SUPREME COURT OF THE UNITED STATES

No. 91–7580

GARY GRAHAM, PETITIONER *v.* JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 25, 1993]

JUSTICE THOMAS, concurring.

By deciding this case on the basis of *Teague* v. *Lane*, 489 U. S. 288 (1989), the Court has avoided a direct reconsideration of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). I join the Court's opinion because I agree that the holding sought by Graham is not compelled by the cases upon which *Penry* rests and would therefore, if adopted, be a new rule for *Teague* purposes. I write separately, however, to make clear that I believe *Penry* was wrongly decided.

Several members of the Court have commented on the "tension" between our cases on the constitutional relevance of mitigating circumstances in capital sentencing and those decisions applying the principle, first articulated in *Furman* v. *Georgia*, 408 U. S. 238 (1972), that the Eighth and Fourteenth Amendments prohibit States from giving sentencers unguided discretion in imposing the death penalty. *E. g.*, *Franklin* v. *Lynaugh*, 487 U. S. 164, 182 (1988) (plurality opinion); *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'CONNOR, J., concurring); *McCleskey* v. *Kemp*, 481 U. S. 279, 363 (1987) (BLACKMUN, J., dissenting). In my view, Texas had largely resolved this tension through the use of the three special issues repeatedly approved by this Court. *Penry*, however, is at war with the former Texas scheme. As the most extreme statement in our "mitigating" line, *Penry* creates more than an unavoidable tension; it presents an evident danger.

It is important to recall what motivated Members of this Court at the genesis of our modern capital punishment case law. *Furman* v. *Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States, and most particularly in rape cases. The three petitioners were black.[1] Lucious Jackson was a 21–year-old black man sentenced to death by Georgia for raping a white woman. Elmer Branch was sentenced to death by Texas for the rape of a 65–year-old white widow. William Henry Furman faced the death penalty in Georgia for unintentionally killing a white homeowner during a burglary. See 408 U. S., at 252–253 (Douglas, J., concurring).[2] In his opinion concurring in the Court's judgment that the death penalty in these cases was unconstitutional, Justice Douglas stressed the potential role of racial and other illegitimate prejudices in a system where sentencing juries have boundless discretion. He thought it cruel and unusual to apply the death penalty "selectively to minorities . . . whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." *Id.*, at 245. Citing

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[1]The Court decided two cases together with *Furman* v. *Georgia*, 408 U. S. 238 (1972): *Jackson* v. *Georgia*, No. 69–5030, and *Branch* v. *Texas*, No. 69–5031. A fourth case, *Aikens* v. *California*, No. 68–5027, was argued with *Furman* but was dismissed as moot. 406 U. S. 813 (1972).

[2]Furman was surprised to discover the victim at home and, while trying to escape, accidentally tripped over a wire, causing his pistol to fire a single shot through a closed door, thereby killing the victim. See 408 U. S., at 294–295, n. 48 (Brennan, J., concurring).

studies and reports suggesting that "[t]he death sentence [was] disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups," especially in cases of rape, *id.*, at 249–250 (internal quotation marks omitted), Justice Douglas concluded that

> "the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Id.*, at 255.

Justice Marshall echoed these concerns. See *id.*, at 364–366 (concurring opinion). He wrote that "[r]acial or other discriminations [in sentencing] should not be surprising," because, in his view, the Court's earlier decision in *McGautha* v. *California*, 402 U. S. 183 (1971), upholding a procedure that had "committ[ed] to the untrammeled discretion of the jury the power to pronounce life or death," *id.*, at 207, was "an open invitation to discrimination." 408 U. S., at 365. Justice Stewart also agreed that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.*, at 310 (concurring opinion).

The unquestionable importance of race in *Furman* is reflected in the fact that three of the original four petitioners in the *Furman* cases were represented by the NAACP Legal Defense and Educational Fund, Inc. This representation was part of a concerted "national litigative campaign against the constitutionality of the death penalty" waged by a small number of ambitious lawyers and academics on the Fund's behalf. Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1745 (1987). Although their efforts began rather modestly,

assisting indigent black defendants in isolated criminal cases—usually rape cases—where racial discrimination was suspected, the lawyers at the Fund ultimately devised and implemented (not without some prompting from this Court) an all-out strategy of litigation against the death penalty. See generally M. Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (1973) (hereinafter Meltsner); Muller, The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death, 4 Yale L. & Policy Rev. 158 (1985).[3] This campaign was part of a larger movement carried on in the 1960s by "abolitionist lawyers" whose agenda for social and legal change depended on an activist judiciary; their "unmistakable preference for the courts, especially the federal courts," came as a direct "response to the Supreme Court's willingness to redraw America's ethical and legal map, a task state houses and executive mansions were slow to tackle." Meltsner 25, 71.[4]

