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Constitutional Law—Capital Punishment and Freedom of Association—When Death Penalty Imposition Based on Wrongful Admission of Beliefs in Capital Sentencing Proceeding Violates Freedom of Association. *Dawson v. Delaware*, 112 S. Ct. 1093 (1992).

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NOTES

CONSTITUTIONAL LAW—CAPITAL PUNISHMENT AND FREEDOM OF ASSOCIATION—WHEN DEATH PENALTY IMPOSITION BASED ON WRONGFUL ADMISSION OF BELIEFS IN CAPITAL SENTENCING PROCEEDING VIOLATES FREEDOM OF ASSOCIATION. *Dawson v. Delaware*, 112 S. Ct. 1093 (1992).

I. INTRODUCTION

In *Dawson v. Delaware*, the United States Supreme Court considered the question of whether introduction of the defendant's membership in the Aryan Brotherhood during a capital sentencing hearing was prohibited by the First and Fourteenth Amendments when the evidence was irrelevant to the issue being decided in the hearing.¹ At Dawson's penalty hearing following his conviction for murder and various other crimes, evidence relating to his membership in the Aryan Brotherhood was admitted as aggravating evidence.² The Supreme Court held that the admission of associational evidence during the sentencing phase of a capital case violated the defendant's First and Fourteenth Amendment rights.³

This note examines the development of capital punishment jurisprudence under the Eighth Amendment and briefly details the evolution of a capital defendant's rights protected by the First and Fourteenth Amendments. Further, this note explores the Supreme Court's current perspective on the relevance of constitutionally protected beliefs and associations as aggravating evidence in capital cases.

1. *Dawson v. Delaware*, 112 S. Ct. 1093, 1095 (1992).

2. *Id.* at 1096.

3. *Id.* at 1095.

II. FACTS

David Dawson escaped from the Delaware Correctional Center located near Smyrna, Delaware in the early morning of December 1, 1986 and fled south in a stolen car.⁴ Later that morning, Dawson burglarized a home in the Kenton area of Delaware, taking a motorcycle jacket, pocket watches, and containers of pocket change.⁵ About a half mile away, Dawson entered another home and found the occupant, Madeline Kisner, alone as she readied herself for work.⁶ Dawson brutally murdered Mrs. Kisner, stole an undetermined amount of money, and left in the family car.⁷

Later that afternoon, Dawson appeared at a bar in Milford, Delaware, wearing the motorcycle jacket from the previous burglary.⁸ At the bar, Dawson introduced himself to a woman as "Abaddon" and told her that this meant "one of Satan's disciples."⁹ Dawson was eventually asked to leave the bar.¹⁰ As he left, a Milford police sergeant noticed that he matched Dawson's description; however, the sergeant was unsuccessful in apprehending him.¹¹ After the police were called to the scene of a one-car accident involving a stolen vehicle from the bar area that contained the hat worn by Dawson the previous night, they began a house-to-house search for Dawson.¹² They discovered him the next morning on the floor of a car parked near the site of the one-car

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Mrs. Kisner's body was discovered by her son with her hands tied with shoe strings and her mouth gagged with a sock. There was also a nylon stocking twisted around her neck. *Dawson v. Delaware*, 581 A.2d 1078, 1083 (Del. 1990). The physician who performed the autopsy stated that the wounds around the victim's neck indicated that Dawson had attempted to strangle her several times. The death was actually caused by one of twelve stab wounds to the woman's chest. *Id.* at 1083-84 n.2.

8. 112 S. Ct. at 1095. Witnesses stated that the jacket worn by Dawson was too big for him. *Id.* Dawson is five feet, ten inches tall and weighs about one hundred seventy-five pounds. 581 A.2d at 1084. The motorcycle jacket that was stolen in the burglary was a man's size forty-eight. 581 A.2d at 1083.

9. 112 S. Ct. at 1095. "Abaddon," which is tattooed in large red letters on Dawson's stomach, means "angel of the bottomless pit." 581 A.2d at 1085.

10. 112 S. Ct. at 1095.

11. 581 A.2d at 1084. Dawson was wearing a motorcycle jacket and hat when noticed by the police sergeant. Although unsuccessful in apprehending Dawson, the sergeant was successful in finding the murder victim's car near the Milford bar. In the car, police found items covered with Dawson's fingerprints as well as a postcard signed "Abaddon." *Id.*

12. 112 S. Ct. at 1095. Dawson's hat alerted police that he was probably in the vicinity and that a search for him should begin immediately. 581 A.2d at 1084.

accident.¹³

Dawson was convicted by a jury in the Superior Court of Kent County, Delaware, of first-degree murder, possession of a deadly weapon during the commission of a felony, first-degree robbery, second-degree burglary, and possession of a deadly weapon by a felon.¹⁴ Prior to the separate penalty hearing before the jury to determine if Dawson should be sentenced to death for the murder,¹⁵ the prosecution indicated that it intended to introduce expert testimony concerning the nature and origin of the Aryan Brotherhood,¹⁶ a white supremacist organization, and information that Dawson: (1) had an Aryan Brotherhood tattoo on his hand; (2) called himself "Abaddon" and had the name tattooed on his stomach; and (3) made use of swastika symbols.¹⁷ Before the sentencing phase began, the parties ultimately agreed to a narrow stipulation concerning the Aryan Brotherhood evidence which simply indicated that the Aryan Brotherhood prison gang was established in response to other racial gangs and that separate gangs called "the Aryan Brotherhood" exist in several state prisons.¹⁸ In exchange for Dawson's agreement to the stipulation, the State agreed not to call any expert witnesses to explain the nature of the organization.¹⁹ Even though he had agreed to this stipulation, Dawson continued to maintain

13. 112 S. Ct. at 1095. Dawson was found wearing the stolen motorcycle jacket and carrying with him stolen pocket watches, money, and a sock which matched the one used to gag Mrs. Kisner during the murder. 581 A.2d at 1084-85.

14. 581 A.2d at 1081. Dawson pleaded guilty to misdemeanor theft and first-degree burglary for his actions at the home in Kenton. He was, therefore, not indicted by the grand jury on these two counts. *Id.* at 1081 n.1.

15. 112 S. Ct. at 1095. Delaware's death penalty statute requires a bifurcated trial for first-degree murder. DEL. CODE ANN. tit. 11, § 4209 (1987). Once the defendant has been convicted by a jury for first-degree murder, the Superior Court holds a separate hearing before the same jury to determine whether the defendant should be sentenced to life imprisonment without the possibility of parole or death. 112 S. Ct. at 1095.

16. 112 S. Ct. at 1095. From an independent search of extrinsic evidence, the Superior Court found that the Aryan Brotherhood is "a white supremacist Nazi-oriented gang which first originated in San Quentin Prison in California." 581 A.2d at 1085-86 n.5. The court found that this gang typically directed its violence against minority prison gangs, such as those composed of blacks and Latinos. The motto of the gang is: "Kill to get in and die to get out." *Id.*

17. 112 S. Ct. at 1095-96. Dawson had painted a swastika on his cell wall while in prison and also had swastika tattoos covering his back. *Id.*

18. *Id.* at 1096. The stipulation allowed during the sentencing phase stated only that "the Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." *Id.*

19. *Id.* In addition to the stipulation, the prosecution was allowed to call a detective to testify that an Aryan Brotherhood tattoo, consisting of the name "Aryan Brotherhood" with a red and black diamond, was imprinted on Dawson's hand. 581 A.2d at 1100.

that admission of evidence regarding his membership in the Aryan Brotherhood violated his constitutional rights under the First and Fourteenth Amendments.²⁰

At the sentencing proceeding, the prosecution did not introduce the expert testimony regarding the nature of the Aryan Brotherhood and Dawson's use of swastikas.²¹ The prosecution introduced to the jury the following evidence: (1) Dawson was a member of the Aryan Brotherhood; (2) "Aryan Brotherhood" was tattooed on Dawson's hand; and (3) Dawson had tattooed on his stomach his nickname, "Abaddon," which means "angel of the bottomless pit."²² The prosecution also submitted proof of Dawson's prior criminal record.²³ Dawson introduced as mitigating evidence his kindness toward family members and good time credits received in prison.²⁴ The jury recommended the death penalty based upon its finding of three statutory aggravating circumstances.²⁵ In addition, the jury concluded that the prosecution's ag-

20. 112 S. Ct. at 1096. Dawson argued that admission of this evidence would violate his First Amendment rights of freedom of religion and freedom of association. 581 A.2d at 1100. The First Amendment guarantees that "[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Dawson also argued that the Aryan Brotherhood evidence would violate his Fourteenth Amendment right to due process. 581 A.2d at 1100. The Due Process Clause of the Fourteenth Amendment guarantees the right to due process by stating: "nor shall any state deprive any person of life, liberty, or property, without due process of the law." U.S. CONST. amend. XIV.

