelevant. Hoover was convicted of first degree murder and sentenced to life imprisonment.

Pursuant to the Arizona statute, the trial judge conducted a separate "aggravation/mitigation hearing" without a jury. The state presented two aggravating circumstances to justify a sentence of death: (1) that the murder was committed "in an especially heinous, cruel or depraved manner," and (2) that the murder was committed for pecuniary gain. As mitigating factors, Walton presented psychiatric testimony indicating an extensive history of substance abuse that may have impaired his judgment at the time of the murder, evidence pointing to a history of sexual abuse as a child, and a suggestion that his young age justified a sentence of imprisonment. Immediately after the closing arguments, the trial judge sentenced Jeffrey Walton to death.

B. The Arizona Death Penalty Statute

The principle issue in Walton concerned whether the Arizona statutory provisions violated the eighth and fourteenth amendments.

93. Id. at 8. During the jury's deliberation on the guilt phase, the following question was presented to the judge: "For a person to be guilty of felony murder, does he actually have to pull the trigger?" Id. at 9 (citing Joint Appendix at 43). The court responded that the jury should "review the felony murder instructions and the accomplice instructions." Id. The guilty verdict followed soon after the judge's response. Id.; see also ARIZ. REV. STAT. ANN. § 13-1105 (Supp. 1988) (defining crimes punishable by death and including offense of robbery in which defendant or another person causes the death of any person). The Supreme Court's treatment of Arizona's felony murder provision has received extensive attention. See generally Gallaway, Felony-Murder Death Sentence: The Tison Brothers' Intent to Kill, 27 ARIZ. L. REV. 889 (1985) (examining Court's decision upholding Arizona's capital punishment provision incorporating felony murder); Note, Tison v. Arizona: A General Intent for Imposing Capital Punishment Upon an Accomplice Felony Murderer, 20 U. TOL. L. REV. 255 (1988) (discussing constitutionality of Arizona's statutory provision permitting death sentence for felony murder); Note, Redefining a Culpable Mental State for Non-Triggermen Facing the Death Penalty, 33 VILL. L. REV. 367 (1988) (investigating Supreme Court's decision upholding capital sentencing of defendant despite lack of intent or commission of murder).
96. Id.
97. Id. at 3052-53. The Arizona statute listed five factors to be considered as mitigating circumstances. The fifth factor stated only "[t]he defendant's age" without further clarification. ARIZ. REV. STAT. ANN. § 13-703(G)(5) (Supp. 1988). The defendant introduced mitigating evidence that he was 20 years old at the time of sentencing. Walton, 110 S. Ct. at 3052-53.
98. Walton, 110 S. Ct. at 3053.
99. Id. at 3051. The Arizona statute that defines capital sentencing requirements and guidelines reads, in relevant part, as follows:

B. When a defendant is found guilty of or pleads guilty to first degree murder . . .

the judge who presided at the trial or before whom the guilty plea was entered . . .
The distinction between the Arizona statute and other capital sentencing guidelines was its approach to the aggravating and mitigating circumstances analysis. Unlike other statutory constructions

shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsection F and G of this section, for the purpose of determining the sentence to be imposed. *The hearing shall be conducted before the court alone.*

C. In the sentencing hearing . . . [t]he burden of establishing the existence of any of the [aggravating] circumstances set forth in subsection F of this section is on the prosecution. *The burden of establishing the existence of the [mitigating] circumstances included in subsection G of this section is on the defendant.*

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and *shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.*

F. Aggravating circumstances to be considered shall be the following:

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.
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 . . . 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.

G. 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.
2. The defendant was under unusual and substantial duress.
3. The defendant was legally accountable for the conduct of another . . . but his participation was relatively minor.
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.
previously addressed by the Court, the Arizona law placed a burden on the defendant to establish "mitigating circumstances sufficiently substantial to call for leniency" if the state proved at least one of the enumerated aggravating circumstances.100

The Arizona Supreme Court has consistently noted that mitigating circumstances are not sufficiently substantial to call for leniency unless they outweigh the aggravating circumstances presented by the state.101 The Arizona court further clarified this point by finding that "[w]hen the issue of guilt is settled and only the question of punishment remains, due process is not offended by requiring the already guilty defendant to carry the burden of showing why he should receive leniency."102

C. The Opinion of the Court

In evaluating the Arizona statute, the Supreme Court in Walton v. Arizona103 considered two issues significant to the development of a mitigating factor evaluation in capital sentencing: (1) whether a statute permitting sentencers to consider only mitigating factors that have been proven by a preponderance of the evidence is constitutional; and (2) whether the Arizona statute's language creates an

100. Compare Ariz. Rev. Stat. Ann. § 13-703(E) (Supp. 1988) (allocating burden of showing mitigating factors "substantially sufficient to call for leniency" to defendant if court finds "one or more . . . aggravating circumstances. . .") with Ga. Code Ann. § 27-2534.1(b) (Supp. 1975) (requiring that "judge shall consider [or include instruction for jury to consider] . . . any mitigating or aggravating circumstances . . ." without allocating burden) and Ohio Rev. Code § 2929.04(B)(1)-(3) (Baldwin 1975) (placing burden on defendant to show by preponderance of evidence existence of specified mitigating factors). The Ohio statute at issue in Lockett was not invalidated because it allocated the "risk of nonpersuasion" to the defendant, but rather because it limited the types of mitigating circumstances to be considered. See Walton v. Arizona, 110 S. Ct. 3047, 3055 (1990) (distinguishing statute at issue in Walton from statute in Lockett (citing Lockett v. Ohio, 438 U.S. 586, 609 & n.16) (1978) (plurality opinion)).


impermissible presumption that the death penalty is appropriate. These considerations implicitly challenge the “death is different” doctrine and represent a potential retreat from precedent requiring a heightened due process for death penalty cases.

1. Constitutionality of assigning preponderance burden to presentation of mitigating factors

The Arizona statute at issue in Walton required the trial judge, as sentencer, to consider only those mitigating circumstances that had been established by a preponderance of the evidence and were “sufficiently substantial to call for leniency.” Justice White, in deliv-

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104. Walton, 110 S. Ct. at 3054-56. The Court rejected two other arguments by Walton: (1) whether Arizona’s delegation of sentencing and mitigating factor analysis to the trial judge rather than the jury is permissible under the sixth amendment entitlement to a jury sentencer, would be aware of any limitations mandated by the statute and under which he was sentenced, failed to properly guide the sentencer's discretion. Id. at 3054-57.