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[3]According to the published account of one Legal Defense Fund lawyer who participated in the campaign, the Fund—though it had had experience with racial discrimination in rape cases in the South—did not seriously consider a broader offensive against the death penalty until three Members of this Court, in an opinion dissenting from a denial of certiorari, offered a "strong foundation" for such a strategy. Meltsner 27–35. See *Rudolph* v. *Alabama*, 375 U. S. 889 (1963) (Goldberg, J., joined by Douglas and Brennan, JJ., dissenting) (calling on the Court to decide "whether the Eighth and Fourteenth Amendments . . . permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life" and suggesting several lines of argument in the form of questions that "seem relevant and worthy of . . . consideration").

[4]See also Meltsner 25: "[L]awyers attempting to

In mustering every conceivable argument—"ethical, legal, polemical, theological, speculative, [and] statistical"—for abolishing capital punishment, *id.*, at 59, the Fund lawyers and other civil rights advocates supplied the empirical and rhetorical support for the observations of Justices Douglas, Marshall, and Stewart with respect to race bias. See Brief for Petitioner in *Aikens* v. *California*, O. T. 1971, No. 68–5027, pp. 50–54; Brief for Petitioner in *Jackson* v. *Georgia*, O. T. 1971, No. 69–5030, p. 15 ("The racial figures for all men executed in the United States for the crime of rape since 1930 are as follows: 48 white, 405 Negro, 2 other. In Georgia, the figures are: 3 white, 58 Negro") (footnotes omitted). See also Brief for NAACP et al. as *Amici Curiae* in *Aikens* v. *California*, *supra*, at 13–18, and App. A (discussing, in particular, history of South's use of death penalty in rape cases prior to Civil War, when it was typical for rapes or attempted rapes committed by black men upon white women to be punishable by mandatory death or castration, while rapes committed by whites were not punishable by death); Brief for Synagogue Council of America et al. as *Amici Curiae* in *Aikens* v. *California*, *supra*, at 31 ("The positive relationship between the death penalty and race is strong, but where the crime involved is rape and more particularly, as in two of the present cases, the rape of white women by Negroes, the relationship is almost uncontrovertible").[5]

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thrust egalitarian or humanitarian reforms on a reluctant society prefer to use the courts because lifetime-appointed federal judges are somewhat more insulated from the ebb and flow of political power and public opinion than legislators or executives."

[5]The Federal Government later acknowledged before this Court that in 11 Southern States between 1945 and 1965, "[t]he data revealed that among all those convicted of rape, blacks were selected

In the end, Justice Douglas and the other Members of the Court concluded that "[w]e cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black." *Furman*, 408 U. S., at 253 (Douglas, J., concurring). See *id.*, at 310 (Stewart, J., concurring) ("racial discrimination has not been proved"). The Court focused more generally on the uncontrolled discretion placed in judges and juries. Such unbridled discretion, it was argued, practically invited sentencers to vent their personal prejudices in deciding the fate of the accused. See Brief for Petitioner in *Furman* v. *Georgia*, O. T. 1971, No. 69–5003, p. 12 ("The jury knew nothing else about the man they sentenced, except his age and race"). "Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12." 408 U. S., at 253 (Douglas, J., concurring). Justice Stewart observed that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," and concluded that the Eighth and Fourteenth Amendments cannot tolerate sentencing procedures that allow the penalty to be "so wantonly and so freakishly" inflicted. *Id.*, at 309–310 (Stewart, J., concurring). The practice of delegating unguided author-ity—a practice "largely motivated by the

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disproportionately for the death sentence." App. to Brief for United States as *Amicus Curiae* in *Gregg* v. *Georgia*, O. T. 1975, No. 74–6257, p. 4a. Furthermore, the Government stated, "we do not question [the] conclusion that during the 20 years in question, in southern states, there was discrimination in rape cases." *Id.*, at 5a. We eventually struck down the death penalty for convicted rapists under the Eighth Amendment, not on the basis of discriminatory application, but as an excessive and disproportionate punishment. *Coker* v. *Georgia*, 433 U. S. 584 (1977).

desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence"—actually allowed a jury, "in its own discretion and without violating its trust or any statutory policy, [to] refuse to impose the death penalty no matter what the circumstances of the crime." *Id.*, at 313, 314 (WHITE, J., concurring).