21. 112 S. Ct. at 1096. The expert testimony concerning the origin and nature of the Aryan Brotherhood was excluded due to the stipulation agreement. *Id.* The swastika information was not to be introduced during the sentencing phase without the court's permission because it did not seem relevant to Dawson's character. The prosecution never attempted to introduce this evidence once the court made this determination. 581 A.2d at 1101.

22. 581 A.2d at 1100-01.

23. 112 S. Ct. at 1096. Dawson was first placed in a juvenile correctional facility when he was thirteen years old, and was readmitted five times. He was convicted of fourteen felonies and escaped from correctional facilities six times. While in prison, Dawson had sanctions brought against him due to 24 conduct violations. 581 A.2d at 1085.

24. 112 S. Ct. at 1096, 1099. Dawson's family members testified that his aunt and sister loved him and that Dawson once offered to donate a kidney to benefit his cousin. 581 A.2d at 1108. Dawson presented evidence of his membership in drug and alcohol rehabilitation organizations while in prison, such as Alcoholics Anonymous and the Green Tree Program. 112 S. Ct. at 1100 (Thomas, J., dissenting). He also provided evidence of his participation in counseling groups. *Id.*

25. 112 S. Ct. at 1096. Delaware's death penalty statute does not allow imposition of the death sentence against a defendant unless the jury unanimously finds that at least one aggravating circumstance exists beyond a reasonable doubt. DEL. CODE ANN. tit. 11, § 4209(e)(1) (1987). Among nineteen enumerated aggravating circumstances in the statute, the jury unanimously found that the three following circumstances existed beyond a reasonable doubt: "(1) that the

gravating evidence outweighed Dawson's mitigating evidence.²⁶ Thus, the trial court was required by Delaware law to impose the death penalty.²⁷

On automatic appeal,²⁸ the Supreme Court of Delaware affirmed both Dawson's conviction and his death sentence.²⁹ The court upheld admission of the evidence of his membership in the Aryan Brotherhood and his use of the name "Abaddon" at sentencing.³⁰ The court reasoned that the jury was entitled to consider information concerning Dawson's good and bad character traits because it had found at least one statutory aggravating circumstance.³¹ The information was necessary in order for the jury to make a fair determination of Dawson's overall character and to provide him with an individualized sentence.³² The court found that the character evidence concerning the name "Abaddon" and the Aryan Brotherhood was relevant, did not violate Dawson's constitutional rights, and did not appeal to the jury's prejudices.³³

The United States Supreme Court granted certiorari³⁴ to determine if it was constitutional error to admit the evidence concerning the Aryan Brotherhood during the sentencing phase of Dawson's capital murder trial.³⁵ The Court held that admission of Dawson's membership

murder was committed by an escaped prisoner, (2) that the murder was committed during the commission of a burglary, and (3) that the murder was committed for pecuniary gain." 112 S. Ct. at 1096.

26. 112 S. Ct. at 1096. The Delaware statute provides that the jury must unanimously recommend the death penalty after carefully weighing all of the relevant aggravating and mitigating evidence for a death sentence to be imposed. DEL. CODE ANN. tit. 11, § 4209(d)(1)(b) (1987).

27. 112 S. Ct. at 1096. Section 4209(d)(1)(b) indicates that the court is bound to impose the death penalty if the jury has found a statutory aggravating circumstance based on the evidence and if the jury has then recommended death for the defendant. DEL. CODE ANN. tit. 11, § 4209(d)(1)(b) (1987).

28. 581 A.2d at 1081. Delaware's death penalty statute provides an automatic review of the recommendation and imposition of the death penalty by the Supreme Court of Delaware. DEL. CODE ANN. tit. 11, § 4209(g) (1987). In addition, the defendant is allowed an opportunity to appeal his conviction, which is then reviewed in addition to the recommendation and imposition of the death penalty. *Id.* § 4209(h). Dawson's appeal of his conviction and the automatic appeal were consolidated by the Supreme Court of Delaware. 581 A.2d at 1081.

29. 112 S. Ct. at 1096.

30. *Id.*

31. *Id.*

32. *Id.* It is important to make "an individualized determination on the basis of character of the individual and the circumstances of the crime" since each defendant's situation is unique, and the defendant's life is at risk. *Zant v. Stephens*, 462 U.S. 862, 879 (1982).

33. 581 A.2d at 1103.

34. *Dawson v. Delaware*, 111 S. Ct. 1412 (1991).

35. 112 S. Ct. at 1096.

in the Aryan Brotherhood as aggravating evidence at the penalty phase was constitutional error which violated his First and Fourteenth Amendment rights.³⁶ The Court reasoned that the evidence was not relevant to legitimate issues in the sentencing proceeding and that it penalized him for beliefs and opinions that had no nexus to the crime.³⁷ It vacated the Supreme Court of Delaware's judgment upholding admission of the evidence and remanded the case for further proceedings, leaving open the question of whether it was harmless error to admit the Aryan Brotherhood evidence at the hearing.³⁸

III. HISTORICAL DEVELOPMENT

When a court is faced with the possibility of imposing capital punishment, the court must consider many interrelated issues pertaining to the rights of the capital defendant. These rights often involve aspects of the First, Eighth, and Fourteenth Amendments. To facilitate understanding of the complex issues presented in *Dawson*, the evolution and development of the regulation of capital punishment under the Eighth Amendment is first discussed.³⁹ Then, this note details the progression of the capital defendant's rights protected by the First and Fourteenth Amendments.⁴⁰

A. Regulation of Capital Punishment Under the Eighth Amendment

Since death is the most severe penalty available for a crime, the Supreme Court has frequently struggled with the concept of the death penalty as cruel and unusual punishment.⁴¹ The Eighth Amendment was ratified over two hundred years ago to prevent the imposition of cruel and unusual punishments.⁴² Therefore, the Supreme Court's general interpretation of the death penalty has been that it is constitutional if imposed pursuant to guidelines that the Court deems to be consistent

36. *Id.* at 1095.

37. *Id.* at 1098-99.

38. *Id.* at 1099.

39. *See infra* notes 44-75 and accompanying text.

40. *See infra* notes 77-96 and accompanying text.

41. *See generally* John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 485 (1990) (discussing diverse views of cruel and unusual punishment held by members of the Court).

42. *Id.* at 478. The Eighth Amendment guarantees that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

with the Eighth Amendment.⁴³

Prior to 1972, juries were given absolute discretion to impose death sentences without guided discretion from the courts.⁴⁴ Commentators and courts have stated that the death penalty was imposed so arbitrarily that it was difficult to deny that any death sentence was cruel and unusual punishment.⁴⁵ In 1972, a majority of the Court in *Furman v. Georgia*⁴⁶ clarified its position on the Eighth Amendment as it applied to capital punishment by striking down the death penalty as then applied.⁴⁷ The Court found that the system, which placed absolute discretion with the jury, was arbitrary and capricious, and thereby violated the Eighth Amendment.⁴⁸ This decision ended the minimal requirements that were previously needed for the imposition of death sentences.⁴⁹ Instead of the imposition of an arbitrary penalty based on total jury discretion, the Court demanded that capital punishment be imposed only when all relevant evidence had been considered by the jury or statutory requirements concerning aggravating circumstances had been met.⁵⁰

In response to the *Furman* decision, a number of states passed new death penalty laws.⁵¹ In a series of 1976 cases,⁵² the Supreme Court

43. Jacqueline Cook, *Coming Full Circle: A Return to Arbitrary Sentencing Patterns in Capital Punishment Cases*, 56 UMKC L. REV. 387, 396 (1988).