Walton’s sixth amendment argument suggested that every issue concerning the finding of fact must be decided by a jury. Id. at 3054. The Arizona statute, however, delegated the entire sentencing process to the judge including the fact-finding mitigating circumstance analysis. Ariz. Rev. Stat. Ann. § 13-703(B) (1989); see supra note 99 (quoting from relevant portion of Arizona statute). Walton contended that a jury must make the determination concerning which relevant mitigating and aggravating factors exist before the judge renders a sentence. Walton, 110 S. Ct. at 3054. Unlike other statutes delegating sentencing decisions to a judge, the Arizona statute provided no process for jury recommendation or input in the sentencing phase. Ariz. Rev. Stat. Ann. § 13-703(B) (1989).

The majority placed little credence on Walton’s attempt to distinguish the Arizona statute from other state statutes previously upheld by the Court which delegate capital sentencing to judges. Walton, 110 S. Ct. at 3054. Citing Florida’s jury recommendation provision as representative, the Supreme Court noted that even statutes that provide for jury recommendation do not make such findings binding on the trial judge’s sentencing determination. Id. Finally, the Court cited Hildwin v. Florida, 490 U.S. 638 (1989), in concluding that the sixth amendment does not require the specific findings which authorize the imposition of the death sentence to be made by the jury. Walton, 110 S. Ct. at 3054.

Walton also contended that the definition of aggravating circumstances, provided in the statute and under which he was sentenced, failed to properly guide the sentencer’s discretion as required by the eighth and fourteenth amendments. Id. at 3056-57. Walton relied on Maynard v. Cartwright, 486 U.S. 356 (1988) and Godfrey v. Georgia, 446 U.S. 420 (1980), wherein the Supreme Court had struck down similar aggravating circumstance definitions in the Oklahoma and Georgia statutes respectively. Walton, 110 S. Ct. at 3057.

Walton was sentenced to death on the judge’s finding that he “committed the offense in an especially heinous, cruel or depraved manner.” See Ariz. Rev. Stat. Ann. § 13-703(F)(6) (1987) (delineating aggravating circumstances under Arizona law). In Maynard, the Court struck down an aggravating circumstance provision which warranted a death sentence for crimes which were “especially heinous, atrocious, or cruel.” Maynard, 486 U.S. at 359. The Court in Godfrey found Georgia’s provision of “outrageously or wantonly vile, horrible or inhuman” to be equally unconstitutional as applied in that case. Godfrey, 446 U.S. at 422.

The Court distinguished the Arizona statutory construction from those at issue in Maynard and Godfrey. Walton, 110 S. Ct. at 3057. In the two prior cases, the jurors were not instructed beyond the “bare terms” of the statutory language. Id. The Court found that since Walton was sentenced by a trial judge aware of the constitutional limitations on aggravating circumstance analysis, his case was distinguishable from Maynard and Godfrey. Id. The majority concluded that “[t]rial judges are presumed to know the law and to apply it in making their decisions.” Id. Therefore, the statute need not be more clear because the trial judge, as sentencer, would be aware of any limitations mandated by the eighth amendment. Id.

er the Court’s opinion, distinguished the Arizona statute from the law struck down by the Court in *Lockett*.\(^{106}\) In *Lockett*, the Supreme Court invalidated the Ohio death penalty statute because it restricted the mitigating circumstances a capital sentencer could consider.\(^{107}\) Justice White distinguished *Walton* by framing the issue as one concerning a criminal defendant’s burden of proof rather than one involving the preclusion of mitigating evidence.\(^{108}\)

Justice White reasoned that three prior decisions by the Court upholding various statutorily-mandated burdens on criminal defendants controlled the result in *Walton*.\(^{109}\) In the first case, *Martin v. Ohio*,\(^ {110}\) the Court upheld a provision requiring a homicide defendant to prove by a preponderance of the evidence that he or she was acting in self-defense when the murder was allegedly committed.\(^ {111}\) In the second case, *Leland v. Oregon*,\(^ {112}\) the Court upheld a requirement that a defense of insanity be proven beyond a reasonable doubt by a criminal defendant.\(^ {113}\) Finally, the *Walton* majority cited *Patterson v. New York*\(^ {114}\) in which the Court found that the assignment of a preponderance burden to a defendant asserting an affirmative defense of extreme emotional disturbance did not conflict with the right to due process.\(^ {115}\) Justice White used these cases to support the proposition that as long as the state did not lessen the prosecutor’s burden to prove every element of an offense or to prove the existence of aggravating circumstances, then a defendant’s constitutional rights were not violated by requiring proof of mitigating circumstances by a preponderance of the evidence.\(^ {116}\)

In addition to requiring proof of mitigating circumstances by a preponderance of evidence, the Arizona law further limited a sentencer’s consideration to only those mitigating circumstances suffi-
ciently substantial to call for leniency. In upholding this statute, the Court distinguished the Arizona law from those struck down in *Mullaney v. Wilbur* and *Mills v. Maryland*. In *Mullaney*, the Court invalidated a statute requiring convicted murder defendants to affirmatively disprove an element of murder in order to receive the reduced sentence of voluntary manslaughter. The Court in *Walton* reasoned that Arizona’s “sufficiently substantial” provision and its limitation on the mitigating circumstance analysis was not analogous to the *Mullaney* statute’s limitation on a state’s burden to establish all of the elements of a crime. Justice White concluded that finding *Mullaney* applicable would create a constitutional mandate that a sentencer consider all mitigating factors presented by the defendant unless negated by the state by a preponderance of the evidence. The Court declined to endorse this concept.

