FIRST AND FIFTH AMENDMENTS—THE FREEDOM TO ASSOCIATE AND DUE PROCESS CLAUSE—A STATE MAY NOT INTRODUCE AT CAPITAL SENTENCING EVIDENCE OF ASSOCIATIONAL PREFERENCES IF SUCH EVIDENCE PROVES NOTHING MORE THAN MERE ABSTRACT BELIEFS—*Dawson v. Delaware*, 112 S. Ct. 1093 (1992).

Elaine A. Imbriani

I. INTRODUCTION

The Due Process Clause of the United States Constitution provides in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[1] In accordance

[1] U.S. CONST. amend. V. The Due Process Clause protects a capital defendant from arbitrary and capricious sentences. *See* McClesky v. Kemp, 481 U.S. 279, 305 (1987) (holding that "the State must establish rational criteria that narrow the decision-maker's judgment . . . ."); California v. Brown, 479 U.S. 538, 541 (1987) (citing Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (explaining that "death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion . . . .")); Darden v. Wainwright, 477 U.S. 168, 178-82 nn.10 & 11 (1986) (affirming conviction and capital sentence despite prosecutor's remark during closing argument suggesting that death penalty might be the only solution to prevent future unlawful conduct and referring to the defendant as an "animal"); Barclay v. Florida, 463 U.S. 963, 987 (1983) (Marshall, J., dissenting) (noting the Supreme Court's "insistenc[y] on consistency and fairness in the capital sentencing process"); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (explaining that more reliable sentencing procedures are needed in capital cases because death penalty is unique in its finality); *cf.* California v. Ramos, 463 U.S. 992, 1001-04 (1983) (finding that jury instruction permitting consideration of Governor's power to commute life sentences does not encourage jurors to speculate because such consideration is directly related to the future dangerousness of the defendant); *Barclay*, 463 U.S. at 961 (affirming death sentence under state statute permitting the sentencer to consider both statutory and nonstatutory aggravating factors in order to render an individualized determination); Barefoot v. Estelle, 463 U.S. 880, 905-06 (1983) (finding that expert psychiatric testimony indicating a defendant's future dangerousness is not too speculative, but is relevant for consideration at sentencing); Jurek v. Texas, 428 U.S. 262, 276-77 (1976) (upholding state death penalty statute requiring the jury to find one statutory aggravating factor before imposing the death sentence). A meaningful and individualized review at sentencing is essential to guarantee due process protection. *See* Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (holding that a sentencer is required by law to consider all relevant mitigating evidence); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (a sentencer must not be precluded from considering any relevant mitigating evidence as a basis for imposing a sentence lesser than death); *Woodson*, 428 U.S. at 304 (striking down statute permitting the mandatory imposition of death sentences because it failed to allow for individualized review). In order to ensure that such constitutional protection is afforded to the capital defendant, the capital sentencer must be able to consider all relevant information about the defendant and the

with the Due Process Clause, a sentencing authority[2] may consider all relevant evidence[3] when determining the appropriate punishment to

circumstances of the crime. *See* Sumner v. Shuman, 483 U.S. 66, 84 (1987) (asserting the right of the capital defendant to introduce evidence in mitigation in order to persuade the sentencer to impose a lesser sentence); Skipper v. South Carolina, 476 U.S. 1, 4-9 (1986) (stating that due process protects a defendant from being sentenced based upon evidence which he was not given an opportunity to explain or deny).

[2] The sentencing authority may be a judge or a jury, depending upon state legislative guidelines. *See* Raymond J. Pascucci, et al., *Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1130, 1237-38 nn.716-22 (1984) [hereinafter Pascucci, *Special Project*]; *see also* DEL. CODE ANN. tit. 11, § 4209(9) (1979). Some states provide that the sentencing authority will be composed of the same jurors who decided to convict the defendant at trial. *See, e.g.*, CAL. PENAL CODE § 190.4(c) (West Supp. 1984); CONN. GEN. STAT. § 53a-46a(b)(1) (1983); DEL. CODE ANN. tit. 11, § 4209(b)(1) (1979); MASS. ANN. LAWS ch. 279 § 68 (Law. Co-op. Supp. 1984). N.J. STAT. ANN. § 2C:II-3(c)(1) (West 1982). If empaneling the same jury is impracticable, most state statutes permit a new selection to be made for sentencing purposes only. *See, e.g.*, CAL. PENAL CODE § 190.4(c) (West Supp. 1984); CONN. GEN. STAT. § 53a-46b(b)(2)(C) (West Supp. 1983); DEL. CODE ANN. tit. 11, § 4209(b)(1) (1979); MASS. ANN. LAWS ch. 38, para. 9-1(d)(2)(C) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(1) (West 1982). Where a judge presided over the trial without a jury, some state statutes provide for that same judge to determine sentencing. *See, e.g.*, COLO. REV. STAT. § 16-11-103(1) (1978); GA. CODE § 17-10-32 (1982); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983). Where no jury was utilized, three state statutes require a panel of three judges to impose punishment. *See, e.g.*, NEV. REV. STAT. § 175.552 (1983); OHIO REV. CODE ANN. § 2929.03(C)(2)(a) (Anderson 1982). Three other states require in all situations that the court impose punishment, regardless of whether a jury or the judge convicted the defendant. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(B) (Supp. 1983); IDAHO CODE § 19-2515(b) (1979); MONT. CODE ANN. § 46-18-301 (1983).

[3] The standards applied by the sentencing authority to consider relevant evidence about the capital defendant and the circumstances of the crime vary among the jurisdictions. Seven states allow the admission of all relevant evidence regardless of whether exclusionary rules of evidence apply. *See* ALA. CODE § 13A-5-45(d) (1982); FLA. STAT. ANN. § 922.141(1) (West Supp. 1983); MONT. CODE ANN. § 16-18-302 (1983); TENN. CODE ANN. § 39-2-203(C) (1982); UTAH CODE ANN. § 76-3-207(2) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.060(3) (Supp. 1984); WYO. STAT. § 6-2-102(c) (1983). Other states, including Delaware, do not expressly state whether the exclusionary rules of evidence apply, thus leaving the question of admissibility to the sentencer. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4209(c)(1) (1979); *accord*, GA. CODE § 17-10-2(a)-(b) (1982); IND. CODE ANN. § 35-50-2-9(d) (Burns. Supp. 1983); N.H. REV. STAT. ANN. § 630:5(II) (Supp. 1983); N.C. GEN. STAT. § 15A-2000(a)(3) (Supp. 1983); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983). Three states expressly provide that the same evidentiary standards apply both during the trial and at sentencing. *See, e.g.*, LA. CODE CRIM. PROC. § 190.3 (West Supp. 1984); MO. ANN. STAT. § 565.030.4 (Vernon Supp. 1984); VA. CODE § 19.2-264.4(B) (1983). Still other states provide great latitude in the admissibility of relevant evidence where it is presented in mitigation, *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(C) (Supp. 1983); COLO. REV. STAT. § 16-11-103(2) (Supp.

impose upon a capital defendant.[4] Such relevant evidence[5] may include a capital defendant's particular association or abstract beliefs[6] despite the defendant's freedom to associate under the First Amendment.[7]

1983); CONN. GEN. STAT. § 53a-46a(c) (1983) MASS. ANN. LAWS ch. 279, § 68 (Law. Co-op. Supp. 1984), but not when it is presented in aggravation, *see, e.g.*, ILL. ANN. STAT. ch. 38, para. 9-1(e) (Smith-Hurd Supp. 1983). *See also supra* note 3, Pascucci, *Special Project* at 1237-38.

[4] Several factors that a sentencing authority may consider include lack of remorse, repeat offender status, and effects on the community. *See, e.g.*, United States v. Kikumura, 918 F.2d 1084, 1098 (3d Cir. 1990) ("Because criminal statutes have never been . . . written with sufficient particularity to take all such factors into account, a system of pure charge offense sentencing-one that metes out punishment solely on the basis of the offense of conviction-would necessarily abstract away considerations obviously relevant in determining an appropriate sentence."); U.S. Sentencing Commission, FEDERAL SENTENCING GUIDELINES MANUAL, 239 *et. seq.* (1993).

A sentencing authority's consideration of aggravating or mitigating circumstances is generally unlimited so long as evidence comports with judicial standards of relevancy. *See* Hitchcock v. Dugger, 481 U.S. 393, 395-97 (1987) (vacating death sentence because jury instruction limited consideration to statutory mitigating factors and trial judge refused to consider nonstatutory mitigating circumstances); *Sumner*, 438 U.S. at 84 (invalidating death penalty statute precluding the sentencing authority from considering whether any relevant mitigating factors existed to warrant the imposition of a lesser sentence); *Skipper*, 476 U.S. at 4-5 (reversing death sentence because trial judge's instruction to jury limited consideration of mitigating factors to those listed in the death penalty statute); *cf.*, Zant v. Stephens, 462 U.S. 862 (1983) (consideration of relevant aggravating evidence is not statutorily restricted as a matter of federal law).

[5] Relevant evidence presented at capital sentencing consists of either aggravating or mitigating circumstances. Currently 34 states, including Delaware, statutorily prescribe what is considered an aggravating circumstance. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(F) (Supp. 1983); CAL. PENAL CODE § 190.2(a) (West Supp. 1984); CONN. GEN. STAT. § 53a-46a(g) (1983); DEL. CODE ANN. tit. 11, § 4209(e)(7) (1979 & Supp. 1982); N.J. STAT. ANN. § 2C:11-3(c)(4) (West 1983). Presently, 30 states do the same for mitigating circumstances. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1983); CAL. PENAL CODE § 190.3 (West Supp. 1984); CONN. GEN. STAT. § 53a-46a(f) (1983); N.J. STAT. ANN. § 2C:11-3(c)(5) (West 1982); 42 PA. CONS. STAT. ANN. § 9711(e) (Purdon 1982). For a complete state-wide list of legislative acts with respect to evidence admissible at sentencing, see *supra* note 3, Pascucci, *Special Project*, at 1227-37.