44. See Thomas P. Bishop & Abby L. Martin, *Statutory Aggravating Circumstances and the Death Penalty: What Lies Beyond the Threshold after Zant v. Stephens?*, 35 MERCER L. REV. 1443, 1444-45 (1984).

45. Cook, *supra* note 43, at 388-89.

46. 408 U.S. 238 (1972). In *Furman*, the Supreme Court granted certiorari to three death row inmates to consider if imposition of the death penalty in their cases was cruel and unusual punishment which violated the Eighth and Fourteenth Amendments. *Id.* at 240. Two defendants had been sentenced to death for rape; the other received the death penalty for a murder conviction. Five separate opinions composed the judgment of the Court that the death penalty in these cases was cruel and unusual punishment. *Id.*

47. *Id.*

48. *Id.* at 365-71. By allowing juries to sentence convicted capital defendants with no regulation of their decision, juries can be very discriminatory. *Id.* The Court indicated that mostly poor minorities are sentenced to death. *Id.* The Court found death penalties given in this manner to be cruel and unusual punishment in violation of the Eighth Amendment. *Id.*

See also Cook, *supra* note 43, at 388-89; Mark T. Hunzeker, *The Fate of Aggravating Circumstances (1)(d) after State v. Hunt*, 20 CREIGHTON L. REV. 531, 537-38 (1986).

49. See Bishop & Martin, *supra* note 44, at 1445 (citing *Furman v. Georgia*, 408 U.S. 238 (1972)).

50. See Bishop & Martin, *supra* note 44, at 1446.

51. Most state legislatures passed new death penalty statutes that contained "guided discretion" schemes. Richard E. Wirick, *Dark Year on Death Row: Guiding Sentencer Discretion After Zant, Barclay, and Harris*, 17 U.C. DAVIS L. REV. 689, 690 (1984).

52. *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that a death sentence for murder did

upheld statutory schemes that "guided the discretion" of the sentencing jury in capital hearings.⁵³ The "guided discretion" approved by the Court included separate trial and sentencing phases, specified aggravating circumstances that must be found in order to impose death, and appellate court review of the sentence imposed.⁵⁴ These statutes were found to provide individualized sentencing determination as required by the Eighth Amendment.⁵⁵ Some statutes that responded to the *Furman* absolute discretion problem with provisions for mandatory death sentences were struck down as violative of the Eighth Amendment.⁵⁶ The Supreme Court found these statutes to be unconstitutional because they merely established standard sentencing rather than the required individualized sentencing.⁵⁷

Having established the basis for regulated jury discretion in capital sentencing proceedings,⁵⁸ the Court then had occasion to review the permissible scope of mitigating and aggravating evidence during the sentencing phase of the bifurcated trial.⁵⁹ In *Lockett v. Ohio*⁶⁰ the

not violate the Eighth Amendment under a "guided discretionary" death penalty statute that called for a bifurcated trial, consideration of aggravating and mitigating statutory factors, and appellate review to determine if the sentence imposed was disproportionate to the crime); *Jurek v. Texas*, 428 U.S. 262 (1976) (holding that the death penalty was not per se cruel and unusual punishment that violates the United States Constitution when there is a "guided discretion" death penalty statute); *Proffitt v. Florida*, 428 U.S. 242 (1976) (holding that it is not unconstitutional to impose the death penalty on a defendant for first-degree murder when there is regulation of sentencing discretion).

53. Bishop & Martin, *supra* note 44, at 1448.

The Supreme Court declared that the death penalty was constitutional when administered under "guided discretion" statutes because the sentencing authority's discretion was regulated by statutory guidelines for considering relevant information instead of total sentencing discretion. *Id.*

"Guided discretion" statutes are those which "allow the sentencer to impose the death penalty according to legislatively defined standards." Shelley Clarke, *A Reasoned Moral Response: Rethinking Texas's Capital Sentencing Statute After Penry v. Lynaugh*, 69 TEX. L. REV. 407, 424 (1990).

54. Wirick, *supra* note 51, at 690; Bishop & Martin, *supra* note 44, at 1444-45.

55. See Bishop & Martin, *supra* note 44, at 1447.

56. See, e.g., *Roberts v. Louisiana*, 428 U.S. 325 (1976) (finding Louisiana's death penalty scheme unconstitutional due to its mandatory imposition of a death sentence upon conviction of one of five first-degree murder categories); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that the mandatory death sentence imposed on the two defendants for first-degree murder violated the Eighth Amendment because it was arbitrarily imposed and degraded humanity by not considering each individual's situation before imposing the punishment).

57. See Bishop & Martin, *supra* note 44, at 1447.

58. See Wirick, *supra* note 51, at 689-90. See generally *Furman v. Georgia*, 408 U.S. 238 (1972).

59. See *Hunzeker*, *supra* note 48, at 538. "Guided discretion" statutes that allowed the consideration of evidence of aggravating and mitigating circumstances during the penalty phase were held constitutional by the Supreme Court. *Id.* Aggravating circumstances, which add to the

Court struck down state-imposed restrictions on mitigating evidence.⁶¹ Although mitigating evidence was previously allowed to be considered in sentencing,⁶² the *Lockett* majority concluded that the sentencer must not be prevented from considering *any* evidence concerning the defendant's character or the nature of the crime that the defendant desires to present in mitigation.⁶³ The Court stated that preclusion of mitigating evidence violated the Eighth Amendment by not allowing the defendant the opportunity to submit evidence in favor of a sentence less than death.⁶⁴ The Supreme Court subsequently broadened death-sentencer discretion by allowing consideration of mitigating factors to prevent the imposition of the death penalty.⁶⁵

To achieve the Court's requirement of individualized sentencing under the Eighth Amendment, admission of aggravating circumstances in capital sentencing proceedings as provided for in the "guided discretion" statutes was needed.⁶⁶ Generally, aggravating circumstances are

injurious consequences of the crime committed, and mitigating circumstances, which may be considered to reduce the penalty imposed by law, are both allowed as evidence during a capital sentencing proceeding. *Id.*

60. 438 U.S. 586 (1978). In *Lockett*, the defendant was found guilty of aggravated murder and was sentenced to death. The Ohio death penalty statute provided that the death sentence must be imposed unless one of three narrow mitigating circumstances was found. In failing to allow the sentencing judge to consider the defendant's character and crime, the death penalty statute severely limited the amount of mitigating evidence that could be considered to lessen the punishment. The Court held that the Ohio death penalty statute was unconstitutional because it failed to provide for individualized sentencing as required by the Eighth Amendment. *Id.* at 602-06.

61. Miranda B. Strassmann, *Mills v. Maryland: The Supreme Court Guarantees the Consideration of Mitigating Circumstances Pursuant to Lockett v. Ohio*, 38 CATH. U. L. REV. 907, 920 (1989); Bishop & Martin, *supra* note 44, at 1450.

62. See Strassman, *supra* note 61, at 909-10. When juries were allowed total discretion in capital sentencing, they were able to consider mitigating evidence. The juries were inclined to avoid imposition of a death penalty where mitigating evidence tended to show that the penalty was inappropriate. *Id.* However, it was not until *Lockett* that the Court required that all relevant mitigating evidence provided by the defendant be considered. *Id.* at 919-20.

63. 438 U.S. at 604.