In *Mills*, the Court invalidated a death penalty statute that appeared to preclude consideration of a mitigating factor unless the jurors unanimously agreed that the factor was valid. The Court in *Walton* first distinguished *Mills* by noting that the Arizona statute delegated sentencing authority to the trial judge, thereby eliminating the concern about jury instructions prevalent in *Mills*. In addition, the Court noted that *Mills* did not forbid the requirement that each individual juror find a mitigating circumstance established

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120. *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). In *Mullaney*, the Supreme Court found unconstitutional a Maine statute requiring a murder defendant to prove that he acted in the heat of passion in order to reduce a homicide conviction mandating life imprisonment to manslaughter which carried a sentence not greater than twenty years. *Id.* at 684. The Maine provision was deemed to violate the due process clause of the fourteenth amendment. *Id.* at 704. The Court reasoned that the state must prove beyond a reasonable doubt every element necessary to constitute the crime charged. *Id.* at 703-04 (noting Justice Harlan’s sentiments that “it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter”) (citing *In re Winship*, 397 U.S. 358, 372 (1970) (concurring opinion)).


122. *Id.*

123. *Id.*

124. *Mills v. Maryland*, 486 U.S. 367, 384. *Mills* involved an appeal from a capital sentence imposed after the petitioner was convicted of murdering a fellow prison inmate. *Id.* at 369. The Maryland scheme under which the petitioner was sentenced provided a verdict form in which mitigating factors were listed next to “yes” and “no” boxes. See *Id.* at 387-89 (providing reproduction of verdict form). The instructions to the mitigating evidence section appeared to require juror unanimity before either box could be checked. *Id.* at 377-78. Reaffirming the notion that capital sentencers must be permitted to consider all mitigating factors, the Court vacated the capital sentence. *Id.* at 384.

by a preponderance of the evidence.\textsuperscript{126}

2. The presumption of death

Walton's second challenge to the Arizona statute attacked the provision requiring the imposition of a capital sentence if mitigating evidence is not established "sufficiently substantial to call for leniency" because it created an unconstitutional presumption that death is the appropriate sentence.\textsuperscript{127} The Court cited \textit{Blystone v. Pennsylvania}\textsuperscript{128} and \textit{Boyde v. California}\textsuperscript{129} as precedent precluding such a challenge.\textsuperscript{130}

In \textit{Blystone}, the Court upheld a Pennsylvania statute requiring the imposition of a capital sentence if the state established at least one aggravating factor and the jury found no applicable mitigating circumstances.\textsuperscript{131} The \textit{Blystone} Court found the Pennsylvania statute outside the category of "impermissibly mandatory" death penalty statutes invalidated in \textit{Woodson} because it did not automatically impose the death penalty for a certain crime.\textsuperscript{132} Applying the \textit{Blystone} analysis, the Court in \textit{Walton} concluded that the Arizona statute did not afford an excessive amount of discretion to the sentencer.\textsuperscript{133} The Court's companion decision, \textit{Boyde v. California}, upheld a California jury instruction which mandated a capital sentence if aggravating circumstances outweighed mitigating factors.\textsuperscript{134} The Court equated the Arizona statute's provision at issue in \textit{Walton} to the challenged procedure in \textit{Boyde} and therefore concluded that the Arizona provision was not constitutionally defective.\textsuperscript{135}

\textsuperscript{126} Id. at 3056.
\textsuperscript{127} Id.
\textsuperscript{128} 110 S. Ct. 1078 (1990).
\textsuperscript{129} 110 S. Ct. 1190, reh'g denied, 110 S. Ct. 1961 (1990).
\textsuperscript{130} Walton, 110 S. Ct. at 3056.
\textsuperscript{131} Blystone v. Pennsylvania, 110 S. Ct. 1078, 1084 (1990); see also 42 Pa. Const. Stat. § 9711(c)(1)(iv) (1988) (imposing sentence of death if jury unanimously finds at least one aggravating circumstance and no mitigating circumstances or jury unanimously finds that aggravating circumstances outweigh mitigating factors).
\textsuperscript{132} Blystone, 110 S. Ct. at 1082. In addition, the Court in \textit{Blystone} concluded that the Pennsylvania statute did not violate the constitutional requirement of an individualized sentence because the sentencer was not precluded from considering any type of mitigating evidence. \textit{Id.} at 1082-83.
\textsuperscript{133} See Walton, 110 S. Ct. at 3056 (finding that death penalty statute did not automatically run afoul of eighth amendment by requiring certain sentence) (citing \textit{Woodson v. North Carolina}, 428 U.S. 280 (1976) (plurality opinion)). The Court concluded that only when the sentence is mandated in response to a particular factual scenario does it infringe the individualized sentence required by eighth amendment precedent. \textit{Id.}
\textsuperscript{134} Boyde v. California, 110 S. Ct. 1190, 1195-96 (1990). The California jury instruction commanded: "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." \textit{Id.} (emphasis omitted).
\textsuperscript{135} Walton, 110 S. Ct. at 3056.
Walton v. Arizona

D. Justice Scalia's Concurrence

Although Justice Scalia joined the Court's judgment and much of the majority opinion, he did not join the Court's opinion concerning the defendant's preponderance burden or the presumption of death issues. Justice Scalia's concurrence was premised on the belief that capital sentencing jurisprudence has developed along two separate and conflicting lines: one "requiring constraints on the sentencer's discretion to 'impose' the death penalty" and the other "forbidding constraints on the sentencer's discretion to 'decline to impose' it." Justice Scalia equated the Supreme Court's prior attempts to harmonize these diametrically opposing goals with an attempt to simultaneously promote the ends of good and evil.

After a detailed review of the capital sentencing doctrines, Justice Scalia concluded that the contradictory directives could not coexist in one viable body of law. According to Justice Scalia, the contradiction has provided ample grounds for defense counsel to file a "flood-tide of stay applications and petitions for certiorari to review adverse judgments," that has created a judicial backlog of capital cases and an endless delay in execution timetables.