In sum, the Court concluded that in a standardless sentencing scheme there was no "rational basis," as Justice Brennan put it, to distinguish "the few who die from the many who go to prison." *Id.*, at 294 (concurring opinion). See also *id.*, at 313 (WHITE, J., concurring) ("no meaningful basis for distinguishing"). It cannot be doubted that behind the Court's condemnation of unguided discretion lay the specter of racial prejudice—the paradigmatic capricious and irrational sentencing factor.

At its inception, our "mitigating" line of cases sprang in part from the same concerns that underlay *Furman*. In response to *Furman*, 35 States enacted new death penalty statutes. See *Gregg* v. *Georgia*, 428 U. S. 153, 179–180 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). In five cases decided on a single day in 1976, we passed on the constitutionality of a representative sample of the new laws.[6] The controlling opinion in each case was a joint opinion of Justices Stewart, Powell, and STEVENS. In the lead case, *Gregg* v. *Georgia*, these Justices squarely rejected the argument that the death penalty is cruel and unusual under all circumstances. *Id.*, at 176–187. Rather, they focused on the States' capital sentencing procedures, distilling from *Furman* two

[6]*Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976).

complementary rationalizing principles about sentencing discretion: The discretion given the sentencer must be "directed and limited" to avoid "wholly arbitrary and capricious action," *Gregg*, 428 U. S., at 189, and this discretion must be exercised "in an informed manner." *Ibid.* *Furman* was read as holding that "to minimize the risk that the death penalty [will] be imposed on a capriciously selected group of offenders, the decision to impose it ha[s] to be guided by standards so that the sentencing authority [will] focus on the particularized circumstances of the crime and the defendant." *Gregg*, 428 U. S., at 199. The jury should be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Id.*, at 192. "Otherwise, the system cannot function in a consistent and a rational manner." *Id.*, at 189 (internal quotation marks omitted).

Gregg's requirement that the sentencer be guided by information about the particular defendant and the particular circumstances of the crime—in other words, by traditionally accepted sentencing criteria, see *id.*, at 189–190—added a second dimension to *Furman*'s rule against open-ended discretion. The jury's discretion must be focused on rational factors, and its decision should be based on information about the circumstances of the crime and about the accused as an individual, not merely as a member of a group. In *Furman* itself, for example, the jury was given almost no particularized information about the accused: "About Furman himself, the jury knew only that he was black and that, according to his statement at trial, he was 26 years old and worked at `Superior Upholstery.' It took the jury one hour and 35 minutes to return a verdict of guilt and a sentence of death." *Furman*, 408 U. S., at 295, n. 48 (Brennan, J., concurring) (citations omitted). Moreover, it was irrelevant to the jury's determination that the killing

committed by Furman was accidental. *Ibid.* Without a focus on the characteristics of the defendant and the circumstances of his crime, an uninformed jury could be tempted to resort to irrational considerations, such as class or race animus.

Justices Stewart, Powell, and STEVENS applied these principles in upholding the guided discretion procedures of Georgia, Florida, and Texas, and in striking down the mandatory death penalty provisions of North Carolina and Louisiana. The Georgia, Florida, and Texas schemes were held constitutional because they "guide[d] and focuse[d] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender." *Jurek* v. *Texas*, 428 U. S. 262, 273–274 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). The "essential" factor was that "the jury ha[d] before it all possible relevant information about the individual defendant whose fate it must determine." *Id.*, at 276. Moreover, the Georgia statute featured "an important additional safeguard against arbitrariness and caprice": a provision for automatic appeal of a death sentence that required the State Supreme Court to determine, *inter alia*, whether the sentence was imposed under the influence of passion or prejudice and whether it was disproportionate to other sentences imposed in similar cases. *Gregg*, *supra*, at 198.

The mandatory death penalty statutes, on the other hand, were held to violate the Eighth and Fourteenth Amendments for three reasons. First, the Justices believed, a mandatory death penalty departed from "contemporary standards" of punishment. *Woodson* v. *North Carolina*, 428 U. S. 280, 301 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). Second, experience had suggested that such statutes "simply papered over the problem of unguided and unchecked jury discretion" by provoking arbitrary jury nullification. *Id.*, at 302–303. Thus, "[i]nstead of

rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly." *Id.*, at 303; see *Roberts* v. *Louisiana*, 428 U. S. 325, 335 (1976) (opinion of Stewart, Powell, STEVENS, JJ.). Third, the mandatory nature of the penalty prevented the sentencer from considering "the character and record of the individual offender or the circumstances of the particular offense," and thus treated all convicted persons "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass." *Woodson*, *supra*, at 304. The latter concern echoed Justice Douglas's suggestion that sentences of death might have fallen disproportionately upon the "member[s] of a suspect or unpopular minority." *Furman*, *supra*, at 255.