64. *Id.*

65. See e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989) (finding the Texas death penalty statute unconstitutional because it did not allow the jury to fully consider mitigating evidence of the defendant's mental retardation and abusive upbringing); *Skipper v. South Carolina*, 467 U.S. 1 (1986) (concluding that a defendant has a constitutional right to present all relevant mitigating evidence in order to receive a lesser sentence); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (indicating that state courts are not allowed to completely refuse consideration of relevant mitigating circumstances offered by the defendant to avoid the death penalty). See also Sarah W. Wellington, *People v. Deere: Mitigating Evidence in Capital Sentencing: Defense Opportunity or Obligation?*, 9 CRIM. JUST. J. 349, 354-55 (1987).

66. *Clarke*, *supra* note 53, at 428. In capital penalty hearings, an aggravating circumstance refers to a "factor that the sentencer must find before it can impose the death penalty." *Id.*

narrowly defined in the death penalty statutes.⁶⁷ The Court has stated that clear definition of aggravating circumstances differs in importance based on each state's statutory scheme for "guided discretion."⁶⁸ In "weighing" states, the statutory scheme provides for capital sentencing based on the existence of at least one statutory aggravating factor with aggravating evidence then weighed against mitigating evidence.⁶⁹ In "non-weighing" states, at least one statutory aggravating factor must be found by the jury in order to impose the death penalty.⁷⁰ However, the jury is not then limited to a consideration of the statutory aggravating evidence, but may consider all evidence that has been presented relating to the defendant and his crime in order to determine an appropriate sentence.⁷¹ Even though the Court's approach to admission of non-statutory aggravating evidence differs depending on a "weighing" or "non-weighing" statutory scheme, the Court has indicated that both schemes are constitutional because they provide for guided discretion in determining individualized sentences as required under the Eighth Amendment.⁷²

The types of evidence allowed as aggravating circumstances during a capital sentencing hearing have recently been expanded by the Court. In *Payne v. Tennessee*⁷³ the Court upheld the State's use of victim impact statements as aggravating evidence.⁷⁴ The Court indicated that, just as a defendant may exhibit his individualism through a wide range of mitigating evidence, so may the State portray the victim's in-

67. Clarke, *supra* note 53, at 428.

68. See *Stringer v. Black*, 112 S. Ct. 1130, 1136 (1992) (indicating that aggravating factors must be defined more precisely in "weighing" states).

69. See e.g., *Stringer v. Black*, 112 S. Ct. 1130 (1992); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981). Delaware is a "weighing" state in regard to its "guided discretion" scheme. DEL. CODE ANN. tit. 11, § 4209 (1987).

70. See e.g., *Zant v. Stephens*, 462 U.S. 862, 871-73 (1983) (holding that under Georgia's "guided discretion" scheme, the jury must consider *statutory* aggravating circumstances to determine if a death penalty may be imposed and then must consider *all* aggravating evidence to determine if the death penalty should be imposed).

71. *Id.*

72. E.g., *Stringer v. Black*, 112 S. Ct. 1130, 1136-37 (1992).

73. 111 S. Ct. 2597 (1991), *overruling*, *Booth v. Maryland*, 482 U.S. 496 (1987). In *Payne*, the defendant murdered a mother and her daughter and attempted to murder the son. During the sentencing proceeding, the defendant presented mitigating evidence concerning his life and character. As aggravating evidence, the State presented statements concerning the impact of the two murders on the victims' family, especially upon the young boy who had lost his mother and sister. In *overruling Booth v. Maryland*, the Supreme Court held that admission of the victim impact statements did not violate the capital defendant's constitutional rights protected under the Eighth Amendment. 111 S. Ct. at 2608-10.

74. 111 S. Ct. at 2610.

dividuality as an aggravating circumstance.⁷⁵

B. Protection of Capital Defendants' Rights Under the First and Fourteenth Amendments

Additional opportunities are afforded capital defendants to avoid imposition of the death penalty. During sentencing hearings, a capital defendant may raise constitutional objections based on First and Fourteenth Amendment rights to the admission of certain evidence. For a better understanding of constitutional objections in this context, it is essential to outline the developments of the rights protected by the First and Fourteenth Amendments.⁷⁶

Included in the rights protected by the First Amendment is freedom of association.⁷⁷ The right to freely associate is not expressly enumerated in the United States Constitution.⁷⁸ It is, however, implied in the First Amendment rights of freedom of religion, speech, and assembly, as well as in the Due Process Clause of the Fourteenth Amendment.⁷⁹ The right to freely associate is "almost as inalienable in its

75. *Id.* at 2608 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987)).

76. The First Amendment guarantees that "[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The Fourteenth Amendment guarantees that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

77. See *supra* note 76 and accompanying text.

78. See Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedoms*, 10 HARV. J.L. & PUB. POL'Y 101, 107-10 (1987). The right is an important element of the background property rights that are protected by the Fourteenth Amendment. The Fourteenth Amendment protects individuals from the deprivation of "life, liberty, or property, without due process of the law." Implied in the Due Process Clause is the protection of associational freedoms. *Id.*

79. Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91, 91 (1987). The Supreme Court has used the Fourteenth Amendment's Due Process Clause to incorporate the "fundamental" constitutional rights guaranteed in the first ten amendments and extend them to the states. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 361 (3d ed. 1986). See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (extending First Amendment protection to the states by incorporation through the Due Process Clause of the Fourteenth Amendment).

The Court eventually made it clear that the Eighth Amendment's cruel and unusual punishment clause applied to the states by incorporation through the Fourteenth Amendment. See *Louisiana v. Resweber*, 329 U.S. 459, 462 (1947) (holding that a second attempt at punishment by

nature as the right of personal liberty."⁸⁰ The idea of explicitly recognizing freedom of association as a protected First Amendment right developed gradually.⁸¹

In 1958, the Supreme Court first explicitly recognized freedom of association as a protected constitutional right in *NAACP v. Alabama*.⁸² The National Association for the Advancement of Colored People (NAACP) refused to produce membership lists requested by the Alabama Attorney General in order to satisfy compliance with a state qualification statute for all foreign corporations conducting business in Alabama.⁸³ The NAACP claimed that compelling disclosure of membership lists violated its members' constitutional right to freely associate.⁸⁴ The Court stated that freedom of association in order to advance similar beliefs is a liberty which is protected by the First Amend-

death by electrocution when the first attempt failed was not denial of due process or cruel and unusual punishment).

80. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1011 (2d ed. 1988) (quoting ALEXANDER DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 196 (P. Bradley ed. 1945)).

81. During the Cold War years of the 1950s, defendants could be penalized for their membership in organizations holding Communist "dissident" beliefs even though that membership had no correlation to the defendant's actions. Government concern due to the Communist "Red Scare" resulted in these types of restrictions on an individual's freedom to associate and prompted the Court's delay in expressing a clear right of free association. These infringements on associational freedoms were part of legislative acts passed for the purpose of exposing affiliation with the Communist party. The Supreme Court upheld these restrictions in order to protect our country from "Communist infiltration." See EDMUND LINDOP, *THE BILL OF RIGHTS AND LANDMARK CASES*, 58, 90 (1989). See also *Alder v. Board of Educ.*, 342 U.S. 485 (1952), *rev'd by Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (holding a "loyalty test" permissible where a teacher could be dismissed for mere association with a subversive group); *Garner v. Los Angeles Bd. of Pub. Works*, 341 U.S. 716 (1951) (allowing state inquiry into membership with the Communist party through a requirement for state employees to sign affidavits concerning their association with the party).

By the late 1950s and the 1960s, the Court moved away from suppression of Communism and moved toward protection of the right of freedom of association. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (finding a loyalty oath unconstitutionally vague); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (finding it unconstitutional to restrict travel for mere membership in the Communist party); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (concluding that past membership in the Communist party was not a valid reason for refusing a person the right to take the exam for admission to the Bar). *Accord Cooper v. Henslee*, 257 Ark. 963, 522 S.W.2d 391 (1975) (holding a statute that proscribed employment with the state because of membership in the Communist party violated the First Amendment and was unconstitutional).