After concluding that the two lines of capital sentencing doctrines could not coexist, Justice Scalia reevaluated the logic of both, beginning with the Court's initial interpretation of the eighth amendment. Justice Scalia interpreted the eighth amendment as not prohibiting a punishment, "no matter how cruel a judge might think it to be," unless it is also unusual. The Scalia concurrence reaffirmed the Court's analysis in Furman v. Georgia, finding a constitutional prohibition in the eighth amendment against unfettered capital sentencing discretion. In ratifying the Furman decision,
however, Justice Scalia found no justification for continuing to apply the line of cases requiring individualized capital sentencing. In so doing, Justice Scalia declared that he would no longer apply the principles and precedent from Woodson, Lockett or any of their progeny. Following his reconstruction of death penalty jurisprudence, Justice Scalia briefly evaluated the Arizona statute at issue in Walton. Under Justice Scalia's interpretation, Arizona's aggravating factors provided sufficient guidance for a sentencer to distinguish an appropriate capital crime from a non-capital crime. Furthermore, since Justice Scalia found the Woodson-Lockett individualization cases no longer applicable, he found no constitutional violation in the Arizona statute's provision concerning the mitigating circumstance evaluation. 

E. The Dissenting Opinions

Three dissents were filed in Walton. Justice Brennan prefaced his attack on the Court's retreat from established precedent by reiterating his continuing belief that the death penalty is per se unconstitutional. Justice Brennan admonished the majority and accused them of facilitating the execution of capital defendants "with as little interference as possible from our established Eighth Amendment doctrine." Justic, Blackmun filed the main dissent which sharply criticized
the Court’s logic in citing non-capital cases as justification for a departure from established eighth amendment precedent. Justice Blackmun concluded that the Arizona statute should be invalidated because it precluded sentencer consideration of mitigating evidence. More than half of the Blackmun dissent was devoted to one of the aggravating circumstances, statutorily-defined as any murder committed “an especially heinous, cruel, or depraved manner,” under which the defendant was sentenced to death. Justice Blackmun criticized the statutory definition as encouraging arbitrary and capricious application of the death penalty and found it lacked constitutionally-mandated clarity. Justice Blackmun concluded by accusing the Court of abandoning its constitutional duty to regulate abusive application of the death penalty.

Justice Stevens, in addition to joining Justice Blackmun’s dissent,
filed his own.\textsuperscript{158} He concluded that the Arizona statute's delegation of post-conviction fact-finding to a judge rather than to a jury offended the sixth amendment right to a jury trial.\textsuperscript{159} Justice Stevens also rebuked Justice Scalia's concurrence and dismissed it as nothing more than "reactionary."\textsuperscript{160} Justice Stevens concluded with an affirmation of the two-prong limitation on capital punishment.\textsuperscript{161}

\textsuperscript{158} Walton, 110 S. Ct. at 3086-92 (Stevens, J., dissenting).


\textsuperscript{160} Walton, 110 S. Ct. at 3089-92 (Stevens, J., dissenting) (criticizing Justice Scalia's categorical rejection of developed precedent and stare decisis).

Justice Stevens also noted that, in Zant, the Georgia Supreme Court analogized the two-prong eighth amendment doctrine to a pyramid. Id. at 3090-92 (citing Zant v. Stephens, 462 U.S. 862 (1983)). The pyramid paradigm has three levels. The first level is statutorily defined types of homicides which qualify for capital punishment. Id. The second level is specific homicides which may qualify for the death penalty as defined by statutory aggravating factors. Id. The third level represents those cases in which capital punishment shall be imposed after an evaluation of all mitigating circumstances. Id. The Furman guided discretion requirement dictates the level two requirement: states must define certain aggravating factors that must exist in order for a particular defendant to qualify for a capital sentence. See Walton, 110 S. Ct. at 3090 & n.6 (Stevens, J., dissenting) (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (Stewart, Powell, Stevens, J.J., concurring) (noting that Furman has been characterized as mandating guidance along with discretion)). The Woodson-Lockett individualized sentencing requirement dictates the level three requirement: states must allow complete discretion for the sentencer to find mitigating circumstances sufficient to decline death penalty imposition. See id. at 3070-71 (Blackmun, J., dissenting) (setting forth principles of Woodson and Lockett as mandating consideration of any mitigating factors).

\textsuperscript{161} See Walton, 110 S. Ct. at 3092 (Stevens, J. dissenting) (insisting that 1976 cases presented best framework for regulating capital punishment under eighth amendment).
III. CRITICAL ANALYSIS OF WALTON

A. Constitutionality of Assigning Preponderance Burden to Presentation of Mitigating Factors

The Arizona death penalty statute at issue in Walton requires the defendant to establish mitigating evidence by a preponderance of the evidence.\(^{162}\) As a result, if a defendant fails to fulfill the requisite burden, the sentencer is precluded from giving any weight to mitigating evidence presented at the capital sentencing hearing.\(^{163}\) By preventing sentencer consideration of mitigating evidence, the Arizona statute, on its face, offends both the fundamental doctrine that death is qualitatively different from all other punishments and the requirement of individualized sentencing that developed from that premise.

The Court in Woodson required that every constitutionally valid death penalty statute allow the sentencer to consider mitigating as well as aggravating circumstances.\(^{164}\) As the doctrine of individualized sentencing evolved, the Court struck down statutes that limited mitigating evidence consideration.\(^{165}\) Walton reversed this evaluation by upholding a statute that limits a capital sentencer's consideration of mitigating factors.\(^{166}\)

The Court failed to address directly how the Arizona statute could be reconciled with the body of eighth amendment jurisprudence developed over the last fifteen years.\(^{167}\) Justice White briefly cited only three cases to justify this radical departure from established precedent.\(^{168}\) Although two of the three cases involved defendants who were sentenced to death, none specifically addressed the issue of capital sentencing nor did any provide sufficient grounds for the Supreme Court's deviation from established eighth amendment jurisprudence.

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166. Walton, 110 S. Ct. at 3058 (upholding Arizona statute).
167. Walton, 110 S. Ct. at 3071 (Blackmun, J., dissenting) (criticizing plurality for ignoring settled precedent). Justice White, recognizing the obvious tension between the Arizona statute and established law, stated that "[i]t is true that the Court has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty . . . ." Id. at 3055. Nevertheless, he summarily concluded that the Arizona statute did not exclude any particular type of mitigating evidence. Id.
Justice White ignored the “death is different” doctrine by equating a defendant’s burden of proof when presenting an affirmative defense at trial to a defendant’s burden of proof when presenting mitigating evidence in a capital sentencing hearing. In *Patterson v. New York*, the first of the three affirmative defense cases cited by Justice White, the Court considered whether a New York statute violated the fourteenth amendment by assigning a murder defendant the burden of proving extreme emotional disturbance as an affirmative defense. In *Patterson*, the Court rejected the constitutional challenge, finding that the state was not even required to recognize the defense and, as such, could require any level of proof it saw fit. The Court’s conclusion in *Patterson*, however, bears little relevance to the issue in *Walton*.