[6] Dawson v. Delaware, 112 S. Ct. 1093, 1097 (1992) (concluding that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.").

[7] The First Amendment to the United States Constitution provides that "Congress 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 people peaceably to assemble, and to petition the Government for a redress of grievances." U.S.

Recently, in *Dawson v. Delaware*,[8] the United States Supreme Court limited a sentencing authority's consideration of sentencing phase evidence.[9] The Court found that associational evidence is relevant only if it is directly related to the circumstances of the crime and the offender's participation in the crime.[10] Specifically, the Court held that a State may not present evidence of a capital defendant's membership in a racist prison gang as an aggravating factor at a criminal sentencing proceeding where evidence of such membership is not proven to be relevant to the crime and the defendant's role in it.[11] The Court's holding in *Dawson* represents an adherence to First Amendment principles which prohibit the government from criminally prosecuting individuals merely for exercising their constitutional right to freely

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CONST. amend. I.

The United States Supreme Court has interpreted this constitutional amendment as a right to associate freely without government intrusion. Police Department v. Mosley, 408 U.S. 92, 95 (1972) (holding that First Amendment principles prohibit the government from restricting expression on the basis of its "message, its ideas, its subject matter, or its content"); *see* Collin v. Smith, 578 F.2d 1197, 1210 (7th Cir.) (holding that the First Amendment protects both those expressions which society deems acceptable in addition to those which it justifiably rejects and despises), *cert. denied*, 439 U.S. 916 (1978).

Government encroachment upon an individual's First Amendment associational rights will not be tolerated unless the State can demonstrate a compelling interest to justify its interference. Bates v. City of Little Rock, 361 U.S. 516, 525 (1960) (holding that when state action significantly encroaches upon an individual's constitutionally protected freedom, the United States Supreme Court must determine "whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification."); NAACP v. Alabama, *ex rel* Patterson, 357 U.S. 449, 460-61 (1958) (finding that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

[8] *Dawson*, 112 S. Ct. at 1097.

[9] *Id.* at 1099.

[10] *Id.* at 1098. Specifically, in *Dawson*, the Court explained that aggravating evidence will be considered relevant if presented in one of two ways; either to show that the defendant represents a future danger to society or to rebut mitigating good character evidence presented by the capital defendant. *Id.*

[11] *Id.*; *cf.* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

associate[12] no matter how pernicious society may consider that association to be.[13] These First Amendment principles also dictate that the government may not rely upon evidence of a capital defendant's constitutionally protected activity to aggravate a criminal sentence.[14] However, *Dawson* does not preclude a state from considering a capital defendant's membership in an organization as aggravating character evidence unless it proves that the organization has unlawful purposes and the defendant intends to further those purposes.[15] Moreover, even if

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[12] Dawson v. Delaware, 112 S. Ct. 1093, 1098 (1992) (concluding that the defendant's "First Amendment rights were violated by the admission of [his membership in] the Aryan Brotherhood [as] evidence, because such evidence proved nothing more than [the defendant's] abstract beliefs"); *see* United States v. Abel, 469 U.S. 45, 48-49 (1984) (upholding an individual's First Amendment right to belong to any organization, even if it advocates illegal activity) (citing United States v. Abel, 707 F.2d 1013 (1983)); *see also* United States v. Lemon, 723 F.2d 922, 938, 941-42 (D.C. Cir. 1983) (holding that a sentencing authority may not rely upon evidence of a defendant's membership in religious associations purportedly embracing legal and illegal goals when no reliable evidence exists to prove that defendant intends to further those goals) (citing Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (per curiam); Scales v. United States, 367 U.S. 203, 219-24 (1961)).

[13] *See, e.g.*, *Brandenburg*, 395 U.S. at 449 (per curiam) (The Ku Klux Clan may propagate its ideas of racial supremacy); Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (former Communist Party member permitted to sit for state bar exam); DeJonge v. Oregon, 299 U.S. 353, 366 (1937) (communists may run for office); Collin v. Smith, 578 F.2d 1197, 1210 (7th Cir.) (Nazis may proclaim their anti-Semitic beliefs in marches through Jewish neighborhoods), *cert. denied*, 439 U.S. 916 (1978).

[14] *See* Zant v. Stephens, 462 U.S. 862, 885 (1983) (an aggravating circumstance will be invalid if it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," for example "the display of a red flag [or] the expression of unpopular political views."); *see also Lemon*, 723 F.2d at 938 ("a sentence based to any degree on activity or beliefs protected by the First Amendment is constitutionally invalid."); United States v. Bangert, 645 F.2d 1297, 1308 (8th Cir.) ("Consideration of political beliefs, as distinguished from criminal activity, would clearly be impermissible in determining defendants' sentences, because it would impair the rights of the defendants under the First Amendment, protected public expression of their political beliefs, by words or symbols."). *But see* United States v. Rosenberg, 806 F.2d 1169, 1180 (3d Cir. 1986) (justifying the imposition of sentence based upon defendant's unwillingness to be rehabilitated and lack of remorse and not on the defendant's First Amendment activity supporting political change), *cert. denied*, 481 U.S. 1070 (1987).

[15] Dawson v. Delaware, 112 S. Ct. at 1098. In *Dawson*, the Court suggested that "[a]ssociational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." *Id.* For example, the Court noted that "[a] defendant's membership in an organization that endorses the killing of any identifiable group . . . might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future." *Id.* *See* Beam v. Paskett, 966 F.2d 1563, 1572 (9th Cir. 1992).

the association advocates illegal activity, the Court has held that the government may not prosecute on the basis of that association if there is proof beyond a reasonable doubt that the defendant specifically sought to carry out the group's illegal objective.[16]

This casenote will trace the development of the Fifth Amendment guarantee against arbitrary and unguided sentencing discretion with particular emphasis on the Supreme Court's recognition of an individual's First Amendment protections against criminal prosecution for associating with particular groups or exercising certain beliefs.

In the early morning hours of December 1, 1986, David Dawson escaped from a Delaware prison.[17] During the course of his escape, Dawson burglarized the home of Madeline Kisner, brutally murdered her, and then stole her car.[18] Using the stolen car and the money he

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In *Beam*, the United States Court of Appeals for the Ninth Circuit held that a defendant's "non-violent, consensual or involuntary sexual conduct" failed to provide a sufficient link to "future dangerousness" when imposing capital punishment. *Id.* In relying upon *Dawson*, the *Beam* court held the evidence inadmissible, noting that, as in *Dawson*, the danger in admitting such evidence is too great because the sentencing authority might be swayed by its morally reprehensible nature. *Id.*

[16] *Scales*, 367 U.S. at 229-30 (asserting that if there were a "blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired."); *see* Elfbrandt v. Russell, 384 U.S. 11, 15-16 (1966) (upholding the right of association even if the group advocates illegal activity, unless there is proof beyond a reasonable doubt that the defendant specifically intended to carry out the group's illegal aims). *See also* Noto v. United States, 367 U.S. 290, 299-300 (1961) (holding that a defendant who is a member of a certain group may not be held responsible for the acts of that group unless the prosecution is able to prove beyond a reasonable doubt that the defendant sought to further the group's objectives).

[17] Dawson v. State, 581 A.2d 1078, 1082 (Del. 1990). Dawson escaped with three other inmates between the hours of midnight and 2:30 a.m. *Id.* After stealing two cars, the three others headed north while Dawson drove south alone. *Id.*

[18] *Id.* at 1083-84. At approximately 6 a.m., two hours prior to the burglary and murder of Madeline Kisner, Dawson had burglarized a different home, taking a leather motorcycle jacket, some watches, and loose change. *Id.* at 1083. At Dawson's trial for the murder of Kisner, testimony was offered by FBI Special Agent Andrew Podolak that the fibers of the white cotton sock located in Dawson's pocket at the time of his arrest matched those of the sock used to gag the victim. *Id.* at 1085. Podolak also testified that he had detected fibers taken from Kisner's bathrobe on Dawson's black motorcycle jacket and tee shirt. *Id.* The State also presented the testimony of FBI serologists Randall Murch and Joseph Errera who had determined that the blood found on Dawson's clothing matched the genetic markers of the victim's blood type. *Id.* On the same evening that he had committed the two burglaries and the murder, Dawson was

had taken from Kisner's home, Dawson drove south until the police found him early the following morning.[19]

A Delaware Superior Court tried and convicted Dawson of first-degree murder[20] and possession of a deadly weapon during the commission of a felony, as well as various other crimes.[21] The same court conducted a penalty hearing to determine whether Dawson should

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seen at a southern Delaware bar called the Zoo Bar, wearing an oversized, dark leather jacket. *Id.* at 1084. At the bar, he introduced himself to a woman as "Abaddon," which, he told her, meant "one of Satan's disciples." *Id.* at 1101. Shortly thereafter, he was asked to leave. *Id.* at 1084.

[19] *Id.* The police began their search for Dawson following a call reporting a one-car accident. *Id.* According to the police report, the damaged car was stolen from the Zoo Bar parking lot the night of Kisner's murder. *Id.* The car was found deserted in a ditch. *Id.*

At 5:25 a.m. the following morning, the police found Dawson crouched on the floor of a Cadillac parked less than a half-mile away from the deserted car. *Id.* When they found him, Dawson was wearing the stolen leather motorcycle jacket. *Id.* In the jacket pockets were four of the five stolen watches and a sock which matched the one used to gag Madeline Kisner prior to her murder. *Id.* at 1084-85.