However, it was not until 1958 in *NAACP v. Alabama* that the Supreme Court clearly expressed the right to freely associate. See NOWAK ET AL., *supra* note 79, at 947 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958)).

82. 357 U.S. 449 (1958).

83. *Id.* at 451.

84. *Id.* at 458-60.

ment.⁸⁵ The Supreme Court then engaged in a "balancing test" which weighed the State's need for the membership evidence against the prejudice that might result to the NAACP members from compelled disclosure.⁸⁶ It determined that the right of the individual to freely associate as guaranteed in the First Amendment outweighed the government's interest in obtaining the membership information.⁸⁷ The Court held that without a compelling interest, the government cannot force disclosure of membership lists and intrude on the rights of organization members simply because of their association with that organization and its beliefs.⁸⁸

The Supreme Court has also extended First Amendment protection of the freedom of association to those organizations that hold dissident beliefs.⁸⁹ In *Elfbrant v. Russell*⁹⁰ the Court addressed the issue of whether a member who knows of subversive beliefs held by her organization could be penalized for mere association without the intent to further the subversive beliefs.⁹¹ The Supreme Court held that it is not unlawful to be a member of an association knowing that the group holds dissident beliefs as long as the member does not intend to further

85. *Id.* at 460. See Marsha R. Schermer, *Freedom of Association: NAACP v. Alabama?* 41 OHIO ST. L.J. 823, 832 (1980).

86. 357 U.S. at 463. See Gregory L. Padgett, *Racially-motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. CRIM. L. & CRIMINOLOGY 103, 112-13 (1984). The new balancing test created in *NAACP* "weighs the likelihood and gravity of a chilling effect on the exercise of association against the state's legitimate interest in obtaining the information." *Id.*

If the balance is not properly struck, the information could have a prejudicial effect on the member whose rights of free association have been violated. There is prejudice when the relevant evidence persuades the jury or court to make an improper decision, or the jury or court causes the evidence to be given more weight than it should have been given. Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 524 (1991). The Court in *NAACP* also determined that infringement on the right to associate freely is "subject to the closest scrutiny." 357 U.S. at 461.

87. 357 U.S. at 466.

88. *Id.* at 459-60, 466. See also *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (holding that a state could not compel disclosure of membership lists and infringe on associational freedoms without showing a compelling interest in the information).

89. See *Elfbrant v. Russell*, 384 U.S. 11 (1966).

90. 384 U.S. 11 (1966). In *Elfbrant*, an Arizona school teacher challenged the constitutionality of a statute that required her to take a loyalty oath that allowed for dismissal from office if she became a member of an organization that she knew had the unlawful purpose of overthrowing the government. She could not decide if she should take the oath. The Supreme Court found that the statute was invalid because it infringed upon freedom of association for members who did not have the intent to act on the unlawful objectives of the organization. *Id.* at 17-19.

91. *Id.* at 12-13.

those beliefs.⁹² Also, the Court concluded that a law which infringes on freedom of association for mere membership without an intent to further subversive beliefs is invalid.⁹³ Holding or teaching subversive, abstract beliefs is not considered the same as committing an unlawful action based on those beliefs.⁹⁴ The Court supports the view that beliefs and associations which hold beliefs that are contrary to the norm of society are still given First Amendment protection.⁹⁵ Because the First Amendment protects the right to associate with dissident groups, courts have held that using this membership evidence against a criminal defendant in the absence of a compelling state interest violates his freedom of association.⁹⁶

IV. REASONING OF THE COURT IN *DAWSON*

Applying the precedent and principles previously discussed, the Supreme Court concluded in *Dawson v. Delaware* that a criminal defendant's constitutional rights of freedom of association and due process can be violated when such constitutionally protected information is wrongfully used as evidence of aggravating circumstances in a capital sentencing proceeding.⁹⁷ The Court cited its conclusion in *NAACP v. Alabama* that the freedom to associate with those holding similar beliefs is protected by the First Amendment.⁹⁸ However, the Court refused to accept Dawson's broad contention that consideration of any of these protected beliefs or activities in the penalty phase of a criminal trial violates the United States Constitution.⁹⁹ Using *Payne v. Tennes-*

92. *Id.* at 19.

93. *Id.* See also *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (prohibiting states from penalizing an individual for membership in the Communist Party when there is no correlation between the person's membership and their actions or character).

94. See Padgett, *supra* note 86, at 107-08.

95. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (stating that the government cannot infringe upon religious beliefs which are given First Amendment protection even though the beliefs do not conform to the norms of society).

96. See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Cooper v. Henslee*, 257 Ark. 963, 522 S.W.2d 391 (1975). But see *Barclay v. Florida*, 463 U.S. 939 (1983) (upholding consideration of dissident beliefs and racial hatred stemming from Barclay's membership in the Black Liberation Army because the evidence was relevant to his murder of a white victim).

97. *Dawson*, 112 S. Ct. at 1095. Chief Justice Rehnquist delivered the majority opinion of the Court. *Id.*

98. *Id.* at 1096-97. See *NAACP v. Alabama*, 357 U.S. 449 (1958) (concluding that freedom of association in the NAACP is protected, and the organization cannot be compelled to disclose its membership lists). See also *supra* notes 82-88 and accompanying text.

99. 112 S. Ct. at 1097. Dawson's basis for his broad contention concerning constitutional protection can be found in *Zant v. Stephens* where the Supreme Court discussed the invalidity of

*see*¹⁰⁰ to emphasize that a sentencing authority is free to consider a broad range of relevant material,¹⁰¹ the Court then cited *Barclay v. Florida*¹⁰² to illustrate the propriety of admitting dissident beliefs and acts as aggravating evidence in capital sentencing hearings if the evidence is relevant.¹⁰³ Pointing to the *Barclay* decision, which allowed admission of evidence of racial hatred related to the defendant's crime to be used as aggravating evidence in capital sentencing, the Court distinguished the situation in *Dawson* because of the lack of connection between Dawson's dissident beliefs and his crime.¹⁰⁴ Nonetheless, the Court declared that the First Amendment does not construct a per se barrier against the admission of evidence concerning constitutionally protected beliefs and associations.¹⁰⁵

Although the Court rejected Dawson's contention that the First Amendment is a per se bar to admitting evidence of protected beliefs at sentencing,¹⁰⁶ it, nonetheless, found that admission of evidence concerning Dawson's membership in the Aryan Brotherhood was constitutional error.¹⁰⁷ Because the stipulation regarding Dawson's membership in the Aryan Brotherhood was so narrow, the Court determined that the evidence became totally irrelevant in the sentencing hearing.¹⁰⁸ However, the Court indicated in dictum that had the prosecution presented its expert testimony on the nature of the Aryan Brotherhood during the sentencing, Dawson's case would have a very different outcome.¹⁰⁹ The

aggravating circumstances that cause the jury to form a negative view of the defendant from his engagement in constitutionally protected activities. 462 U.S. 862, 885 (1982).

100. 111 S. Ct. 2597 (1991). *See supra* notes 73-75 and accompanying text.

101. 112 S. Ct. at 1097. *See Payne v. Tennessee*, 111 S. Ct. 2597, 2606 (1991); *United States v. Tucker*, 404 U.S. 443, 446 (1972).

102. 463 U.S. 939 (1983). *See supra* note 96.

103. 112 S. Ct. at 1097 (citing *Barclay v. Florida*, 463 U.S. 939 (1983)).

104. *Id.* at 1098.

105. *Id.* at 1097.

106. *Id.*

107. *Id. Contra Dawson*, 581 A.2d at 1103-04.

108. 112 S. Ct. at 1097. The stipulation indicated only that the Aryan Brotherhood is a prison gang which holds certain abstract beliefs. Using Dawson's mere membership in the association as an aggravating circumstance with no evidence of illegal actions arising from that membership, the evidence was rendered irrelevant to the capital sentencing proceeding. The simple stipulation stated "the Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." *Id.* at 1096.