One would think, however, that by eliminating explicit jury discretion and treating all defendants equally, a mandatory death penalty scheme was a perfectly reasonable legislative response to the concerns expressed in *Furman*. See *Roberts*, *supra*, at 346 (WHITE, J., dissenting). See also *Walton* v. *Arizona*, 497 U. S. 639, 662 (1990) (SCALIA, J., concurring in part and concurring in judgment). JUSTICE WHITE was surely correct in concluding that "a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death." *Roberts*, *supra*, at 358. See also *Roberts* v. *Louisiana*, 431 U. S. 633, 649 (1977) (REHNQUIST, J., dissenting); *Sumner* v. *Shuman*, 483 U. S. 66, 86 (1987) (WHITE, J., dissenting). I would also agree that the plurality in *Woodson* and *Roberts* erred in equating the "raw power of [jury] nullification" with the unlimited sentencing discretion condemned in *Furman*. *Roberts*, 428 U. S., at 347 (WHITE, J., dissenting). The curious and counterintuitive outcomes of our 1976 cases—upholding sentences of

death imposed under statutes that explicitly preserved the sentencer's discretion while vacating those imposed under mandatory provisions precisely because of a perceived potential for arbitrary and uninformed discretion—might in some measure be attributable, once again, to the powerful influence of racial concerns.[7] Be that as it may, we are not now confronted with a mandatory sentencing provision, and I have no occasion here to flesh out my disagreement with the Court's prohibition of such schemes.

The significant point for present purposes is that *Woodson* and *Sumner*'s invalidation of the mandatory death penalty guaranteed that sentencers would exercise some degree of discretion in every capital case. And under our precedents, in turn, any such exercise of discretion is unavoidably bound up with the two requirements of *Furman*, as identified in *Gregg:* first and foremost, that the sentencing auth-

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[7]As in *Furman*, the NAACP Legal Defense Fund represented the three petitioners in *Woodson* and *Roberts*, who were black. In addition to contending that the death penalty was a cruel and unusual punishment, the Fund lawyers argued in these cases that despite the mandatory nature of North Carolina's and Louisiana's statutes, the process of imposing the penalty on these petitioners was infected at key junctures with the potential for selective and discriminatory discretion, most importantly the possibility that sentencing juries in cases involving sympathetic defendants would acquit or convict on lesser charges. See Brief for Petitioners in *Woodson* v. *North Carolina*, O. T. 1975, No. 75–5491, pp. 22–39; Brief for Petitioner in *Roberts* v. *Louisiana*, O. T. 1975, No. 75–5844, pp. 30–65. The unsuccessful petitioners in *Gregg*, *Proffitt*, and *Jurek* were white. See Brief for United States as *Amicus Curiae* in *Gregg* v. *Georgia*, O. T. 1975, No. 74–6257, p. 68.

ority be "provided with standards to guide its use of the information" developed at sentencing, and second, in support of this principle, that the sentencer be "apprised of the information relevant to the imposition of sentence." *Gregg*, 428 U. S., at 195. By discovering these two requirements in the Constitution, and by ensuring in *Woodson* and its progeny that they would always be in play, the Court has put itself in the seemingly permanent business of supervising capital sentencing procedures. While the better view is that the Cruel and Unusual Punishment Clause was intended to place only substantive limitations on punishments, not procedural requirements on sentencing, see *Hudson* v. *McMillian*, 503 U. S. ___, ___ (1992) (THOMAS, J., dissenting) (slip op., at 2–3); *Gardner* v. *Florida*, 430 U. S. 349, 371 (1977) (REHNQUIST, J., dissenting), *stare decisis* requires that we make efforts to adhere to the Court's Eighth Amendment precedents, see *Walton* v. *Arizona*, *supra*, at 672 (SCALIA, J., concurring in part and concurring in judgment).

The mitigating branch of our death penalty jurisprudence began as an outgrowth of the second of the two *Furman*/*Gregg* requirements. The plurality's conclusion in *Lockett* v. *Ohio*, 438 U. S. 586 (1978)—that the sentencer in a capital case must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense," *id.*, at 604 (opinion of Burger, C. J.) (emphasis removed)—effectively guarantees the sentencer's access to categories of information favorable to the defendant. Thus, *Lockett* was built on the premise, given credence in *Gregg*, that "where sentencing discretion is granted, it generally has been agreed that the sentencing judge's possession of the fullest information possible concerning the defendant's life and characteristics is [h]ighly relevant." 438 U. S., at 602–603 (internal quotation marks omitted). The

sentencing statute at issue in *Lockett* failed to satisfy this requirement, in the plurality's view, because it eliminated from the jury's consideration significant facts about the defendant and her "comparatively minor role in the offense." *Id.*, at 608.[8] The Court's adoption in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), of the *Lockett* rule and its corollary—that the sentencer may not categorically refuse to consider relevant mitigating circumstances—again drew upon *Gregg*'s notion that capital sentencing is less likely to be arbitrary where the jury's exercise of discretion is focused on the particularized circumstances of the offender and the crime. See *Eddings*, *supra*, at 112 (relying on *Gregg*, *supra*, at 197).