[20] *Id.* at 1081. The Delaware murder statute provides in pertinent part:

> A person is guilty of Murder in the First Degree when, in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person.
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> . . .
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> A person is guilty of Murder in the First Degree when he causes the death of another person . . . in the course of and in furtherance of the commission . . . of escape . . . after conviction.
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> A person is guilty of Murder in the First Degree when he, with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of rape, kidnapping, arson in the first degree, burglary in the first degree, or immediate flight therefrom.

DEL. CODE ANN. tit. 11, § 636(a)(2),(6)-(7) (1979).

[21] Dawson v. State, 581 A.2d 1078, 1081 (Del. 1990). In addition to finding Dawson guilty of four counts of Murder in the First Degree, the jury also found Dawson guilty of six counts of Possession of a Deadly Weapon by a Prohibited Person, Burglary in the Second Degree, Robbery in the First Degree, and Possession of a Deadly Weapon During the Commission of a Felony. *Id.*

be sentenced to death for the murder conviction.[22] Prior to the hearing, Dawson agreed to a stipulation allowing the prosecutor to introduce into evidence Dawson's membership in Delaware Branch of the Aryan Brotherhood, a white supremacist, prison gang.[23] The prosecution, prior to trial, conceded that the nature of the various chapters of the gang may differ, stating that "there are cells or specific off-shoots within various local jurisdictions that don't see eye to eye or share a union, if you will."[24] With no specific evidence linking the tenets of the California prison gang to those of the Delaware prison gang, the prosecution submitted the stipulation as evidence of Dawson's character under Delaware law.[25] The prosecution also introduced evidence of Dawson's tattoos, indicating his ties to the prison gang and

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[22] *Id.* The Delaware death penalty statute provides:

> The Supreme Court shall limit its review under this section to the recommendation on an imposition of the penalty of death and shall determine:
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> a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.
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> b. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (e) of this section and, where applicable, §636(a)(2)-(7) of this title.

DEL. CODE ANN. § 4209(b)(1) (1979). *See*, *Dawson*, 581 A.2d at 1105.

[23] *Id.* at 1100. The stipulation provided:

> "[t]he Aryan Brotherhood refers to a white racist prison gang that began in the 1960's 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. *See also*, Dawson v. Delaware, 112 S. Ct. 1093, 1096 (1992).

[24] *Dawson*, 112 S. Ct. at 1098 (citation omitted).

[25] *Dawson*, 581 A.2d at 1101. Under the Delaware Penal Code, admissible evidence includes "matters relating to any mitigating circumstances and to any aggravating circumstances." DEL. CODE ANN. tit. 11, § 4209(c) (1979).

to satanic worship, in addition to his long criminal history.[26] In mitigation, Dawson submitted evidence of his familial ties and his good behavior during imprisonment.[27]

The jury recommended that Dawson be sentenced to death after finding three statutory aggravating factors under Delaware law and concluding that they outweighed the mitigating factors.[28] In accordance with this recommendation, the trial court sentenced Dawson to death.[29]

On appeal,[30] the Supreme Court of Delaware upheld Dawson's death sentence.[31] In reaching its decision, the Delaware Supreme Court affirmed the trial court's decision to admit into evidence the stipulation referring to the Aryan Brotherhood and also Dawson's use of his name "Abaddon" at the penalty hearing.[32] The state supreme court concluded that a finding of merely one aggravating circumstance justified the admission of as much evidence on Dawson's life as possible since the

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[26] *Id.* at 1101-02. More specifically, in addition to the stipulation, the prosecutor presented evidence regarding Dawson's membership in the Aryan Brotherhood and his "Abaddon" tattoos, but was prohibited from introducing evidence showing the defendant's prison cell walls on which he had painted several swastika symbols. *Id.* at 1100-01. The prosecutor also presented information with respect to Dawson's past criminal record. *Id.* at 1101-02. This record included "Dawson's commitment to a juvenile correctional facility at age thirteen, five commitments or recommitments to the Division of Juvenile Corrections dating from October 1968, the determination that he was not amenable to the Family Court processes, fourteen prior felony convictions, three escapes from maximum security juvenile institutions, three adult escapes, and twenty-four conduct violations resulting in sanctions against him as an inmate." *Id.* at 1101 n.25.

[27] *Dawson,* 112 S. Ct. at 1096. As mitigating factors, Dawson submitted character testimony by two family members, in addition to proof of his participation in various drug and alcohol rehabilitation programs for which he received good time credits at the prison. *Id.*

[28] *Dawson,* 581 A.2d at 1102 n.27. The aggravating factors included that the murder was (1) committed by an inmate escapee, (2) during the commission of a felony, and (3) committed for pecuniary gain. *Id.* (citing DEL. CODE ANN. tit. 11, § 4209(e)(a), (j) & (o) (1979)).

[29] Dawson v. State, 581 A.2d 1078, 1081 (Del. 1990).

[30] *Id.* Dawson appealed his death sentence on the grounds that the stipulation constituted a violation of his First and Fourteenth Amendment rights. *Id.* at 1082. Dawson reasoned that his membership in the Aryan Brotherhood was constitutionally protected and thus, could not be used as a basis for aggravating his sentence. *Id.*

[31] *Id.* at 1082, 1109.

[32] *Id.* at 1100-04.

determination to impose a death sentence must be an individualized one.[33] Holding that the evidence admitted at the penalty hearing focused on Dawson's character and did not appeal to the jury's "prejudices concerning race, religion or political affiliation," the state supreme court upheld its admissibility.[34]

The United States Supreme Court granted certiorari on the question of whether the introduction of associational evidence at capital sentencing, where such evidence is not relevant in the consideration of imposing the appropriate punishment, constitutes constitutional error.[35] Writing for the majority of the Court, Chief Justice Rehnquist, joined by Justices Scalia, Blackmun, White, Stevens, O'Connor, Kennedy and Souter, vacated Dawson's death sentence.[36] In remanding the case to the trial court for further proceedings, the Court held that the admission of Dawson's associational preferences, where such evidence was not relevant to any issues decided at the punishment phase, violates an individual's right to associate pursuant to the First and Fourteenth

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[33] *Id.* at 1103. *Cf.* Weddington v. State, 545 A.2d 607, 616-17 (Del. 1988) (conviction reversed where prosecutor improperly injected race as an issue during trial); Brokenbrough v. State, 522 A.2d 851, 857, 864 (Del. 1987) (conviction upheld despite prosecutor's insinuation that defendant was a devil); Hooks v. State, 416 A.2d 189, 208 (Del. 1980) (murder conviction upheld despite prosecutor's improper injection of defendants' religious beliefs as an issue and categorization of defendant's as despicable people to whom "the Bible did not mean anything").

[34] Dawson v. State, 581 A.2d 1078, 1103-04 (Del. 1990). The state supreme court stated that a death sentence will be invalidated where its imposition was "based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant'" *Id.* at 1103 (quoting Baldwin v. Alabama, 472 U.S. 372, 382 (1985) (quoting Zant v. Stephens, 462 U.S. 862, 885 (1983))).

However, the state supreme court noted that, while certain issues may still be inadmissible for irrelevancy, "[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing . . . evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry." *Id.* at 1103 (quoting Commonwealth v. Abu-Jamal, 555 A.2d 846, 859 (Pa. 1989), *cert. denied* Abu-Jamal v. Pennsylvania, 498 U.S. 881 (1990)).

[35] Dawson v. Delaware, 112 S. Ct. 1093, 1095 (1992).

[36] *Id.* The Supreme Court rendered its decision to vacate Dawson's conviction and sentence and to remand the case to the Superior Court of Delaware on March 9, 1992. *Id.* at 1093, 1099.

Amendments.[37] The Court explained that associational evidence is not relevant to prove an aggravating circumstance where such evidence has no bearing on the circumstances of the convicted crime and merely demonstrates the abstract beliefs of the defendant.[38] Under this line of reasoning, the Court further held that such associational evidence may not be employed to rebut any mitigating evidence presented by the defendant.[39] Thus, to demonstrate a defendant's "bad character" through rebuttal, the State must show more than mere affiliation.[40]

II. THE EVOLUTION OF THE SUPREME COURT'S TREATMENT OF SENTENCING DISCRETION AND ATTEMPTS TO LIMIT IT

Traditionally, sentencing authorities have been afforded wide discretion in the use of evidence to determine the proper sentence for a convicted defendant.[41] This discretion has been allowed in order to

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[37] *Id.* at 1095, 1099. In vacating the decision of the state supreme court, Chief Justice Rehnquist explained that the First Amendment prohibits Delaware "from employing evidence of [Dawson's] abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried." *Id.* at 1099. In justifying its decision, the Chief Justice noted that the prosecution had failed to introduce any evidence directly related to the Delaware Chapter of the Aryan Brotherhood to which Dawson belonged. *Id.* at 1098.

[38] *Id.* at 1098. The Court suggested that Delaware could have avoided a constitutional violation "if it had presented evidence showing more than mere abstract beliefs on Dawson's part, but on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible." *Id.*

[39] *Id.* at 1098-99.