109. *Id.* at 1097. The prosecution had planned to present expert evidence to the jury "that the Aryan Brotherhood is a white racist prison gang that is associated with drugs and violent escape attempts at prison, and that advocates the murder of fellow inmates." *Id.* Once the stipulation was agreed to, this testimony was not admitted. *Id.*

Court implied that evidence firmly establishing the Aryan Brotherhood's advocacy of drug use, violent prison escape attempts, and murder plots on prison inmates could have been admissible as aggravating evidence because of a legitimate state interest.¹¹⁰ Nevertheless, the inference that the jury was allowed to make from the narrow membership information that was presented proved only the abstract beliefs of the Delaware Aryan Brotherhood gang and did not prove the gang's involvement or endorsement of any violent acts.¹¹¹

Further, the Court found the evidence insufficient to establish an aggravating circumstance because it merely presented the Aryan Brotherhood's abstract beliefs.¹¹² The evidence did not prove that the Aryan Brotherhood had committed or endorsed any violent acts.¹¹³ The admission of this evidence during Dawson's sentencing hearing violated his First Amendment rights by proving only his abstract beliefs and not indicating that he acted on these beliefs.¹¹⁴ Again, in dictum, the Court indicated that the prosecution could have avoided constitutional problems by offering evidence of Dawson's actions in addition to his abstract beliefs.¹¹⁵ The evidence of his beliefs was not relevant character evidence to admit during sentencing, and the Court suggested that the prosecution may have presented it in order for the jury to develop a prejudice against Dawson based solely upon his beliefs.¹¹⁶

Finally, the Supreme Court concluded that the evidence was not relevant to rebut Dawson's mitigating evidence.¹¹⁷ Dawson's membership in prison rehabilitation programs, such as Alcoholics Anonymous and the Green Tree program, was admitted as mitigating evidence to show his "good" character.¹¹⁸ Although the prosecution has a right to

110. *Id.*

111. *Id.* at 1098.

112. *Id.*

113. *Id.* Evidence of membership in an association can be relevant as an aggravating circumstance if the association endorses violent acts, because that evidence may show that the defendant could be a future danger to society. *Id.*

114. *Id.* A person's right to associate cannot be violated simply because of his or her beliefs without actions intended to further those beliefs. See *Elfbrant v. Russell*, 384 U.S. 11 (1966).

115. 112 S. Ct. at 1098.

116. *Id.*

117. *Id.*

118. *Id.* at 1096, 1099. Dawson received good time credits in prison for his participation in these rehabilitation programs. *Id.* His mitigating evidence was presented as "good" character evidence in and of itself. *Id.* at 1099. Dawson also presented his kindness toward family members as mitigating evidence. *Id.* at 1096, 1099.

rebut evidence presented by the defendant in mitigation,¹¹⁹ the Court determined that the Aryan Brotherhood evidence was not appropriate for rebuttal because it was not relevant "bad" character evidence in and of itself.¹²⁰ The Supreme Court cited with approval the "balancing test" developed in *NAACP v. Alabama*¹²¹ as it was applied in *Bates v. City of Little Rock*¹²² where the Court found that the First Amendment prohibits the prosecution from infringing on associational rights if there is no link between the information desired and a compelling state interest.¹²³ Applying that test in *Dawson*, the Court concluded that there was not a sufficient link between Dawson's membership in the Aryan Brotherhood and his crime for the information to be relevant during sentencing.¹²⁴ The majority of the Court then held that the First Amendment prohibits the use of evidence of the defendant's abstract beliefs as an aggravating circumstance during the penalty phase when those beliefs are not relevant to the issue being tried.¹²⁵ Suggesting the possibility that the admission of the evidence could be harmless error, the majority remanded the case for further consideration by the Supreme Court of Delaware.¹²⁶

119. *Id.* at 1098-99. A defendant in a capital penalty hearing may present *any* relevant evidence in mitigation in order to attempt to receive a lesser penalty than death. *Eddings v. Oklahoma*, 455 U.S. 104, 114-17 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604-06 (1978). The State is given a broad range of freedom in rebutting evidence given in mitigation. *See Payne v. Tennessee*, 111 S. Ct. 2597, 2608 (1991) (stressing that the State is interested in rebutting the mitigating evidence offered by the defendant).

120. 112 S. Ct. at 1098-99.

121. *See supra* notes 82-88 and accompanying text.

122. 361 U.S. 516 (1960).

123. 112 S. Ct. at 1099 (citing *Bates v. Little Rock*, 361 U.S. 516 (1960)).

124. *Id.*

125. *Id.* The Court's basis for this holding may be found in the following: *NAACP v. Alabama*, 357 U.S. 449 (1958) (stating that the government cannot intrude on members' rights simply because they associate with a certain organization and its beliefs); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (holding that past membership in the Communist Party was not a valid reason for refusing a person the right to take an exam for admission to the Bar).

126. 112 S. Ct. at 1099. The constitutional error in *Dawson* was an evidential error which can be considered harmless error when taken into consideration with other existing evidence. Therefore, the Court, following existing precedent, remanded the case for consideration of harmless error with a minimum amount of instructions concerning the issue. *Id.* *See generally* Thomas G. Myrum, *State v. Paz: Adoption of the Harmless-Error Standard of Review for Capital-Sentencing Errors*, 27 *IDAHO L. REV.* 375, 380 (1991) (discussing how the Court has recognized that error during capital trials and sentencing may be regarded as harmless error). *See also* *Arizona v. Fulminante*, 111 S. Ct. 1246, 1265 (1991) (referring to evidential errors for which a harmless error analysis may be applied).

On remand, the Supreme Court of Delaware vacated Dawson's death sentence and remanded the case to the Superior Court for a new capital sentencing proceeding. *Dawson v. Delaware*, 608

In his concurring opinion, Justice Blackmun emphasized that the majority did not require the Supreme Court of Delaware to find the wrongful admission of the Aryan Brotherhood evidence as harmless error on remand.¹²⁷ Justice Blackmun stated that there are certain types of constitutional errors for which the Supreme Court has refused to apply a harmless error analysis.¹²⁸ He also stated that it could prove detrimental to apply the harmless error analysis to Dawson's case because of the potential chilling effect it might have on First Amendment activities.¹²⁹ Since the harmless error issue was not raised, Justice Blackmun suggested that it would be better for the Supreme Court of Delaware to consider the issue on remand.¹³⁰

As the sole dissenter, Justice Thomas agreed with the Supreme Court of Delaware that the evidence of Dawson's association with the Aryan Brotherhood was relevant in the penalty hearing.¹³¹ Rejecting the majority's contention that the Aryan Brotherhood evidence was irrelevant because it proved only Dawson's abstract racist beliefs, Justice Thomas stated that a jury could reasonably infer that Dawson had committed an illegal act due to his membership in a racist prison gang.¹³² He indicated that jurors understand the nature of a prison gang when introduced by the prosecution as aggravating evidence much like they comprehend the nature of the Boy Scouts or a church choir when introduced by the defense counsel as mitigating evidence.¹³³ Justice Thomas argued that explanations were not needed for Dawson's

A.2d 1201, 1206 (Del. 1992). The State failed to demonstrate beyond a reasonable doubt that the admission of the associational evidence during sentencing did not contribute to Dawson's death sentence. *Id.* at 1205. Therefore, the court concluded that the constitutional error was not harmless. *Id.* at 1206.

127. 112 S. Ct. at 1099. (Blackmun, J., concurring).

128. *Id.* at 1099-100 (Blackmun, J., concurring). See e.g., *Waller v. Georgia*, 467 U.S. 39, 49-50 & n.9 (1984) (determining that harmless error analysis should not be applied to a constitutional error depriving a defendant the right to a public trial); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (finding harmless error analysis inappropriate where the constitutional error involved a defendant's right to a trial before an impartial judge).