Therefore, although it is said that *Lockett* and *Eddings* represent an "about-face" and "a return to the pre-*Furman* days," *Lockett*, *supra*, at 622, 623 (WHITE, J., concurring in part, dissenting in part, and concurring in judgments), there was at root a logical —if by now attenuated—connection between the rationalizing principle of *Furman* and the prophylactic rule of *Eddings*. *Eddings* protects the accused's opportunity to "appris[e]" the jury of his version of the information relevant to the sentencing decision. Our early mitigating cases may thus be read as doing little more than safeguarding the adversary process in sentencing proceedings by conferring on the defendant an affirmative right to place his relevant evidence before the sentencer. See *Skipper* v. *South*

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[8]Lockett aided and abetted an armed robbery that resulted in a murder. She drove the getaway car but did not carry out the robbery and did not intend to bring about the murder. See 438 U. S., at 589–591; *id.*, at 613–617 (BLACKMUN, J., concurring in part and concurring in judgment). Lockett was represented by the same lawyers from the Legal Defense Fund who had represented the petitioners in *Furman*, *Woodson*, and *Roberts*.

Carolina, 476 U. S. 1, 4 (1986). Cf. *id.*, at 5, n. 1 (comparing *Eddings* with "the elemental due process requirement that a defendant not be sentenced to death `on the basis of information which he had no opportunity to deny or explain.' *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977)").

Consistent with this (admittedly narrow) reading, I would describe *Eddings* as a kind of rule of evidence: it governs the admissibility of proffered evidence but does not purport to define the substantive standards or criteria that sentencers are to apply in considering the facts. By requiring that sentencers be allowed to "consider" all "relevant" mitigating circumstances, we cannot mean that the decision whether to impose the death penalty must be based upon all of the defendant's evidence, or that such evidence must be considered the way the defendant wishes. Nor can we mean to say that circumstances are necessarily relevant for constitutional purposes if they have any conceivable mitigating value. Such an application of *Eddings* would eclipse the primary imperative of *Furman*—that the State define the relevant sentencing criteria and provide rational "standards to guide [the sentencer's] use" of the evidence. That aspect of *Furman* must operate for the most part independently of the *Eddings* rule. This is essential to the effectiveness of *Furman*, since providing all relevant information for the sentencer's consideration does nothing to avoid the central danger that sentencing discretion may be exercised irrationally.

I realize, of course, that *Eddings* is susceptible to more expansive interpretations. See, *e. g.*, *Walton*, 497 U. S., at 661, 667 (SCALIA, J., concurring in part and concurring in judgment) (*Eddings* rule "has completely exploded whatever coherence the notion of `guided discretion' once had" by making "random mitigation" a constitutional requirement); *McCleskey* v. *Kemp*, 481 U. S., at 306 ("States cannot limit the sentencer's consideration of any relevant

circumstance that could cause it to decline to impose the [death] penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant"). And even under the narrow reading of *Eddings*, there is still a tension in our case law, because *Eddings* implies something of an outer boundary to the primary *Furman* principle: the sentencing standards chosen by the State may not be so stingy as to prevent altogether the consideration of constitutionally relevant mitigating evidence.

But with the exception of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), our most recent mitigating cases have been careful to read *Eddings* narrowly in an effort to accommodate the "competing commandments" of *Eddings* and *Furman*, *ante*, at 6. We have held that States must be free to channel and direct the sentencer's consideration of all evidence (whether mitigating or aggravating) that bears on sentencing, provided only that the State does not categorically preclude the sentencer from considering constitutionally relevant mitigating circumstances. See *Walton*, *supra*, at 652 ("[T]here is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty") (internal quotation marks omitted); *Boyde* v. *California*, 494 U. S. 370, 377 (1990) (to the same effect); *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988) (plurality) (same); see also *Walton*, *supra*, at 652 (requirement of individualized sentencing in capital cases satisfied as long as State does not altogether prevent sentencer from considering any type of relevant mitigating evidence); *Blystone* v. *Pennsylvania*, 494 U. S. 299, 307–308 (1990) (same); *Saffle* v. *Parks*, 494 U. S. 484, 490–491 (1990) (same).