[40] *Id.* at 1098. To show more than "mere affiliation," the Court indicated that the prosecution must show that a group that a defendant belonged to had engaged in violent or unlawful acts. *Id.* To show that a defendant's membership ties indicate future dangerousness, the Court suggested that relevant evidence would include an organization's endorsement of the killing of a certain identifiable group. *Id.*

[41] Payne v. Tennessee, 111 S. Ct. 2597, 2606 (1991) (holding that, customarily, a sentencing authority may base its decision on a broad scope of relevant material.). *See* United States v. Tucker, 404 U.S. 443, 446 (1972) (holding that it is appropriate for a judge to conduct a comprehensive inquiry, utilizing any type of evidence, regardless of its source); Williams v. New York, 337 U.S. 241, 247 (1949); (determining that sentencing may take into account particular circumstances of an offender's life); *See supra* note 3, Pascucci, *Special Project*, at 1237-38 (current state death penalty statutes require the existence of one aggravating factor before a sentencing judge or jury may

afford a defendant a meaningful and individualized sentencing hearing.[42] However, the Supreme Court has limited the parameters of this discretion in capital proceedings in order to avoid arbitrary and capricious sentences.[43] As *Dawson* indicates, this discretion must be curbed where the evidence considered is not relevant to the circumstances of the crime.[44]

In 1949, in *Williams v. New York*, the United States Supreme Court enunciated a broad policy affording sentencing authorities the virtually unrestricted right to examine any evidence which pertains to the convicted defendant's life.[45] In *Williams*, the defendant was convicted of first-degree murder, and the jury recommended life imprisonment.[46]

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impose capital punishment). *See also* Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1928); Henry B. Cabot and Sam B. Warner, *Administration of Criminal Justice*, 50 HARV. L. REV. 583 (1937); Comment, *Reform in Federal Penal Procedure*, 53 YALE L. J. 773 (1944).

[42] *See* California v. Ramos, 463 U.S. 992, 1008 (1983) (asserting that the jury's decision to sentence an offender to death must take into account the all mitigating and aggravating evidence surrounding an offender's life and must be distinct from its decision to find the offender guilty of a capital offence). *See also* Eddings v. Oklahoma, 455 U.S. 104, 113 (1982) (evidence of violent upbringing and emotional disturbance is relevant); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (invalidating death penalty statute prohibiting the sentencer from considering in mitigation any evidence not enumerated in statute); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (striking down death penalty for its failure to provide for individualized determination at sentencing).

[43] *See* Barclay v. Florida, 463 U.S. 939, 958 (1983) (upholding death sentence despite trial court's consideration of defendant's prior criminal history in violation of state law); Barefoot v. Estelle, 463 U.S. 880, 905 (1983) (upholding death sentence despite the improper prejudicial impact created by the introduction of damaging psychiatric evidence); California v. Brown, 479 U.S. 538, 543 (1987) (vacating death sentence in light of jury instruction prohibiting jurors from considering "sympathy factors" as mitigating circumstances).

[44] *See* Dawson v. Delaware, 112 S.Ct. 1093, 1098 (1992).

[45] 337 U.S. 241, 251 (1949).

[46] *Id.* at 244. The New York death penalty statute provided in pertinent part: "Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided by [§ 1045(a)]." N.Y. PENAL LAW § 1045 (McKinney 1949), reprinted in *Williams*, 337 U.S. at 243 n.1. Section 1045(a) of the statute provided:

> A jury finding a person guilty of murder in the first degree, as defined by [§ 1044(2)], may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the

After considering the defendant's previous criminal record and probation report indicating he was sexually "morbid" and "a menace to society," the trial judge imposed the death sentence.[47] Writing for the majority,[48] Justice Black affirmed the defendant's sentence, holding that such evidence may consist of "the convicted person's past life, health, habits, conduct, and mental and moral propensities."[49]

In accordance with *Williams*, the Court later upheld the right of a capital defendant to introduce in mitigation any evidence about

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court may sentence the defendant to imprisonment for the term of his natural life.

N.Y. PENAL LAW § 1045(a) (McKinney 1949), reprinted in *Williams*, 337 U.S. at 243 n.2.

[47] *Id.* at 242. In instructing the jury, the trial judge indicated that a verdict of guilty without a recommendation for life sentence mandated the imposition of the death penalty, but that this recommendation would not bind the court's discretion. *Id.* at 243.

[48] *Id.* at 241-42. Justice Black was joined by Chief Justice Vinson and Justices Black, Reed, Frankfurter, Douglas, Jackson and Burton. *Id.* at 241. Justice Murphy dissented in a separate opinion. *Id.* at 252 (Murphy, J., dissenting). Justice Rutledge also dissented, but without an opinion. *Id.*

[49] *Id.* at 245. Justice Black noted the longstanding distinction between the phases of tribunals that determined the guilt of a defendant and those that sentenced a defendant, which maintained greater flexibility in allowing evidence in to the fact finder. *Id.* at 246. The Justice noted that the view "that the punishment should fit the offender and not merely the crime . . . ." existed in colonial courts and was traceable back to the English Common Law. *Id.* at 247. *See also* Wasman v. United States, 468 U.S. 559, 572 (1984) (upholding increased sentence after retrial and conviction due to consideration of relevant events which occurred subsequent to time of original sentencing); United States v. Grayson, 438 U.S. 41, 55 (1978) (affirming sentence where sentencing judge considered evidence of defendant's false testimony during trial); McGautha v. California, 402 U.S. 183, 197 (1971) (finding that it is not possible "to identify before the fact those homicides for which the slayer should die"); North Carolina v. Pearce, 395 U.S. 711, 726 (1969) (asserting the freedom of the sentencing authority to consider all relevant evidence, including events occurring immediately prior to re-sentencing).

The Court essentially reiterated the language used in *Williams* in the two later cases of McCleksy v. Kemp, 481 U.S. 279 (1987) and California v. Ramos, 463 U.S. 992 (1983). In those cases, the Court held that the State has an obligation to restrict the criteria used by the jury in determining whether "a particular defendant's case meets the threshold" for imposing the death penalty. *McClesky*, 481 U.S. at 305. If the State meets its obligation and the jury still finds that the defendant meets this threshold, it is then "free to consider a myriad of factors to determine whether death is the appropriate punishment." *Ramos*, 463 U.S. at 1008.

character, record or crime as a basis for a lesser sentence than death.[50] In *Lockett v. Ohio*, Sandra Lockett was convicted of felony murder for being the getaway driver in the robbery of a pawnshop during which one of the robbers accidentally killed the proprietor.[51] At the sentencing hearing, the defense introduced evidence that Lockett was only twenty-one years old, had no serious criminal record and showed good prospects for rehabilitation.[52] Ohio law, however, prohibited the judge's consideration of Lockett's mitigating evidence as a basis for declining to impose the death penalty.[53] In a plurality opinion,[54] Chief Justice

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[50] Lockett v. Ohio, 438 U.S. 586, 589 (1978) (plurality opinion) ("We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Sandra Lockett to death pursuant to a statute that narrowly limits the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.").

[51] *Id.* at 590-91, 593 (plurality opinion). Lockett's co-conspirator, Al Parker, accidentally shot and killed a pawnshop owner while attempting to rob the shop. *Id.* at 590 (plurality opinion). Apparently, when Parker yelled "stickup," the pawnbroker tried to grab the gun. *Id.* With Parker's finger on the trigger, the gun fired, shooting a fatal shot into the owner. *Id.*

[52] *Id.* at 594 (plurality opinion). The presentence report indicated "that Lockett had committed no major offenses although she had a record of several minor ones as a juvenile and two minor offenses as an adult." *Id.* The judge also knew that Lockett once had a drug problem and that her role in the robbery was small. *Id.* at 594 n.2 (plurality opinion).

[53] *Id.* at 597. The Ohio statute provided that the death penalty was only precluded when:

> considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following [was] established by a preponderance] of the evidence:
>
> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

OHIO REV. CODE ANN. §2929.04(B) (Anderson 1975), codified as amended at OHIO REV. CODE ANN. §2929.04(B)-(C) (Anderson 1987).

Thus, Ohio had not mandated the death penalty upon conviction of a capital

Burger concluded that the law must allow a capital sentencer to give "independent mitigating weight" to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[55] Chief Justice Burger asserted that this rule served to guard against a death sentence imposed in the face of "factors which may call for a less severe penalty."[56] For this reason, Chief Justice Burger concluded that the sentencer must be free to reject the death penalty based on "any aspect"of the offender's character, record, or crime."[57] Thus, *Lockett*

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crime, but it had attempted to guide sentencer discretion within highly restrictive channels. *Lockett,* 438 U.S. at 397 (plurality opinion).

[54] *Id.* at 589 (plurality opinion). With regard to the validity of Lockett's death sentence, Chief Justice Burger was joined by Justices Stewart, Powell, and Stevens. *Id.* Justices Blackmun and Marshall concurred in separate opinions. *Id.* at 613-19 (Blackmun, J., concurring); *id.* at 619-21 (Marshall, J., concurring). Then Justice Rehnquist and Justice White dissented separately. *Id.* at 621-28 (White, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 628-36 (Rehnquist, J., concurring in part and dissenting in part). Justice Brennan did not participate in the consideration or decision of this case. *Id.* at 609.

[55] *Id.* at 604-05 (plurality opinion).

[56] *Id.* at 605 (plurality opinion). To support this conclusion, Chief Justice Burger relied on *Woodson v. North Carolina,* where the Court held that, in order to ensure a "fundamental respect for humanity," capital sentencing procedures require the sentencer to consider the individual characteristics of the offender and the crime. *Id.* at 604 (plurality opinion) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (striking down a mandatory death penalty statute because it did not permit any consideration of "relevant facets . . . of the individual offender or the circumstances of the particular offense . . .")).