129. 112 S. Ct. at 1100 (Blackmun, J., concurring). See *Arizona v. Fulminante*, 111 S. Ct. 1246, 1257 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 587 (1986)) ("[C]ertain constitutional errors are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial.").

130. 112 S. Ct. at 1100 (Blackmun, J., concurring).

131. *Id.* (Thomas, J., dissenting). Justice Thomas claimed that Dawson's association was evidence of his character which was relevant in determining if he should be put to death. *Id.* Justice Thomas also believed that evidence of Dawson's gang membership was relevant to his character, and in turn, Dawson's character was relevant in the sentencing phase. *Id.*

132. *Id.* at 1100-01 (Thomas, J., dissenting).

133. *Id.*

membership in the "bad" Aryan Brotherhood organization since they were unnecessary for his participation in the "good" Alcoholics Anonymous and Green Tree organizations.¹³⁴ In addition, the evidence appeared relevant to Justice Thomas because it rebutted Dawson's mitigating evidence of kindness to his family by showing that his membership in a racist prison gang would not allow him to be kind to members of other races.¹³⁵ Most importantly, Justice Thomas considered the evidence relevant because it showed that Dawson could present a future danger to society.¹³⁶

Further, he asserted that the gang membership evidence indicated that Dawson possessed the character of a person likely to engage in violent gang activities.¹³⁷ Justice Thomas argued that the Aryan Brotherhood evidence was relevant simply because it indicated that the organization was a racist prison gang and that Dawson was a member.¹³⁸ He indicated that the evidence was sufficiently relevant to establish Dawson's character¹³⁹ because it strongly suggested that he engaged in criminal activity as a result of the association.¹⁴⁰ Contrary to the majority's interpretation, the holding in *Barclay v. Florida*¹⁴¹ that racist beliefs which fueled the commission of a crime were relevant during capital sentencing suggested to Justice Thomas that evidence of Dawson's membership in a racist gang was similarly relevant.¹⁴² He asserted that a jury could infer from Dawson's membership in the racist gang that he had acted upon his racial prejudice, and the membership evidence was, therefore, relevant.¹⁴³

As a result, Justice Thomas argued that the majority opinion es-

134. *Id.*

135. *Id.* at 1101-02 (Thomas, J., dissenting).

136. *Id.* at 1102 (Thomas, J., dissenting). Membership in the Aryan Brotherhood prison gang suggested to Justice Thomas that Dawson was troublesome in prison, which indicated that he would be dangerous in the future. *Id.*

137. *Id.* at 1101 (Thomas, J., dissenting). The general activities of gang members are deviant or unlawful in nature. *Id.* (citing UNITED STATES DEPT. OF JUSTICE, PRISON GANGS: THEIR EXTENT, NATURE AND IMPACT ON PRISONS x-xi (1985)). The Aryan Brotherhood has been labelled a "singularly vicious prison gang." *United States v. Fountain*, 840 F.2d 509, 516 (7th Cir. 1988).

138. 112 S. Ct. at 1101 (Thomas, J., dissenting).

139. *Id.*

140. *Id.*

141. 463 U.S. 939 (1983). See *supra* notes 102-04 and accompanying text.

142. 112 S. Ct. at 1102 (Thomas, J., dissenting) (citing *Barclay v. Florida*, 463 U.S. 939 (1983)).

143. *Id.* The theory underlying Justice Thomas' reasoning is unsound in that it infers racial motives for the murder when both Dawson and Mrs. Kisner were white.

established a double standard for relevance which is simple for the defendant to establish, but difficult for the State.¹⁴⁴ The capital defendant is allowed to introduce all relevant evidence in mitigation.¹⁴⁵ By allowing the jury to draw inferences from "good" character evidence while considering "bad" character evidence that required similar inferences to be irrelevant, the Court advocated, in his opinion, presenting a distorted view of the evidence to the jury during sentencing.¹⁴⁶

Next, Justice Thomas stated that there was no First Amendment right violated because the State had proven more than the defendant's abstract beliefs through the Aryan Brotherhood evidence.¹⁴⁷ He asserted that the Court failed to decide if abstract beliefs constituted a part of a defendant's character which is allowed for consideration during sentencing.¹⁴⁸ Therefore, he contended that the Court's decision merely limited the aspects of character that can be considered by the sentencer without defining the permissible boundaries of character inquiry.¹⁴⁹ Justice Thomas indicated that the Court's boundaries were unclear because it failed to explain why some First Amendment activities can be considered character evidence while others cannot.¹⁵⁰ Finally, Justice Thomas argued that, even if the Aryan Brotherhood evidence was irrelevant, the First Amendment was not at issue.¹⁵¹ Instead, the Due Process Clause of the Fourteenth Amendment provides a method for correcting the improper admission of evidence that prevents a fair trial.¹⁵² He, therefore, concluded that Dawson's death sentence

144. *Id.*

145. *Id.* Capital defendants frequently use abstract beliefs from associations as good character evidence. *Id.* Dawson introduced his membership in prison rehabilitation organizations as good character evidence. *Id.*

146. *Id.* at 1103 (Thomas, J., dissenting). The Supreme Court has recently condemned a similar distorted view of the evidence. *Id.* (citing *Payne v. Tennessee*, 111 S. Ct. 2597 (1991)).

147. *Id.*

148. *Id.*

149. *Id.* at 1103-04 (Thomas, J., dissenting). The Supreme Court has held for an extended period that the United States Constitution allows consideration of character evidence in penalty hearings. *Id.* at 1104. *See, e.g., Williams v. New York*, 337 U.S. 241, 245 (1949) (allowing sentencing judge broad scope in considering the defendant's character during sentencing proceedings).

150. 112 S. Ct. at 1104 (Thomas, J., dissenting).

151. *Id.*

152. *Id.* The Due Process Clause of the Fourteenth Amendment states: "nor shall any state deprive any person of life, liberty, or property, without due process of the law." U.S. CONST. amend. XIV. In *Payne v. Tennessee*, the Supreme Court reaffirmed the proposition that admission of unduly prejudicial evidence that results in an unfair trial is forbidden by the Due Process Clause of the Fourteenth Amendment. 111 S. Ct. 2597, 2608 (1991).

should be affirmed.¹⁵³

V. ANALYSIS AND SIGNIFICANCE

The Supreme Court's opinion in *Dawson v. Delaware* further defined relevance of evidence, which is partially based on how much a jury is allowed to infer from the evidence presented.¹⁵⁴ In order to protect the First Amendment freedoms of belief and association, the Court limits evidence that may be used as aggravating evidence during capital sentencing. Evidence of the capital defendant's abstract beliefs, unsupported by actions in furtherance of those beliefs, is not admissible because the abstract beliefs are not relevant to the sentencing issues.¹⁵⁵ Therefore, *Dawson* makes it clear that when First Amendment freedoms are likely to be infringed upon, the evidence sought to be used in aggravation must be relevant to the sentencing issues. It cannot be presented simply because the defendant's beliefs or associations are unpopular.

As a result, *Dawson* favors admission of the capital defendant's mitigating evidence in order for the defendant to receive a more lenient sentencing.¹⁵⁶ By allowing the jury to infer Dawson's "good" character through evidence of his mere membership in associations while disallowing an inference of "bad" character from associational evidence, the Court afforded greater protection for the capital defendant.¹⁵⁷ Having struggled with capital punishment over the years,¹⁵⁸ it was appropriate

153. 112 S. Ct. at 1105 (Thomas, J., dissenting).

154. See *id.* at 1098-99. If aggravating evidence is established as *relevant* to the issue at hand, it is allowed in sentencing proceedings. See *Payne v. Tennessee*, 111 S. Ct. 2597 (1991) (indicating the consideration of victim impact statements as aggravating circumstances in sentencing is constitutional); *Zant v. Stephens*, 462 U.S. 862 (1982) (stating the invalidation of one statutory aggravating circumstance in a "non-weighting state" did not give reason to vacate a death sentence when two statutory aggravating circumstances that were relevant were present).

155. 112 S. Ct. at 1098.