This understanding preserves our original rationale

for upholding the Texas sentencing statute—that it "guides and focuses the jury's objective consideration of the particularized circumstances" while allowing the defendant "to bring to the jury's attention whatever [relevant] mitigating circumstances he may be able to show." *Jurek*, 428 U. S., at 272, 274. Thus, in reaffirming the constitutionality of Texas's system of special issues, we have expressed satisfaction that the former Texas scheme successfully reconciled any tension that exists between *Eddings* and *Furman*. See *Franklin* v. *Lynaugh*, *supra*, at 182 (plurality). In the context of the Texas system, therefore, I am unprepared at present to sweep away our entire mitigating line of precedent. By the same token, however, if the more expansive reading of *Eddings* were ultimately to prevail in this Court, I would be forced to conclude that the *Eddings* rule, as so construed, truly is "rationally irreconcilable with *Furman*" and, on that basis, deserving of rejection. See *Walton*, *supra*, at 673 (SCALIA, J., concurring in part and concurring in judgment).

Unfortunately, the narrow reading of *Eddings* is virtu-ally impossible after *Penry*. Whatever contribution to rationality and consistency we made in *Furman*, we have taken back with *Penry*. In the process, we have upset the careful balance that Texas had achieved through the use of its special issues.

Penry held that the Texas special issues did not allow a jury to "consider and give effect to" mitigating evidence of mental retardation and childhood abuse, 492 U. S., at 328, because, even though the defendant had a full and unfettered opportunity to present such evidence to the jury, the evidence had "relevance to [Penry's] moral culpability *beyond the scope* of the special issues." *Id.*, at 322 (emphasis added). Thus, the Court was persuaded that the jury might have been "unable to express its

`*reasoned moral response*' to that evidence in determining whether death was the appropriate punishment." *Ibid.* (emphasis added). See *post*, at 16. Contrary to the dissent's view, see *post*, at 4–9, these notions—that a defendant may not be sentenced to death if there are mitigating circumstances whose relevance goes "beyond the scope" of the State's sentencing criteria, and that the jury must be able to express a "reasoned moral response" to all evidence presented—have no pedigree in our prior holdings. They originated entirely from whole cloth in two recent concurring opinions. See *Franklin*, *supra*, at 185 (O'CONNOR, J., concurring in judgment); *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring).

Together, these notions render meaningless any rational standards by which a State may channel or focus the jury's discretion and thus negate the central tenet of *Furman* and all our death penalty cases since 1972. *Penry* imposes as a constitutional imperative "a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance" whether the defendant deserves death. *Penry*, 492 U. S., at 359 (SCALIA, J., concurring in part and dissenting in part). "It is an unguided, emotional `moral response' that the Court demands be allowed —an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy." *Ibid.* The dissent's reading of *Penry* bears out these fears. The dissent would require that the special issues be "construed with enough scope to allow the full consideration of mitigating potential," *post*, at 12, and that the jury be free to give full effect to the defendant's sympathetic evidence "for all purposes, including purposes not specifically permitted by the questions," *post*, at 8 (internal quotation marks and emphasis omitted).

Any determination that death is or is not the fitting punishment for a particular crime will necessarily be a moral one, whether made by a jury, a judge, or a legislature. But beware the word "moral" when used in an opinion of this Court. This word is a vessel of nearly infinite capacity—just as it may allow the sentencer to express benevolence, it may allow him to cloak latent animus. A judgment that some will consider a "moral response" may secretly be based on caprice or even outright prejudice. When our review of death penalty procedures turns on whether jurors can give "full mitigating effect" to the defendant's background and character, *post*, at 7, and on whether juries are free to disregard the State's chosen sentencing criteria and return a verdict that a majority of this Court will label "moral," we have thrown open the back door to arbitrary and irrational sentencing. See *Penry*, *supra*, at 360 (SCALIA, J., concurring in part and dissenting in part) ("The decision whether to impose the death penalty is a unitary one; unguided discretion not to impose is unguided discretion to impose as well. In holding that the jury had to be free to deem Penry's mental retardation and sad childhood relevant for whatever purpose it wished, the Court has come full circle, not only permitting but requiring what *Furman* once condemned").