[57] *Id.* at 604 (plurality opinion). In vacating the defendant's death sentence for the Ohio death penalty statute's failure to require consideration of mitigating factors, the Chief Justice relied upon *Williams v. Oklahoma,* where Justice Black wrote that "the sentencing judge is authorized, *if not required,* to consider all of the mitigating and aggravating circumstances involved in the crime." *Id.* at 603 (plurality opinion) (emphasis added by the Court) (quoting Williams v. Oklahoma, 358 U.S. 575, 585 (1959)); *see* Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (asserting that the death penalty must not be applied in an arbitrary and capricious manner); *see id.* at 274 (Brennan, J., concurring) (opining that a state disregards human dignity when, absent reason or basis, it imposes punishment in an arbitrary and capricious fashion); McGautha v. California, 402 U.S. 183, 196-208 (1971) (affirming death penalty under state statute allowing sentencing jury untrammeled discretion in its determination). *See also* Miranda B. Strassman, Note: *Mills v. Maryland: The Supreme Court Guarantees the Consideration of Mitigating Circumstances Pursuant to Lockett v. Ohio,* 38 CATH. U. L. REV. 907, 907-12 (1989).

stands for the proposition that a capital-sentencing scheme must provide unhindered access to mitigating evidence to ensure the goal of individualization in sentencing without arbitrary discretion by the court.[58]

While *Lockett* holds that a sentencing authority must be free to consider any mitigating evidence,[59] *Eddings v. Oklahoma*[60] adds that the sentencer is forbidden from refusing such consideration.[61] In *Eddings*, 16 year old Monty Lee Eddings was convicted of first degree murder for killing an Oklahoma Highway Patrolman and subsequently sentenced to death.[62] Oklahoma law required a sentencing authority to consider any aggravating and mitigating factors presented prior to determining punishment.[63] Nevertheless, in imposing capital

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[58] Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion). *See* Eddings v. Oklahoma, 455 U.S. 104, 112-15 (1982) (vacating a death sentence because the trial judge refused as a matter of law to consider in mitigation evidence of the defendant's troubled youth); Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality opinion) (defendant must be given opportunity to rebut information used against him at sentencing). *See also* Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors at Death Sentencing*, 41 HASTINGS L. J. 409, 438-39 (1990); Ellen Fels Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 292-95 (1989); Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317, 319 (1981).

[59] *Locket*, 438 U.S. at 608 (plurality opinion). *See also* Eddings v. Oklahoma, 455 U.S. 104, 113-14, 115 n.10 (1982) (stating "*Lockett* requires the sentencer to listen").

[60] 455 U.S. 104 (1982).

[61] *Id.* at 113-14 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.").

[62] *Id.* at 106. In *Eddings*, the defendant was tried as an adult in an Oklahoma state court. *Id.* A runaway driving his brother's car, Eddings killed an Oklahoma highway patrolman with a shotgun he had taken from his father after the patrolman required him to pull his car to the side of the road. *Id.* at 105-06.

[63] *Id.* at 106. The Oklahoma death penalty statute provides in pertinent part:

> Upon conviction . . . of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. . . . In the sentencing proceeding, evidence may be presented as to *any mitigating circumstances* or as to any of the aggravating circumstances enumerated in this act.

punishment, the trial judge in *Eddings* refused to consider in mitigation evidence of the defendant's unhappy childhood and emotional problems.[64] Finding only one mitigating circumstance,[65] the trial judge held it to be insufficient to outweigh the aggravating circumstances presented by the State.[66]

Writing for the majority,[67] Justice Powell reversed the trial court decision and vacated the defendant's death sentence.[68] The Justice held that the Eighth and Fourteenth Amendments preclude a court from refusing to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[69] Justice Powell further noted that although courts may not exclude mitigating circumstances from sentencing consideration, they still retain discretion in determining the degree of weight to afford to the relevant mitigating evidence.[70]

Id. at 106-07 (citing OKLA. STAT. tit. 21, §701.10 (1980) (emphasis added by the Court)).

[64] *Id.* at 108-09. In imposing the death sentence on Eddings, the trial judge stated that "the Court cannot be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. *Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background.*" *Id.* at 109 (citing Eddings v. State, 616 P.2d 1159, 1169-70 (1980) (emphasis added)).

[65] *Id.* at 109. The trial judge found the mitigating circumstance to be the defendant's youth. *Id.*

[66] *Id.* at 108-09.

[67] *Id.* at 105. Justice Powell was joined by Justices Brennan, Marshall, Stevens and O'Connor. *Id.* In separate opinions, Justices Brennan and O'Connor concurred. *Id.* at 117 (Brennan, J., concurring); *id.* at 117-20 (O'Connor, J., concurring). Chief Justice Burger, joined by Justices White, Blackmun and Rehnquist, dissented. *Id.* at 120-28 (Burger, C.J., dissenting).

[68] *Id.* at 105, 113-17. *See id.* at 113 n.9. ("This Court, by its interpretation of mitigating circumstances, has effectively limited the scope of mitigation and that limitation renders the Oklahoma death penalty statute unconstitutional.") (quoting Petition for Re-Hearing and Supporting Brief in No. C-78-325 at 10).

[69] *Id.* at 110 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)).

[70] *Id.* at 114-15 (1982). In justifying the mandatory inclusion of mitigating evidence at capital sentencing, the *Eddings* Court explained:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to

While *Lockett* and *Eddings* give the defendant the right to introduce mitigating evidence at sentencing, *Zant v. Stephens*[71] gives the prosecution the right to introduce aggravating evidence at sentencing.[72] In *Zant*, a jury convicted the defendant of murder and recommended the death penalty after finding two statutory aggravating factors, the first of which was supported on two grounds.[73]

While the *Zant* defendant's sentence was awaiting appeal, the

> consider, *as a matter of law*, any relevant mitigating evidence . . . . The sentencer . . . on review may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. (emphasis added).

[71] 462 U.S. 862 (1983).

[72] *Id.*

[73] *Id.* at 867. The two statutory factors upon which the jury based its recommendation for the death sentence were enunciated in the Georgia death penalty statute. *Id.* The Georgia statute provided in pertinent part:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, *or* the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> . . . .
>
> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

Id. at 865 n.1 (quoting GA. CODE ANN. §27-2534.1(b)(1)-(9) (Harrison 1978)).

The jury indicated in a written statement that it had found the set of aggravating circumstances described in §27-2534.1(b)(1) & (9), but not those in §27-2534.1(b)(7). *Id.* at 866-67. With respect to §2534.1(b)(1), the jury concluded that both alternatives applied. *Id.* at 867.

Georgia Supreme Court decided *Arnold v. State,*[74] which held that one of the two grounds supporting the first aggravating factor was unconstitutionally vague.[75] When the case reached the Supreme Court of the United States, the majority affirmed the sentence, holding that a sentencer may consider nonstatutory aggravating factors once a statutory aggravating circumstance has been found.[76] Justice Stevens, writing for the majority,[77] explained that because the jury had found one statutory aggravating factor, it could thereafter consider nonstatutory aggravating factors, including subsequently invalidated aggravating factors.[78] In rendering its decision, the Court noted the limitations upon a jury's discretion in considering nonstatutory aggravating factors.[79]

While the jury may not consider aggravating factors which are

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[74] 224 S.E.2d 386, 391-92 (Ga. 1976) (holding that Georgia's death penalty statute provision categorizing a capital defendant's "substantial history of serious assaultive criminal convictions" as an aggravating circumstance to be unconstitutionally vague and written without clear and objective standards to control jury discretion at sentencing) (citations omitted); *see* Coley v. State, 31 S.E.2d 38 (Ga 1944); Furman v. Georgia, 408 U.S. 238 (1971); *see also*, M. Tyus Butler, Comment, *Capital Punishment—Furman v. Georgia and Georgia's Statutory Response*, 24 MERCER L. REV. 891 (1973).

[75] *Zant*, 462 U.S. at 866-87. The alternative ground of the first aggravating factor which the state supreme court struck down was a finding that the defendant had "a substantial history of serious assaultive convictions." *Id.* at 867 (quoting GA. CODE ANN. §27-2534.1(b)(1) (Harrison 1978)).

[76] *Id.* at 885, 892-93.

[77] *Id.* at 864. Chief Justice Burger and Justices Blackmun, Powell and O'Connor joined the majority opinion. *Id.* In a separate opinion, Justice White concurred in part and in the judgment. *Id.* at 89-93 (White, J., concurring). Justice Rehnquist filed a separate opinion, concurring in the judgment. *Id.* at 893-904 (Rehnquist, J., concurring). In a separate opinion, Justice Marshall dissented and was joined by Justice Brennan. *Id.* at 904-18 (Marshall, J., dissenting).

[78] *Id.* at 878, 888-91. Thus, the Court concluded that the jury's consideration of the defendant's "history of serious assaultive criminal convictions" was harmless error. *Id.* at 884-91. In reaching this decision, the Court reasoned that the finding of one statutory aggravating circumstance, namely that "[t]he offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement," warranted the consideration of the defendant's serious criminal history as a nonstatutory aggravating factor. *Id.* at 866, 888-89.

[79] *Id.* at 885. For instance, a jury cannot consider "the race, religion or political affiliation of the defendant" as an aggravating circumstance. *Id.* at 885 (citing Herndon v. Lowry, 301 U.S. 242 (1937) (stating that "[i]f the aggravating circumstances at issue in this case had been invalid for reasons such as these, due process of the law would require that the jury's decision to impose death be set aside.")).

not relevant for purposes of capital sentencing, the Court held in *California v. Brown*[80] that this limitation applies to mitigating factors as well.[81] In *Brown*, Albert Brown was convicted of forcible rape and first-degree murder of 15 year old Susan J.[82] At sentencing, the judge instructed the jury that under California law[83] it may consider and weigh all mitigating and aggravating factors but cautioned the jury not to allow itself to be prejudicially swayed by any mitigating circumstances.[84] In upholding the judge's instruction to limit the jury's sentencing consideration, the United States Supreme Court[85] affirmed the capital defendant's death sentence, noting that the limitation served the useful purpose of excluding potentially arbitrary sentences decided by overly emotional jurors.[86]

In a separate concurring opinion, Justice O'Connor defined the scope of a sentencing authority's power to consider aggravating and

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[80] 479 U.S. 538 (1987).