The notion that death is fundamentally different mandates additional due process safeguards when formulating a valid capital punishment statute. *Patterson* is inapplicable to capital sentencing jurisprudence because it involved the admissibility of evidence at a criminal trial, not a post-conviction capital sentencing hearing. The former must conform only to the requirements of due process while the latter must adhere to the more stringent dictates of eighth amendment jurisprudence. In a post-conviction capital sentencing hearing, the state is specifically required to permit the presentation and consideration of mitigating circumstances. By applying *Patterson*, the Court in *Walton* ignored the “death is different” doctrine and erroneously equated the due process guarantees of a convicted prisoner facing a sentence of death with those of a criminal

170. *Id.*
171. *Patterson* 432 U.S. at 207-09. The Court in *Patterson* noted specifically: “If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty.” *Id.* at 209.
172. See *Walton*, 110 S. Ct. at 3071-73 (Blackmun, J., dissenting) (disparaging plurality’s citation of “analogous” cases because it did not directly address established eighth amendment precedent).
173. See, e.g., California v. Ramos, 463 U.S. 992, 998-99 (1983) (recognizing higher degree of scrutiny required during capital sentencing hearing); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (finding imposition of death sentences by public decree so profoundly different than incarceration that individualized evaluation is essential in capital sentencing hearings); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion) (concluding “that death is a punishment different from all other sanctions in kind rather than degree”).
174. See *Patterson*, 432 U.S. at 200 (finding law requiring defendant to prove by preponderance of evidence defense of extreme emotional disturbance did not violate due process).
175. *Woodson*, 428 U.S. at 304 (stating that heightened procedural safeguards are required in death penalty statutes).
176. See *id.* at 304 (requiring consideration of “mitigating factors stemming from the diverse frailties of humankind”).
defendant at trial.177

In addition to Patterson, Justice White cited Leland v. Oregon as precedent to justify Arizona's preponderance burden provision.178 The Court in Leland held that an Oregon statute requiring a murder defendant to prove the defense of insanity beyond a reasonable doubt did not violate the due process clause.179 The relevance of Leland is also limited because it was decided twenty-six years before Lockett and the development of the eighth amendment jurisprudence addressed in Walton.180 Although the defendant in Leland was sentenced to death after being convicted of first degree murder, that sentence had nothing to do with the issues presented to the Supreme Court.181 Just as Patterson dealt with the defendant's preponderance burden in proving extreme emotional disturbance, Leland addressed whether the state could require a criminal defendant to prove insanity beyond a reasonable doubt.182 In fact, the issue for which Leland was cited in Walton, whether a state may assign a preponderance burden to mitigating evidence at a capital sentencing hearing, was never mentioned in Leland itself.183 Justice White's use of Leland as controlling precedent to justify a retreat from the

177. See Walton, 110 S. Ct. at 3055-56 (citing non-capital cases allocating burdens of proof to defendants without distinguishing capital cases).

178. Id. at 3055 (citing Leland v. Oregon, 343 U.S. 790 (1952)). The Court presented Leland as a case upholding the requirement that the defense of insanity be proved beyond a reasonable doubt by the defendant in a capital sentencing case. Id.


180. Id. The Leland case was decided on June 9, 1952. Id.

181. Id. at 792. The principal issue addressed in Leland was whether the Oregon statute, requiring that a criminal defendant prove insanity beyond a reasonable doubt, deprived him or her of life and liberty without due process guaranteed by the fourteenth amendment. Id. In contrast, the issue on which the Supreme Court granted certiorari in Walton involved a direct challenge to the mitigating circumstances calculation relevant to the sentencing procedure under the Arizona statute. Walton, 110 S. Ct. at 3049-50.

182. See Leland, 343 U.S. at 792 (citing Oregon statute at Ore. Comp. Laws §§ 26-929, 23-122 (1940) regarding burden of proof on insanity defense). The statute provided that "when the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt . . . ." Ore. Comp. Laws § 26-929 (1940); see also Patterson, 432 U.S. at 210 (holding that due process is satisfied even when defendant must prove defense of emotional disturbance by preponderance of evidence).

183. See Leland, 343 U.S. at 792 (stating that judge sentenced defendant to death without additional sentencing hearing); Walton, 110 S. Ct. at 3055 (citing Leland as requiring defense of insanity be proven beyond reasonable doubt). The Oregon jury convicted Leland of first degree murder and refused to recommend life imprisonment. Leland, 343 U.S. at 792. Following the death penalty provisions then in force, the trial court sentenced Leland to death without an additional sentencing hearing. Id. Despite the sentence of death imposed by the trial judge, the issue in Leland involved only the statutory provision requiring a defendant to prove the insanity defense beyond a reasonable doubt after the state had proven all the elements of the offense. Id. at 792. Because the case was decided in 1952, there was no bifurcated sentencing hearing as required in recent capital cases. In fact, the eighth amendment issues relevant to the Walton decision did not evolve until Furman v. Georgia was decided in 1972, some 20 years after Leland was decided.
"Lockett" requirement of individualized sentencing and the underlying "death is different" doctrine is, therefore, untenable.

Finally, the Court cited *Martin v. Ohio* as its third example of precedent upholding a statute placing a preponderance burden on a capital defendant. As in *Patterson* and *Leland*, the Court in *Martin* was faced with an issue involving the burden of proof imposed on an affirmative defense to a charge of murder. The defendant in *Martin* was convicted of aggravated murder after killing her husband during a domestic argument. The appeal on which certiorari was granted concerned the defendant's burden of persuasion in proving self-defense. Instead of the insanity defense at issue in *Leland*, *Martin* addressed the issue of whether a state could require proof of self-defense by a preponderance of the evidence. Following its affirmative defense ruling in *Patterson*, the Court in *Martin* concluded that the preponderance burden was appropriate for a criminal defendant asserting a claim of self-defense at trial. There was, however, no mention of eighth amendment jurisprudence and, therefore, *Martin* also fails to provide any justification for the Supreme Court's analysis in *Walton*.