The Court in *Penry* denied that its holding signaled a return to unbridled jury discretion because, it reasoned, "so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant." 492 U. S., at 327 (citing *Gregg*, 428 U. S., at 197–199, 203 (joint opinion), and 222 (WHITE, J., concurring in judgment)). Cf. *McCleskey* v. *Kemp*, 481 U. S., at 311 (discussing the benefits to the defendant of discretionary leniency). Thus, the dissent suggests that once the

State has sufficiently narrowed the class of death-eligible murderers, the jury's discretion to select those individuals favored to live must remain effectively unbounded. See *post*, at 10–13, 16. It turns reason on its head, however, to argue that just because we have approved sentencing systems that continue to permit juries to exercise a degree of discretionary leniency, the Eighth Amendment necessarily requires that that discretion be unguided and unlimited with respect to "the class of murderers subject to capital punishment." To withhold the death penalty out of sympathy for a defendant who is a member of a favored group is no different from a decision to impose the penalty on the basis of negative bias, and it matters not how narrow the class of death-eligible defendants or crimes. Surely that is exactly what the petitioners and the Legal Defense Fund argued in *Woodson* and *Roberts*. See n. 7, *supra*. It is manifest that "`the power to be lenient [also] is the power to discriminate.'" *McCleskey* v. *Kemp*, *supra*, at 312 (quoting K. Davis, Discretionary Justice 170 (1973)). See also *Roberts*, 428 U. S., at 346 (WHITE, J., dissenting) ("It is undeniable that the unfettered discretion of the jury to save the defendant from death was a major contributing factor in the developments which led us to invalidate the death penalty in *Furman* v. *Georgia*").[9]

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[9]The Texas special issues involved here did a considerably better job of rationalizing sentencing discretion than even the elaborate Georgia system approved in *Gregg*, where juries still retained power "to return a sentence of life, rather than death, for no reason whatever, simply based upon their own subjective notions of what is right and what is wrong." *Woodson*, 428 U. S., at 314–315 (REHNQUIST, J., dissenting). As a regrettable but predictable consequence of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), the Texas Legislature has since amended its

We have consistently recognized that the discretion to accord mercy—even if "largely motivated by the desire to mitigate"—is indistinguishable from the discretion to impose the death penalty. *Furman*, 408 U. S., at 313, 314 (WHITE, J., concurring) (condemning unguided discretion because it allows the jury to "*refuse* to impose the death penalty no matter what the circumstances of the crime") (emphasis added). See also *Jurek*, 428 U. S., at 279 (WHITE, J., concurring in judgment) (Texas's scheme is constitutional because it "does not extend to juries discretionary power to dispense mercy"); *Roberts*, *supra*, at 335 (joint opinion) (Louisiana's statute "plainly invites" jurors to "choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate"). For that reason, we have twice refused to disapprove instructions directing jurors "`not [to] be swayed by mere . . . sympathy,'" because, we have emphasized, such instructions "foste[r] the Eighth Amendment's `need for reliability in the determination that death is the appropriate punishment in a specific case.'" *California* v. *Brown*, 479 U. S., at 539, 543 (quoting *Woodson*, 428 U. S., at 305 (joint opinion)). Accord, *Saffle* v. *Parks*, 494 U. S., at 493 ("Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable,

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sentencing statute, which now invites the jury to react subjectively to "all" circumstances, including "the personal moral culpability of the defendant." See 3A Tex. Code Crim. Proc. Ann., Art. 37.071(e) (Vernon Supp. 1993) (applicable to offenses committed on or after September 1, 1991).

accurate, and nonarbitrary").

Penry reintroduces the very risks that we had sought to eliminate through the simple directive that States in all events provide rational standards for capital sentencing. For 20 years, we have acknowledged the relationship between undirected jury discretion and the danger of discriminatory sentencing—a danger we have held to be inconsistent with the Eighth Amendment. When a single holding does so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, it cannot command the force of *stare decisis*. In my view, *Penry* should be overruled.[10]

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[10]Indeed, it can be argued that we have already implicitly overruled *Penry* in significant respects. In *Saffle* v. *Parks*, 494 U. S. 484 (1990), we gave a dramatically narrow reading to *Penry*, reaffirming that under *Lockett* and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), the State is free to "limi[t] the manner in which [a defendant's] mitigating evidence may be considered." 494 U. S., at 491. And in *Boyde* v. *California*, 494 U. S. 370 (1990), we expressly rejected the significance of *Penry*'s conclusion that "`a reasonable juror *could well have believed* that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.'" *Id.*, at 379 (emphasis in original) (quoting *Penry*, *supra*, at 326). *Boyde* held instead that a jury instruction will run afoul of *Eddings* only if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," and the Court made it clear that "a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition." 494 U. S., at 380.