[81] *Id.* at 542-43.

[82] *Id.* at 539.

[83] *Id.* at 540. The California death penalty statute provides in pertinent part that at sentencing capital defendants may present any evidence "as to any matter relevant to . . . mitigation . . . including, but not limited to, the nature and circumstances of the present offense, . . . and the defendant's character, background, history, mental condition and physical condition." *Id.* (citing CAL. PENAL CODE § 190.3 (West Supp. 1987)).

[84] *Id.* Specifically, the judge advised to jury not to "be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.* (citation omitted).

[85] *Id.* at 539. Writing for the Court, Chief Justice Rehnquist was joined by Justices White, Powell, O'Connor and Scalia. *Id.* In a separate opinion, Justice O'Connor concurred. *Id.* at 544 (O'Connor, J., concurring). Justice Brennan dissented and was joined by Justice Marshall. *Id.* at 547-61 (Brennan, J., dissenting). Justice Stevens joined in Justice Brennan's dissenting opinion with respect to four of the five parts of the dissenting opinion. *Id.* at 547 (Brennan, J., dissenting) (Justice Stevens did not join in Justice Brennan's view that capital punishment constitutes cruel and unusual punishment in violation of the Eighth Amendment in all circumstances.). In a separate opinion, Justice Blackmun dissented and was joined by Justice Marshall. *Id.* at 561-63 (Blackmun, J., dissenting).

[86] *Id.* at 541. ("The Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.") (citing Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972)).

mitigating circumstances.[87] The Justice pointed out that this scope must be limited to the capital defendant's "culpability," including the consideration of his blameworthiness or personal responsibility for the capital crime.[88] The sentencer must therefore evaluate all of the facts surrounding the crime and the capital defendant's participation in that crime.[89]

In 1984, in *Barclay v. Florida*[90] the Supreme Court addressed the relevancy of a defendant's membership in certain organizations to the sentencing phase.[91] The Court held that evidence of a convicted defendant's membership in the Black Liberation Army ("B.L.A.") and racial views could be considered by sentencing authorities where such evidence is related to the crime.[92]

In *Barclay*, Petitioner Elwood Barclay and four other members of the B.L.A. were convicted of killing a white hitchhiker.[93] During the named defendant's sentencing hearing, the sentencing judge found that the crime was committed to further the purpose of the B.L.A., which he determined was "to indiscriminately kill white persons and to start a revolution and a racial war."[94] In affirming the petitioner's sentence

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[87] *Id.* at 545 (O'Connor, J., concurring).

[88] *Id.*

[89] *Id. See* Penry v. Lynaugh, 492 U.S. 302, 328 (1989) ("Rather than creating the risk of unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.'") (citing Franklin v. Lynaugh, 487 U.S. 164, 184 (O'Connor, J., concurring); *Brown*, 479 U.S. at 545 (O'Connor, J., concurring in the judgment)).

[90] 463 U.S. 939 (1983).

[91] *Id.*

[92] *Id.* at 949.

[93] *Id.* at 942.

[94] *Id.* (quoting Barclay v. State, 343 So. 2d 1266, 1267 (Fla. 1977)). A note warning Whites that a revolution was imminent was attached to the victim's body by a knife belonging to one of the attackers. *Id.* at 943. Additionally, two of the defendants made tape recordings describing the murder which were sent to the victim's mother as well as to television and radio stations. *Id.* The jury sentenced one defendant to death and sentenced petitioner Barclay to life imprisonment. *Id.* at 944. Two defendants who had not done the actual killing were sentenced to a prison term of 199 years each. *Id.* at 944 n.1. After receiving a sentencing report, the sentencing judge sentenced Barclay to death because he found that several aggravating factors were present. *Id.*

under Florida law,[95] then Justice Rehnquist held that it was proper for the trial judge to consider the defendant's membership in the Black Liberation Army and his racial animus as aggravating circumstances at

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[95] *Id.* at 958. The Florida death penalty statute provides in pertinent part that the jury is required to:

> deliberate and render an advisory sentence based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and
> (c) Based upon these considerations, whether the defendant should be sentenced to life imprisonment or death.

FLA. STAT. ANN. § 921.141(2) (West Supp. 1983). Furthermore, the trial judge is required to impose the death sentence on the defendant if he finds:

> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

FLA. STAT. ANN. § 921.141(3) (West Supp. 1983). The pertinent statutory aggravating factors include:

> (a) The capital felony was committed by a convict under sentence of imprisonment;
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;
> (c) [The defendant] had knowingly created a great risk of death to many persons;
> (d) [The defendant] had committed the murder while engaged in a kidnapping . . .
> (g) [The defendant] had endeavored to disrupt governmental functions and law enforcement;
> (h) [The murder] had been especially heinous, atrocious, or cruel.

FLA. STAT. ANN. § 921.141(5)(a)-(d) & (g)-(h). The trial judge in *Barclay* found no relevant mitigating factors which merited consideration. *Barclay*, 463 U.S. at 944.

sentencing.[96] Justice Rehnquist further upheld the trial judge's comparison between the racially motivated crime in this case and those which took place in the Nazi Concentration Camps during World War II as an "entirely fitting" manner in which "the moral, factual, and legal judgment of judges and juries" may "play a meaningful role in sentencing."[97] Finding the trial judge's discretion to be "neither irrational nor arbitrary," Justice Rehnquist concluded that the evidence was suitably relevant to the circumstances of the crime.[98]

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[96] Barclay v. Florida, 463 U.S. 939, 950 (1983). Writing for the majority, Justice Rehnquist was joined by Chief Justice Burger and Justices White and O'Connor. *Id.* In a separate opinion, Justice Stevens, joined by Justice Powell, concurred in the judgment. *Id.* at 958-74 (Stevens, J., concurring). Justice Marshall, joined by Justice Brennan, dissented. *Id.* at 974-91 (Marshall, J., dissenting). Justice Blackmun dissented in a separate opinion. *Id.* at 991 (Blackmun, J., dissenting).

In upholding the admission of evidence of defendant's membership and racial animus for consideration at sentencing, Justice Rehnquist explained that "[t]he United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder." *Id.* at 949. *See also id.* at 970 and 970 n.18 (Stevens, J., concurring) (stating "judge's candid exposition of his deeply felt concern about racial crimes . . . does not undermine the legitimacy of the ultimate sentence" because it pertained to the judge's use of his sentencing discretion).

The statutory aggravating factors found by the sentencing judge included (1) that the defendant created a "great risk of death to many persons," (2) the defendant disrupted or hindered "the lawful exercise of any governmental function or the enforcement of the laws," and (3) the murder was "especially heinous, atrocious, or cruel." *Id.* at 949 n.7.

[97] *Id.* at 950. In rendering his decision to impose the death penalty, the trial judge stated the following:

> Because of [my] extensive experience [in the field of criminal law], I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.
>
> My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination.

Id. at 948 n.6.

[98] *Id.* at 949. *See* Zant v. Stephens, 462 U.S. 862, 874 (1983) (holding that "'discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action'") (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion)).

A year later, in *United States v. Abel*,[99] the Court addressed the admissibility of associational evidence when it is relevant to a witness' credibility.[100] In *Abel*, the defendant was being tried for an alleged bank robbery.[101] At trial, the defense offered testimony to show that the defendant was being falsely implicated for the crime.[102] To rebut this testimony, the prosecution attempted to offer testimony that the defendant, the cohort, and the witness were members of the Aryan Brotherhood and that one of the tenets of the organization required them to lie on each other's behalf.[103] In a unanimous opinion by the Court, then Justice Rehnquist allowed evidence of the witness' beliefs and affiliation with the Aryan Brotherhood to impeach the witness for bias.[104] Thus, the Justice concluded that the evidence was sufficiently relevant to show bias.[105]

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[99] 469 U.S. 45 (1984).

[100] *Id.* at 47.

[101] *Id.*

[102] *Id.* The offered testimony was submitted by one of the defendant's accomplices who had told the witness that he "planned to testify that . . . [he] intended to implicate [the defendant] falsely, in order to receive favorable treatment from the Government." *Id.*

[103] *Id.* Specifically, the proffered testimony would indicate that the Aryan Brotherhood was "a secret prison gang that required its members always to deny the existence of the organization and to commit perjury, theft, and murder on each member's behalf." *Id.*

[104] *Id.* at 55-56. The Court admitted the testimony of the cohort for purposes of impeaching the witness under FED. R. EVID. 608(b)(1) which allows the court discretion to admit "specific instances of the conduct of a witness" to prove the witness' "character for truthfulness or untruthfulness" on cross-examination. *Id.* (citing FED. R. EVID. 608 (b)(1)). In applying Rule 608(b)(1) to *Abel*, the Court concluded that "the proffered testimony with respect to [the witness'] membership in the Aryan Brotherhood sufficed to show potential bias in favor of [the defendant]; because of the tenets of the organization described . . . ." *Id.* at 56.

[105] United States v. Abel, 469 U.S. 45, 56 (1984) (opining that "[i]t was enough that such evidence could properly be found admissible to show bias"). In justifying its decision, the Court explained that the testimony of the defendant's and witness' membership in the Aryan Brotherhood was admissible not to assist in the conviction of the defendant for a crime, but rather to impeach the witness' credibility. *Id.* at 49. "For purposes of the law of evidence the jury may be permitted to draw an inference of subscription to the tenets of the organization from membership alone, even though such an inference would not be sufficient to convict beyond a reasonable doubt in a criminal prosecution." *Id.* at 53.