The Court's opinion in *Walton* provided only a cursory rationale for its position. In a scant two-page analysis, Justice White presented three inapplicable cases to uphold the Arizona provision requiring a capital defendant to prove mitigating circumstances by a preponderance of the evidence. All three cases dealt exclusively with affirmative defense issues outside the eighth amendment doctrines at issue in *Walton*. In effect, because prior cases permitted the assignment of heightened burdens of proof for affirmative defenses, the Court in *Walton* reasoned that a state may impose the same burden on a defendant presenting mitigating evidence in opposition to a capital sentence. This conclusion clearly offends the doctrines set forth in *Woodson* and *Lockett* and runs counter to the

184. *Walton*, 110 S. Ct. at 3055 (citing *Martin v. Ohio*, 480 U.S. 228 (1987)). In *Walton*, the Court described its decision in *Martin v. Ohio* as upholding the statutory imposition of a preponderance burden on evidence that the capital defendant was acting in self-defense. *Id.*
187. *Id.*
188. *Id.* at 231.
189. *Id.* at 231-33 (citing *Patterson*, 432 U.S. at 201-02 for proposition that state may set its own requirement for affirmative defense burden of proof).
191. *Id.* at 3051.
192. *See id.* at 3055-56 (arguing that state can impose same burden on defendant presenting mitigating evidence).
fundamental precept that the punishment of death is qualitatively different from a sentence of imprisonment.

The "death is different" doctrine, reinforced by the individualized sentencing requirements of *Woodson* and *Lockett*, cannot be reconciled with the Arizona statutory construction at issue in *Walton*. Citing the unique status of the death penalty, *Woodson* validated only those statutes which permit the sentencer to evaluate the capital defendant's particularized circumstances.193 The Arizona statute's exclusion of all mitigating circumstances not proven by a preponderance of the evidence offends both the broad decree set forth in *Woodson* and the more particular requirements mandated by subsequent cases.

*Lockett* and its progeny addressed the very concerns raised by the Arizona preponderance provision and held that a statute may not preclude consideration of "any aspect of a defendant's character or record or any circumstances of the offense that the defendant proffers as a basis for a sentence less than death."194 The Arizona statute clearly precludes mitigating circumstances not proven by a preponderance of the evidence.195 The Supreme Court has, in the past, consistently upheld *Lockett*.196 In *Walton*, however, the Court refused to apply the doctrine or provide any convincing justification for doing so.

### B. The Arizona Statute's Presumption of Death Provision

Justice White's opinion also provided scant justification for upholding the Arizona statute's presumption of death provision.197 By mandating a sentence of death unless the defendant's mitigating evidence outweighed the aggravating circumstances presented by the state, the Arizona statute created a presumption in favor of imposing death.198 To justify the Arizona statutory construction, the

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193. *See Woodson*, 428 U.S. at 303 (permitting capital sentence only after particularized consideration of relevant aspects of character and record of convicted defendant).

194. *Lockett*, 438 U.S. at 604. A majority of the Supreme Court in *Eddings v. Oklahoma* further clarified the mitigating circumstances evaluation requirement by declaring that the sentencer may determine the relevance of a particular factor but "may not give it no weight by excluding such evidence from their consideration." *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982).


197. *See Walton*, 110 S. Ct. at 3075-76 (Blackmun, J., dissenting) (contesting plurality's analysis in upholding Arizona's presumption of death provision in cases where aggravating and mitigating circumstances are evenly balanced).

198. *See supra* notes 127-35 and accompanying text (discussing Arizona capital punish-
Court cited only two capital cases, *Blystone v. Pennsylvania*¹⁹⁹ and *Boyde v. California*.²⁰⁰

Both cases, however, fail to provide a sufficient basis to justify the Court's holding in *Walton*. Neither the statute at issue in *Blystone* nor the jury instruction at issue in *Boyde* dictated a death sentence if the defendant presented mitigating evidence equal to the aggravating factors established by the state.²⁰¹ Both cases involved statutes with provisions requiring the imposition of a capital sentence only if the state's aggravating factors clearly outweigh the defendant's mitigating circumstances.²⁰² The Court in *Walton*, therefore, failed to support its decision to uphold the presumption of death provision.

The Arizona statute mandated a sentence of death if the defendant's mitigating factors did not outweigh the state's aggravating circumstances.²⁰³ The *Blystone/Boyde* construction, on the other hand, required a death sentence if the state's aggravating factors outweighed the defendant's mitigating circumstances.²⁰⁴ The provisions at issue in *Boyde* and *Blystone* would *not* require the imposition of a death sentence in a case where the mitigating factors are of equal weight to the aggravating factors.²⁰⁵ If, however, a sentencer found the defendant's mitigating evidence and the state's aggravating...
ing factors to be of equal weight, the statute at issue in Walton would mandate a death sentence. Therefore, the Arizona statute cannot be reconciled with those of California and Pennsylvania.

The qualitative difference between death and all other penalties provides the foundation for the presumption of death provision’s invalidity. In Gregg, the Supreme Court upheld Georgia’s death penalty statute principally because of the heightened due process protection afforded the capital defendant. By mandating a capital sentence unless sufficient mitigating evidence is presented, the Arizona statute, in effect, requires the defendant to convince a judge that death is not an appropriate punishment. At the guilt phase, a defendant is considered innocent until proven guilty and the burden of persuasion rests with the state. The Arizona presumption of death provision, however, shifts the burden of persuasion from the state to the individual capital defendant.

C. Justice Scalia’s Concurrence

Justice Scalia asserted that the Furman precedent cannot coexist with the individualized sentencing requirements of Woodson and Lockett. Because Furman mandated less capital sentencing discretion, Justice Scalia concluded that the Woodson decision which required more discretion could not be reconciled within the same body of law. Justice Scalia failed, however, to consider the fundamental precept of eighth amendment jurisprudence: death is different.

Justice Scalia endorsed Furman and its ban on unfettered discre-


207. See Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (plurality opinion) (emphasizing importance of heightened due process required of valid capital sentencing statute); see also id. at 222-23 (White, J., concurring) (concluding that Georgia statute at issue provided sufficient safeguards to guide juries in capital sentencing without risk of arbitrary or capricious results).