156. The decision in *Dawson* reinforces the idea established in *Lockett v. Ohio* that a broad consideration of relevant mitigating evidence is allowed. 438 U.S. 586 (1978). The imbalance created by allowing jury discretion with mitigating evidence while not allowing discretion with aggravating evidence is justified because it is more acceptable to avoid the imposition of a death sentence than to allow errors in imposing one. See generally Strassmann, *supra* note 61.

157. See 112 S. Ct. at 1102-03 (Thomas, J., dissenting). Justice Thomas indicated that this double standard for determining relevancy of evidence in capital sentencing does not allow the jury to make a fair and balanced determination of the defendant's character. Instead, the jury is presented with a distorted picture of the defendant and his "good" character traits. *Id.*

158. Justice Blackmun, in his dissent to *Furman v. Georgia*, 408 U.S. 238 (1972) (Blackmun, J., dissenting), expressed his dislike of the death penalty but could not understand why the majority had suddenly found arbitrary capital sentencing unconstitutional under the Eighth

for the Court to allow the capital defendant additional opportunities to avoid the death penalty by deeming evidence that could be highly prejudicial as wrongfully admitted during sentencing. The decision in *Dawson* to prevent irrelevant associational evidence from being introduced to the jury when determining a death penalty sentence creates a guideline that limits jury discretion and guides the sentencer. This decision follows the Court's previous requirement of "guided discretion" in order to prevent a death sentence from being imposed arbitrarily.¹⁵⁹

Another interesting approach taken by the Supreme Court in *Dawson* concerns protected First Amendment rights. In *Dawson*, the Court further defined First Amendment freedoms in the context of a capital proceeding.¹⁶⁰ The Court, which is normally hostile to challenges to capital sentences,¹⁶¹ emphasized the importance of First Amendment freedoms by setting aside a death sentence based on wrongful admission of associational evidence during sentencing.¹⁶² The protection afforded *Dawson* firmly establishes that the Court will not allow punishment of an individual based on mere dissident beliefs, associations, or expression of ideas. Recently, the Court confirmed this strong stand on First Amendment rights in *R.A.V. v. St. Paul*.¹⁶³ Finding *St. Paul's* ordinance regulating speech facially unconstitutional, the Court refused to allow the defendant to be punished for expressing his unpopular beliefs.¹⁶⁴ Although the Court found *R.A.V.'s* actions reprehensible, it upheld his First Amendment right of expressive speech on a disfavored subject.¹⁶⁵

Employing the *NAACP v. Alabama*¹⁶⁶ balancing test, the Court in

Amendment when prior decisions had not so held. Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect*, 18 U.C. DAVIS L. REV. 927, 929-31 (1985) (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (Blackmun, J., dissenting)).

159. See Bishop & Martin, *supra* note 44, at 1445-48.

160. See 112 S. Ct. at 1097-99.

161. See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597 (1991); *Barclay v. Florida*, 463 U.S. 939 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983).

162. *Dawson*, 112 S. Ct. at 1099.

163. 112 S. Ct. 2538 (1992). In *R.A.V.* the defendant allegedly burned a cross in a black family's yard and was charged with violating the *St. Paul Bias-Motivated Crime Ordinance*. Under the ordinance, the display of a symbol that is likely to incite anger or resentment in another based on "race, color, creed, religion or gender" is prohibited. The Supreme Court held the ordinance unconstitutional under the First Amendment because it prevented expression of beliefs on disfavored subjects. *Id.* at 2547.

164. *Id.*

165. *Id.* at 2550.

166. See *supra* notes 86-87 and accompanying text.

Dawson also demonstrated how protection of First Amendment associations outweighs the State's interest in the associational evidence when it is unrelated to the crime at hand.¹⁶⁷ The use of the balancing test created a guideline for future capital cases when determining if protected beliefs or associations of the defendant can be used against him as aggravating evidence in support of a death penalty. With the use of a balancing test, the Court again indicated its willingness to protect a capital defendant from punishment based strictly upon his dissident beliefs or associations.¹⁶⁸

The majority in *Dawson* drew a line for consideration of membership evidence as possible aggravating evidence in capital sentencing. Although the boundary is somewhat vague,¹⁶⁹ the Court indicated that evidence would be deemed irrelevant in a capital sentencing proceeding if it exposed merely dissident beliefs held by the defendant.¹⁷⁰ However, the relevancy of evidence could be established if the subversive beliefs were coupled with the defendant's subversive actions. The decision is vague, however, because the Court indicated in dictum that *Dawson's* membership evidence may have been admissible if the State had been more explicit about the Aryan Brotherhood's beliefs.¹⁷¹ Even though this evidence did not explicitly indicate that *Dawson* had acted on his abstract beliefs, the Court implied that it could be admissible to demonstrate that the gang in general acted on the subversive beliefs.¹⁷² The Court failed to clarify if the associational evidence could be used against the defendant for actions committed solely by his organization without his participation in those actions. Nonetheless, the Court's support of freedom of association in this decision reinforced the notion that the subscription to subversive beliefs without action on those beliefs is a protected First Amendment right.¹⁷³

167. 112 S. Ct. at 1096-99.

168. *Id.*

169. *See id.* at 1098. Associational evidence might be of a sufficient state interest to override the First Amendment protection of association given to the individual. The Supreme Court indicated simply that "a defendant's associations might be relevant in proving other aggravating circumstances" without giving a clear boundary of when those associations might be relevant. *Id.*

170. *Id.*

171. *Id.* at 1097. Had the prosecution admitted the expert testimony which verified that the gang advocated the murder of prison inmates and was associated with drugs and escape attempts, the outcome of *Dawson* might have been different. *Id.*

172. *Id.* at 1097-98.

173. *See, e.g.,* *Elfbrant v. Russell*, 384 U.S. 11 (1966) (indicating that membership in an association known for its dissident beliefs is not unlawful without action by the member to further those beliefs).

The majority's willingness to allow a harmless error analysis on remand indicates the Court's general hostility toward vacating capital sentences. By implying that First Amendment violations during capital sentencing could be subject to harmless error analysis, the Court cited the decision of *Clemons v. Mississippi*¹⁷⁴ which allowed some constitutional errors to be analyzed as harmless. However, the Court indicated that state courts may develop higher standards for First Amendment violations if they so desire.¹⁷⁵ Nonetheless, the defendant is not granted absolute protection of his First Amendment rights. The Supreme Court's implication that this type of constitutional error may be subject to harmless error analysis does not afford strong protection of associations based on dissident beliefs.¹⁷⁶ Moreover, the fact that membership in an organization advancing dissident beliefs is protected by the First Amendment, but that the membership may be used as a factor in determining the imposition of a death sentence, runs counter to the goals of the United States Constitution to protect individuals from punishment for mere dissident beliefs.

Dawson v. Delaware is also significant in that it limits what is to be considered relevant evidence as aggravating circumstances in capital sentencing proceedings. Defendants may be able to invoke First Amendment rights if their defense counsel can persuade the court that aggravating evidence represents only the defendant's beliefs and not his action on the beliefs. Also, courts may be aided by having the possible option of applying harmless error analysis in death penalty cases when there is error that violates the First and Fourteenth Amendments. *Dawson* provides basic protection of First Amendment rights for the capital defendant. However, the Court ultimately leaves open the possibility to infringe upon the defendant's rights if the information is relevant during capital sentencing or if violation of the rights is harmless error.¹⁷⁷ Although *Dawson* advances protection of First Amendment freedoms, it also indicates that these freedoms do not create a per se barrier to the admission of associational evidence as an aggravating circumstance in death penalty sentencing.

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174. 494 U.S. 738 (1990).

175. See 112 S. Ct. at 1099-100.

176. The majority created the possibility for the Supreme Court of Delaware to again impose Dawson's death penalty if that court can establish that admission of the Aryan Brotherhood membership evidence was harmless error. *Id.* at 1099.

177. *Id.* at 1098-99.