III. DAWSON V. DELAWARE—THE FIRST AMENDMENT DOES NOT ERECT A PER SE BARRIER OVER THE INTRODUCTION OF EVIDENCE OF DEFENDANT'S ASSOCIATIONAL PREFERENCES AT SENTENCING

In 1992, the Supreme Court of the United States decided the case of *Dawson v. Delaware*[106] and emphasized that the First Amendment does not erect "a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[107] The Court concluded, however, that the use at a capital sentencing proceeding of information relating to a defendant's constitutionally protected association with a particular group must be relevant to the circumstances of the crime in order to avoid constitutional censure.[108] Finding in this case that the admission of petitioner's membership in the Aryan Brotherhood[109] was irrelevant to the capital sentencing inquiry, the Court vacated the petitioner's death sentence and remanded the case for further proceedings.[110]

A. CHIEF JUSTICE REHNQUIST REAFFIRMS RESTRICTIONS ON PER

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[106] 112 S.Ct. 1093, 1097 (1992).

[107] *Id.* at 1097. Chief Justice Rehnquist, writing for an 8-1 Court, was joined by Justices White, Powell, O'Connor, Scalia, Kennedy, and Souter. *Id.* Justice Blackmun concurred in a separate opinion . *Id.* at 1099-1100 (Blackmun, J., concurring). Justice Thomas dissented. *Id.* at 1100-05 (Thomas, J., dissenting).

[108] *Id.* For examples of relevant factors which a sentencing authority may consider, see *supra* note 2.

[109] The Aryan Brotherhood is only one of many known prison gangs that have developed in prisons nationwide. Studies completed on the Brotherhood indicate that its tenets are based upon white supremacist beliefs and that it was originally organized in the 1960s to defend its members from racial violence in the prison system but now primarily advocates drug trafficking among prisoners through violent means. *See* United States v. Mills, 704 F.2d 1553, 1555 (1983), *cert. denied*, Mills v. United States, 467 U.S. 1243 (1984)); *see also* JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT, (1983); JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY, (1977).

[110] *Dawson*, 112 S.Ct. at 1097, 1099. The *Dawson* majority stated: "the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding." *Id.* at 1095.

SE BARRIER RULE ON ADMISSIBILITY STANDARDS AT SENTENCING.

Chief Justice Rehnquist rejected the petitioner's contention that consideration of his beliefs and membership in the Aryan Brotherhood at capital sentencing is a violation of his freedom to associate pursuant to the First Amendment.[111] Relying on precedent, the Chief Justice interpreted this contention as an overstatement of the protections under the First Amendment.[112]

Nevertheless, the Court vacated petitioner's death sentence and remanded it for further proceedings.[113] The Court reasoned that the stipulation offered by the prosecution at sentencing was irrelevant to the capital sentencing inquiry.[114] Acknowledging that a sentencing authority is generally free to consider any circumstances in aggravation or in mitigation that are relevant to the capital defendant's character or role in this crime, Chief Justice Rehnquist nevertheless found the

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[111] *Id.* at 1097. On appeal, Petitioner specifically challenged the stipulation which the prosecution submitted at sentencing as irrelevant because it consisted of constitutionally protected activities, notably his beliefs and associational preferences, under the First and Fourteenth Amendments. *Id.* at 1096-97. In response, the prosecution contended that the stipulation was relevant because it dealt with petitioner's character. *Id.* at 1096.

[112] *Id.* at 1096 (citing Payne v. Tennessee, 111 S.Ct. 2597, 2606 (1991) ("the sentencing judge has always been free to consider a wide range of relevant material"); United States v. Abel, 469 U.S. 45 (1984) (holding that the prosecution may impeach a defense witness by proving that the witness and the defendant were both members of the Aryan Brotherhood and that one of the tenets of the gang required them to lie on each other's behalf); Barclay v. Florida, 463 U.S. 939 (1983) (plurality opinion) (holding that the sentencing judge's consideration of the racist motivations of a member of the Black Liberation Army to murder a white hitchhiker did not constitute an abuse of discretion); United States v. Tucker, 404 U.S. 443, 446 (1972) (finding that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"); Williams v. New York, 337 U.S. 241, 245 (1949) (upholding the constitutionality of a state policy that encouraged the sentencing authority "to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities").

[113] Dawson v. Delaware, 112 S.Ct. 1093, 1098-99 (1992).

[114] *Id.* In identifying the constitutional error, the Court pointed specifically to the stipulation explaining the tenets of the California chapter of the Aryan Brotherhood. *Id.* Because Dawson belonged to the Delaware chapter and the prosecution failed to prove that these two chapters shared the same objectives, the Court concluded that the stipulation bore no relation to Dawson and thus could not be considered as an aggravating circumstance at his sentencing proceeding. *Id.*

stipulation to be irrelevant for purposes of sentencing.[115] More specifically, the Court found that the State erred by introducing evidence pertaining to the California chapter of the Aryan Brotherhood rather than of the Delaware chapter to which Dawson belonged.[116] The Court explained that this substitution constituted an error in light of the State's concession that many of these chapters differ in objectives, making the evidence irrelevant to Dawson's sentencing.[117]

Furthermore, the Court opined, even if the Delaware group was racist, both the murder victim and the defendant were white, and therefore, the elements of racial hatred that were present in *Barclay*[118] were not at issue in this case.[119] In a different case, the Court continued, a capital defendant's membership in an organization advocating the killing of any identifiable group could be relevant as to the defendant's dangerousness in the future.[120] However, the Court explained that the prosecution failed to show the relevancy of the defendant's membership in the Aryan Brotherhood with respect to future dangerousness.[121] The effect of this prosecutorial failure was in effect to invite the sentencing jury to draw the adverse inference that the defendant's abstract beliefs tend to prove future dangerousness.[122] Such an inference, the Court concluded, constituted a violation of Dawson's rights under the First Amendment.[123]

Chief Justice Rehnquist similarly rejected the state's justification of the prosecutor's statements regarding Dawson's affiliation with the

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[115] *Id.* at 1097.

[116] *Id.* at 1097-98.

[117] *Id.* at 1098 ("Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was . . . not relevant to help prove any aggravating circumstances.").

[118] 463 U.S. 939 (1983). For a detailed discussion of the *Barclay* case, see *supra* notes 36-41 and accompanying text.

[119] Dawson v. Delaware, 112 S. Ct. 1093, 1098 (1992).

[120] *Id.*

[121] *Id.*

[122] *Id.* at 1097.

[123] *Id.* at 1098.

Aryan Brotherhood to rebut the defendant's mitigating evidence.[124] The Court asserted that while the State has the right to rebut any mitigating evidence presented by the defendant and to offer its own proof, it cannot do so where such evidence merely proves the abstract beliefs of an organization to which the defendant belongs.[125] The Chief Justice concluded that the evidence presented by the state reflected only the gang's abstract beliefs and, without more, could not be viewed as bad character evidence.[126] Accordingly, the Court postulated that the state committed constitutional error by introducing evidence of the abstract beliefs of the Aryan Brotherhood's Delaware chapter to rebut the good character evidence presented by Dawson as a mitigating circumstances.[127]

B. JUSTICE BLACKMUN'S CONCERN FOR THE PRESERVATION OF THE FIRST AMENDMENT.

Justice Blackmun concurred in the judgment, but wrote separately, emphasizing that the court was not requiring that the harmless-error analysis be performed on remand.[128] The Justice noted that such an analysis could result in a "potential[ly] chilling effect" on

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[124] *Id.* at 1098-99.

[125] *Id.* at 1099. The Court further stated: "[T]he Aryan Brotherhood evidence presented in this case cannot be viewed as relevant 'bad' character evidence in its own right." *Id.*

[126] *Id.*

[127] *Id.* at 1098. For instance, Dawson introduced in mitigation evidence of his membership and participation in drug and alcohol rehabilitation programs, his kindness to his family, and his accumulation of good time credits at the prison. *Id.* at 1099. In remanding the case to the state court, the majority noted that it was offering no opinion as to whether the First Amendment violation in this case was harmless error. *Id.*

[128] *Id.* at 1099 (Blackmun, J., concurring). On remand, the Delaware Supreme Court held that the trial court's error in admitting the Aryan Brotherhood evidence during the defendant's capital penalty hearing was not harmless error. Dawson v. Delaware, 608 A.2d 1201, 1205-06 (Del. 1992). In justifying its decision, the state court explained that the prosecution failed to satisfy its burden to prove that the error was harmless beyond a reasonable doubt. *Id.* (citations omitted). For a further discussion of harmless error analysis, *see* Chapman v. California, 386 U.S. 18, 24 (1967) (explaining that a harmless error analysis requires the defendant to satisfy the initial burden of demonstrating error, after which the burden must shift to the State to prove beyond a reasonable doubt that the error was harmless). *See also* Van Arsdell v. State, 524 A.2d 3, 10 (Del. 1987) (asserting that the Delaware Supreme Court has "consistently refused to reverse convictions for errors found to be harmless").

the "consideration of First Amendment activity at sentencing," and that it was an issue best left for the Delaware Supreme Court to decide.[129]

C. Justice Thomas' Call for All Evidence, whether Relevant or Not, to be Allowed at Sentencing

In a vigorous dissent, Justice Thomas proffered that the Aryan Brotherhood evidence presented by the prosecution at sentencing was relevant to rebut the mitigating character evidence offered by the petitioner.[130] The Justice warned that the majority's opinion threatened to distort the evidentiary standards for determining relevance: "a standard easy for defendants to satisfy, but difficult for prosecutors."[131] Justice Thomas argued that, under *Eddings v. Oklahoma*[132] and *Lockett v. Ohio*,[133] a capital defendant may introduce all relevant evidence in mitigation.[134] The Justice pointed out that this rule allows capital defendants to freely introduce proof of abstract beliefs and associational rights as mitigating character evidence.[135] Justice Thomas asserted that the refusal of the Court to allow the same freedom to the prosecution would result in a "double standard."[136] The Justice explained that *all* of the defendant's abstract beliefs and associational preferences must be presented so as not to give

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[129] Dawson v. Delaware, 112 S. Ct. 1093, 1100 (1992) (Blackmun, J., concurring).