208. See Coffin v. United States, 156 U.S. 432, 453 (1895) (enunciating importance of precept that criminal defendant is innocent until proven guilty beyond reasonable doubt). The Supreme Court has consistently endorsed a presumption of innocence, and its enforcement is the foundation of the American criminal justice system. Id.

209. Walton, 110 S. Ct. at 3058-61 (Scalia, J., concurring) (referring to individualized sentencing requirements set forth in Woodson as “counterdoctrines” to Furman guided discretion requirement). Interestingly, only three years before writing his scathing attack on developed eighth amendment jurisprudence in Walton, Justice Scalia upheld those same doctrines. In Hitchcock v. Dugger, Justice Scalia, writing for a unanimous Supreme Court, vacated a capital sentence because the trial judge instructed the sentencing jury to consider only a finite list of mitigating circumstances. Hitchcock v. Dugger, 481 U.S. 393, 398 (1987). Justice Scalia found that the judge’s action violated the doctrines set forth in Lockett, Eddings, and Skipper proscribing judicial preclusion of non-statutory mitigating factors from sentencing consideration. Id. at 398-99.

210. Walton, 110 S. Ct. at 3059.
tation but dismissed the Woodson/Lockett requirement of individualized sentencing. If the two doctrines are considered within the context of the "death is different" doctrine, however, it becomes clear that they can and must coexist to ensure proper safeguards against faulty sentencing. The two doctrines work in concert to protect against any imposition of an erroneous death sentence and the irreversible result that would follow.

IV. Ramifications of Walton

The Court's deviation from established eighth amendment jurisprudence in Walton will have a long-standing effect on the future application of the death penalty and on future legislative enactments designed to expedite the capital sentencing process. By upholding the constitutionality of a preponderance burden on mitigating evidence introduced by a capital defendant, Walton begins to erode the heightened due process mandated by the eighth amendment.

Now that the Court has judicially endorsed the Arizona statute, other states are free to employ the same statutory construction to diminish the guarantees ensured by the "death is different" doctrine.

Seven months after Walton, a new Supreme Court decided Parker v. Dugger. In Parker, a Florida trial court judge overruled a jury recommendation for life imprisonment and imposed a sentence of death. The Florida Supreme Court upheld the sentence, accepting without further inquiry the trial court's finding that no mitigating circumstances existed sufficient to outweigh the aggravating factors. A sharply divided United States Supreme Court reversed the sentence and remanded for resentencing in light of mitigating evidence presented by the record.

211. Id. at 3068 (Scalia, J., concurring).
212. See generally supra note 160 (summarizing Georgia Supreme Court's discussion of two-prong eighth amendment jurisprudence developed from Furman and Woodson).
213. See supra notes 105-26 and accompanying text (discussing Court's treatment of preponderance burden provision).
216. Id. at 732-33.
217. Id. at 740. Justice O'Connor wrote the majority opinion in which Justices Marshall, Blackmun, Stevens, and Souter joined. Justice White wrote a strong dissent in which Justices Scalia, Justice Kennedy, and Chief Justice Rehnquist joined. Id. at 733, 740.

After the defendant had exhausted his state court remedies, the United States District Court for the Middle District of Florida granted the defendant's petition for a writ of habeas corpus as to the imposition of the death penalty. Id. at 734-35. The District Court found that the mitigating circumstances prevalent in the record made the capital sentence unconstitutional. Id. The Court of Appeals for the Eleventh Circuit reversed, upholding the judge's weighing of aggravating and mitigating evidence and finding no constitutional error in the capital sen-
A Florida jury had convicted Robert Parker of two counts of first degree murder and one count of third degree murder.\textsuperscript{218} Under Florida law, a capital defendant is sentenced by the trial judge after an advisory sentencing hearing is conducted and the jury makes its recommendation.\textsuperscript{219} In \textit{Parker}, the jury concluded that sufficient mitigating circumstances existed to outweigh the state’s aggravating factors and recommended two sentences of life imprisonment.\textsuperscript{220} The mitigating evidence included the large amounts of alcohol and drugs the defendant had ingested immediately prior to the incident,\textsuperscript{221} the non-capital sentences extended to two of his accomplices,\textsuperscript{222} the defendant’s difficult childhood,\textsuperscript{223} and the positive relationships exhibited between the defendant and his children and neighbors.\textsuperscript{224} The trial judge, however, after considering all of the evidence, overrode the jury’s recommendation on one of the three counts and sentenced Robert Parker to death.\textsuperscript{225} The Florida Supreme Court summarily approved the trial judge’s mitigating factor analysis.\textsuperscript{226}

Under Florida law, a capital sentencer must consider all mitigating evidence in which the sentencer is “reasonably convinced” of its validity.\textsuperscript{227} This standard allows consideration of a much broader range of evidence than the more restrictive preponderance burden employed by the Arizona statute at issue in \textit{Walton}.\textsuperscript{228} As such, the United States Supreme Court concluded that the trial judge’s find-
ing that no mitigating circumstances existed sufficient to outweigh the aggravating circumstances was clearly erroneous considering the record, the jury’s recommendation, and the trial judge’s acceptance of a jury-recommended life sentence for the other first degree murder conviction.229

The *Parker* decision somewhat clarifies the viability of the “death is different” doctrine after *Walton*. Despite clear applicability, the Court did not cite *Lockett* or *Woodson* as precedent to invalidate the mitigating circumstance evaluation as constitutionally deficient. Instead, the Court concluded that the Florida Supreme Court failed to provide an adequate review of the record by failing to examine the weight assigned by the trial judge to the mitigating evidence.230 Had the trial court concluded that no mitigating circumstances existed at all, however, the reviewing court would be justified in adopting such a finding without constitutional implications.231

If the same facts had occurred under Arizona’s statutory scheme, the trial judge could have imposed a death sentence after finding no mitigating circumstances sufficient to satisfy the preponderance burden of proof.232 A summary affirmation by the reviewing court in such a case would present no question of error because there would be no weighing analysis to review. The fundamental doctrine requiring a higher standard of review in capital sentencing can now be wholly subverted, therefore, by the legislative adoption of a preponderance burden for mitigating evidence admission.