The major emphasis throughout our Eighth Amendment jurisprudence has been on "reasoned" rather than "moral" sentencing. We have continually sought to verify that States' capital procedures provide a "rational basis" for predictably determining which defendants shall be sentenced to death. *Furman*, *supra*, at 294 (Brennan, J., concurring). See also *Spaziano* v. *Florida*, 468 U. S. 447, 460 (1984); *California* v. *Brown*, *supra*, at 541; *Barclay* v. *Florida*, 463 U. S. 939, 960 (1983) (STEVENS, J., concurring in judgment) ("A constant theme of our cases . . . has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner"); *McCleskey* v. *Kemp*, 481 U. S., at 323 (Brennan, J., dissenting) ("[C]oncern for arbitrariness focuses on the rationality of the system as a whole, and . . . a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational"). And in the absence of mandatory sentencing, States have only one means of satisfying *Furman*'s demands—providing objective standards to ensure that the sentencer's discretion is "guided and channeled by . . . examination of specific factors." *Proffitt* v. *Florida*, 428 U. S. 242, 258 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

The rule of *Eddings* may be an important procedural safeguard that complements *Furman*, but *Eddings* cannot promote consistency, much less rationality. Quite the opposite, as *Penry* demonstrates. It is imperative, therefore, that we give full effect to the standards designed by state legislatures for focusing the sentencer's deliberations. This Court has long since settled the question of the constitutionality of the death penalty. We have recognized that "capital punishment is an expression

of society's moral outrage at particularly offensive conduct" and that a process for "`channeling th[e] instinct [for retribution] in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.'" *Gregg*, 428 U. S., at 183 (joint opinion) (quoting *Furman*, *supra*, at 308 (Stewart, J., concurring)). If the death penalty is constitutional, States must surely be able to administer it pursuant to rational procedures that comport with the Eighth Amendment's most basic requirements.

In my view, we should enforce a permanent truce between *Eddings* and *Furman*. We need only conclude that it is consistent with the Eighth Amendment for States to channel the sentencer's consideration of a defendant's arguably mitigating evidence so as to limit the relevance of that evidence in any reasonable manner, so long as the State does not deny the defendant a full and fair opportunity to apprise the sentencer of all constitutionally relevant circumstances. The three Texas special issues easily satisfy this standard. "In providing for juries to consider all mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, . . . Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence." *Penry*, 492 U. S., at 358–359 (SCALIA, J., concurring in part and dissenting in part).

As a predicate, moreover, I believe this Court should leave it to elected state legislators, "representing organized society," to decide which factors are "particularly relevant to the sentencing decision." *Gregg*, *supra*, at 192. Although *Lockett* and *Eddings* indicate that as a general matter, "a State cannot take out of the realm of relevant sentencing considerations the questions of the defendant's `character,' `record,' or the `circumstances of the offense,'" they do "not hold

that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." *Franklin* v. *Lynaugh*, 487 U. S., at 179 (plurality). Ultimately, we must come back to a recognition that "the States, and not this Court, retain `the traditional authority' to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance," *Skipper* v. *South Carolina*, 476 U. S., at 11 (Powell, J., concurring in judgment) (quoting *Lockett*, 438 U. S., at 604, n. 12), since "[t]his Court has no special expertise in deciding whether particular categories of evidence are too speculative or insubstantial to merit consideration by the sentencer." 476 U. S., at 15.[11] Accordingly, I also

[11]Under the Federal Sentencing Reform Act, for example, Congress has instructed the United States Sentencing Commission to study the difficult question whether certain specified offender characteristics "have any relevance" in sentencing. 28 U. S. C. §994(d). In response to this directive, the Sentencing Commission has issued guidelines providing, among other things, that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." United States Sentencing Commission, Guidelines Manual §5H1.10 (Nov. 1992). Congress has also concluded that a defendant's education, vocational skills, employment record, and family and commu-nity ties are inappropriate sentencing factors. 28 U. S. C. §994(e). Thus, the Sentencing Guidelines declare that these and other factors "are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." See USSG ch. 5, pt. H, intro. comment. Similar guidelines, it seems to me, could be applied in capital sentencing consistent with the Eighth Amendment, as long as they contributed to the rationalization of the process.

propose that the Court's appropriate role is to review only for *reasonableness* a State's determinations as to which specific circumstances—within the broad bounds of the general categories mandated under *Eddings*—are relevant to capital sentencing.

Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigating relevance "beyond the scope" of the State's sentencing criteria. It may be evidence of voluntary intoxication or of drug use. Or even—astonishingly—evidence that the defendant suffers from chronic "antisocial personality disorder"—that is, that he is a sociopath. See Pet. for Cert. in *Demouchette* v. *Collins*, O. T. 1992, No. 92–5914, p. 4, cert. denied, 505 U. S. ___ (1992). We cannot carry on such a business, which makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman*.

For all these reasons, I would not disturb the effectiveness of Texas's former system.