[130] *Id.* at 1100 (Thomas, J., dissenting).

[131] *Id.* at 1102 (Thomas, J., dissenting).

[132] 455 U.S. 104 (1982).

[133] 438 U.S. 586 (1978).

[134] *Dawson*, 112 S. Ct. at 1102 (Thomas, J., dissenting) (citing *Eddings*, 455 U.S. at 104; *Lockett*, 438 U.S. at 586 (plurality opinion)).

[135] *Id.* (citing Jordan v. State, 518 So. 2d 1186, 1188 (Miss. 1987); Sivak v. State, 731 P.2d 192, 231 (Idaho Ct. App. 1986); Deputy v. State, 500 A.2d 581, 598 (Del. 1985); Deputy v. Delaware, 480 U.S. 940 (1987); People v. Belmontes, 755 P.2d 310, 340 (1988); Evans v. McCotter, 790 F.2d 1232, 1242, and n.10 (5th Cir. 1986); State v. Beuke, 526 N.E.2d 274, 289 (1988)).

[136] *Dawson*, 112 S. Ct. at 1102-03 (Thomas, J., dissenting). The Justice stated: "I see no way to hold that [Dawson's mitigating character] evidence has relevance, but that Dawson's gang membership does not." *Id.* at 1103 (Thomas, J., dissenting).

the jury a limited perspective of defendant's "overall character."[137]

The Justice first looked to Delaware law to justify the introduction of the Aryan Brotherhood evidence at sentencing.[138] Since Dawson was allowed to introduce evidence as proof of "his good character,"[139] the Justice opined that information relating to his gang membership became a relevant issue at sentencing, because it was directly related to his character.[140] The Justice criticized the majority's reasoning that the evidence relating to the Aryan Brotherhood was irrelevant because it merely established the "abstract beliefs" of the organization.[141] Conversely, Justice Thomas stated that the evidence proved much more, notably that Dawson had engaged in unlawful activities while in prison,[142] and that he posed a future danger to

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[137] *Id.*

[138] *Id.* at 1100 (Thomas, J., dissenting) (quoting DEL.CODE ANN., tit. 11, §4209(d)(1) (1987)). The Justice explained that "after a jury finds a statutory aggravating factor, it may consider 'all relevant evidence in aggravation or mitigation' relating to either the crime or the 'character and propensities' of the defendant." *Id.*

[139] *Id.* at 1100 (Thomas, J., dissenting). Justice Thomas asserted opinion that Dawson failed to describe with any specificity the various organizations in which he participated during his imprisonment at the Delaware correctional facility. *Id.* For instance, the Justice noted that Dawson introduced mitigating evidence of "his membership and participation in various respectable organizations, including the Green Tree Program (described only as a 'drug and alcohol program'), Alcoholics Anonymous (not described at all), and certain therapy and counseling groups (also not described at all)." *Id.* (citation omitted). The Justice further noted that Dawson failed to introduce expert testimony to explain the purposes of these organizations. *Id.*

[140] *Id.* at 1100-01 (Thomas, J., dissenting).

[141] *Id.*

[142] *Id.* at 1101 n.1 (Thomas J., dissenting). In rejecting the Court's reasoning that the Aryan Brotherhood evidence was irrelevant because it did not explain the specific tenets of the Delaware chapter, the one to which Dawson had belonged, the Justice wrote:

> Indeed, in the case of an organization claiming to be part of the Aryan Brotherhood, the jury very well may not have needed even the explanation that the stipulation provided. Courts regularly have noticed that the Aryan Brotherhood is a "singularly vicious prison gang," that it has a "hostility to black inmates," and that it originated "during the prison racial violence of the 1960's."

Id. (quoting United States v. Fountain, 840 F.2d 509, 516 (7th Cir. 1988) (presentation of testimony before grand jury by witness who is later alleged to have committed perjury does not warrant dismissal of indictment unless such crime is proven and will be left for

society, both sufficiently relevant to rebut the character evidence offered by Dawson in mitigation.[143] In justifying this contention, the Justice reasoned that a jury should be allowed to consider *all* of the personal traits of the defendant, whether they are racist or not.[144]

Justice Thomas next chastised the majority's First Amendment analysis and referred to it as "troubling and unnecessary."[145] The Justice accused the majority of ignoring precedent to exclude certain character evidence as protected activities under the First Amendment.[146] The Justice relied upon *Williams v. New York*[147] and *United States v. Tucker*,[148] to argue that this Court has in the past authorized capital sentencing inquiries "easily broad enough to encompass a substantial amount of First Amendment activity."[149] Justice Thomas concluded that if the majority "means that no First

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the grand jury to determine credibility), *cert. denied* Fountain v. United States, 488 U.S. 982 (1988); United States v. Silverstein, 732 F.2d 1338, 1341 (7th Cir. 1984) (admission of evidence that White Aryan Brotherhood is a violent gang that advocates killing) , *cert. denied*, Silverstein v. United States, 469 U.S. 1111 (1985); United States v. Mills, 704 F.2d 1553, 1555 (11th Cir. 1983) (consideration of evidence of white supremacy prison gang based on theory that murder was contracted by the gang), *cert. denied*, Mills v. United States, 467 U.S. 1243 (1984)).

[143] *Id.* at 1101-02 (Thomas, J., dissenting) (citing Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (stating that in capital cases, the sentence imposed must reflect a "reasoned moral response" not only to the circumstances of the crime, but also to the "background" and "character" of the defendant himself)).

[144] *Id.* at 1102 (Thomas, J., dissenting). Justice Thomas explained that even if the Delaware chapter to which Dawson belongs does not advocate killing fellow inmates, as the California chapter does, a jury could still reasonably "infer that its members in one way or another act upon their racial prejudice." *Id.*

[145] *Id.* at 1103 (Thomas, J., dissenting).

[146] *Id.* at 1104 (Thomas, J., dissenting) The Justice declared: "Until today, we have never hinted that the First Amendment limits the aspects of a defendant's character that they may consider." *Id.*

[147] 337 U.S. 241 (1949). The *Williams* court stated a sentencing judge may consider evidence about the defendant's "past life, health, habits, conduct, and mental and moral propensities." *Id.* at 245.

[148] 404 U.S. 443 (1972). The *Tucker* court stated a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information to consider or the source from which it may come." *Id.* at 446.

[149] Dawson v. Delaware, 112 S. Ct. 1093, 1104 (1992) (Thomas, J., dissenting).

Amendment protected activity 'ca[n] be viewed as relevant 'bad' character evidence in its own right', then today's decision represents a dramatic shift in our sentencing jurisprudence."[150]

Finally, Justice Thomas asserted that if the majority was correct in its finding that the Aryan Brotherhood evidence was irrelevant, the majority mistakenly relied upon the First Amendment.[151] The Justice suggested that the Due Process Clause, and not the First Amendment, governs questions regarding the admissibility of evidence.[152] Relying upon *Chambers v. Florida*,[153] the Justice acknowledged that a defendant is entitled to a fair trial, free of "prejudice, passion, excitement, and tyrannical power" under the Due Process Clause.[154] Applying that standard to this case, the Justice pointed out that both the trial court and the state supreme court had concluded that the probative value of the Aryan Brotherhood evidence "outweighed . . . the danger of unfair prejudice"and did not"improperly appeal to the juror's passions and prejudices concerning race, religion, or political affiliation."[155] Therefore, the Justice would have affirmed the decision of the state supreme court under either a First Amendment or a Due Process inquiry.[156]

IV. CONCLUSION

The *Dawson* decision attempts to clarify the permissible scope of evidence that a sentencing authority may consider, giving some weight to the right to associate while respecting the need to evaluate a broad range of evidence during the sentencing phase.[157] In his dissent, Justice Thomas seems to argue that even irrelevant evidence may be

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[150] *Id.* (citation omitted).

[151] *Id.*

[152] *Id.*

[153] 309 U.S. 227 (1940) (sentencer may not under the Due Process Clause consider defendants' coerced confessions to impose death penalty).

[154] Dawson v. Delaware, 112 S. Ct. 1093, 1105 (1992) (Thomas, J., dissenting) (citation omitted).

[155] *Id.* (citations omitted).

[156] *Id.*

[157] *See supra* notes 37-42 and accompanying text.

considered at sentencing if common sense dictates that the evidence *might* provide a useful source of inquiry for the sentencing authority. This narrow approach to reviewing an individual's life is somewhat startling. In essence, the dissenting Justice posits that regardless of whether or not a capital defendant intends to further the unlawful aims of his association, those aims may be considered as aggravating factors at sentencing by virtue of the association itself. Most would agree that white supremacy is, as the Court recognized, reprehensible, and that actions prompted by racial hatred must end. However, the solution cannot entail a complete relinquishment of an individual's First Amendment right to associate.

The Majority takes a less drastic view. Initially, the Court's decision appears to affirm an offender's right to associate freely without fearing increased punishment. Upon closer examination, however, *Dawson* only restricts the admission of associational evidence that is not relevant to an offender's punishment. Associational evidence can be relevant if an organization with which an offender has associated pursues unlawful objectives, and if an offender's crime furthered those unlawful goals. The Court's broad test of allowable associational evidence, thus, gives some consideration to the right to associate while providing the sentencer with ample opportunity to account for the company an offender keeps.