In the aftermath of *Woodson* and *Lockett*, states modified their death penalty statutes to allow sentencers to consider all mitigating evidence presented by a capital defendant. The current Alabama statute represents the typical post-*Lockett* treatment of mitigation circumstance consideration in that a capital defendant has only the burden of presenting mitigating factors.233 After the evidence has

229. *Id.* at 736-38. Under Florida law, a judge may override a jury recommendation and impose a death sentence only if the facts suggesting such a sentence are so clear and convincing that virtually no reasonable person could contest it. *Id.* at 735 (citing *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (per curiam). The Supreme Court concluded that this standard was not met. *Id.* at 740 (concluding that Florida Supreme Court’s affirmance of death penalty based upon trial judge’s analysis was arbitrary).

230. *Id.* at 738. The Court majority chastised the Florida Supreme Court for rubber-stamping the trial court’s finding that no mitigating evidence outweighed the aggravating factors. *Id.* at 738-39. Justice O’Connor noted that the error resulted because the weighing of mitigating and aggravating factors was suspect and that the state Supreme Court failed to conduct an adequate review. *Id.*

231. *See id.* at 740 (postulating that “if the trial judge had found no mitigating circumstances and the Florida Supreme Court had relied on that finding, our review would be very different.”).


been introduced to the post-conviction sentencing hearing, the state must disprove the validity of the mitigating factor by a preponderance of the evidence.\(^{234}\)

In a few jurisdictions, however, the burden on capital defendants to prove mitigating evidence has been expanded. The preponderance burden assigned by the Arizona statute and upheld in Walton has been expressly adopted by the legislatures of Maryland and Wyoming.\(^{235}\) Other states, although not adopting the preponderance burden explicitly through law, have burdened the capital defendant through judicial interpretation of ambiguous statutory language.\(^{236}\) The legislatures of Florida and New Hampshire as well as the United States Congress are currently considering bills that modify their respective capital sentencing statutes to include a preponderance burden provision.\(^{237}\) Considering the uniformity in statutory

\(^{234}\) Id. The Alabama statute provides:

When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.

\(^{235}\) Id. The Maryland statute provides that if a jury finds the existence of any aggravating circumstance beyond a reasonable doubt, then it shall "consider whether, based upon a preponderance of the evidence," any mitigating circumstances exist. MD. ANN. CODE art. 27, § 413(g) (1989). The Wyoming statute simply requires the jury consider only those mitigating circumstances proven by a preponderance of the evidence. Wyo. STAT. §§ 6-2-102(c)(ii) to (iii) (1989).


\(^{237}\) See 1990 Fla. Laws 1242 (proposing requirement that evidence of retardation be proven by preponderance of evidence when presented as a mitigating factor in a Florida post-conviction capital sentencing hearing); 1990 N.H. Laws 1157-FN (proposing revision of entire New Hampshire capital sentencing statute and incorporation of preponderance burden on any mitigating evidence presented by capital defendant).

Congress has yet to pass a death penalty statute in which the defendant is required to prove mitigating circumstances by a preponderance of the evidence. At this time, however, 23 bills are pending in the 102nd Congress involving various death penalty statutes and amendments. Each of these 23 bills contains a provision mandating a preponderance burden for mitigating circumstance evaluation. See H.R. 365, 102nd Cong., 1st Sess. § 3592(c) (1991) (proposing bill to combat violent crime); H.R. 596, 102nd Cong., 1st Sess. § 2(d) (1991) (initiating death penalty for certain crimes in District of Columbia); H.R. 628, 102nd Cong., 1st Sess. § 3593 (1991) (providing for new capital punishment procedures); H.R. 639, 102nd Cong., 1st Sess. § 3592(c) (1991) (suggesting death penalty provisions to deal with terrorist murders); H.R. 731, 102nd Cong., 1st Sess. § 2338(c)(3) (1991) (employing capital punishment procedures to punish domestic and international terrorist acts); H.R. 769, 102nd Cong., 1st Sess. § 1102(3) (1991) (proposing Comprehensive Counter-terrorism Act of 1991); H.R. 822, 102nd Cong., 1st Sess. 3795(d) (1991) (seeking to amend title 18, United States Code, to strengthen death penalty procedures); H.R. 826, 102nd Cong., 1st Sess. § 2332(f)(3)(C) (1991) (providing constitutional procedures for imposition of death penalty in response to terrorist murders); H.R. 857, 102nd Cong., 1st Sess. § 3592(c) (1991) (submitting plan to overhaul federal death pen-
language employed to impose a preponderance burden on mitigating evidence, the flood of federal capital sentencing legislation represents the first immediate reaction to the Supreme Court's decision in *Walton*. More state legislatures are likely to follow suit in an effort to expedite the capital sentencing process.

**CONCLUSION**

Since its invalidation of all death penalty statutes in *Furman*, the Supreme Court has struggled to develop a viable doctrine reflecting the eighth amendment's limitation on capital punishment. Despite numerous challenges over the ensuing years, the two-prong analysis requiring both individualized sentencing and non-arbitrary decision-making has endured. The glue holding this fragile construction together has been the fundamental notion that a sentence of death is unlike any other punishment and, therefore, requires a heightened version of due process. By rejecting the need for heightened due process in the mitigating circumstance evaluation, the Supreme Court's decision in *Walton* severely weakens this underlying bond.

Rather than mandating the consideration of all mitigating factors and placing the burden on the state to counter such evidence, the Court has shifted the burden of proof to the capital defendant. Instead of forcing the state to convince a jury why an individual should be executed, the burden now falls on the individual to show why he or she should not be executed.

In combination with the Court's subsequent decision in *Parker*, *Walton* represents a radical shift from prior eighth amendment juris-
prudence. As more jurisdictions abandon the Lockett doctrine requiring consideration of all mitigating evidence in favor of the post-Walton modification in which such evidence is not considered unless it meets the preponderance burden, the amount of sentencer discretion will grow. The heightened due process carefully woven into the sentencing procedures over the last fifteen years will quickly unravel when the existence of mitigating evidence is no longer reviewed by a higher court. The penalty of death, therefore, will become simply another decision subject to the fact-finder's discretion.