SUPREME COURT OF THE UNITED STATES

No. 91–7580

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

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

[January 25, 1993]

JUSTICE STEVENS, dissenting.

Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence. As JUSTICE THOMAS points out, there is reason to believe that this imperative was routinely violated in the years before the Court first held that capital punishment may violate the Eighth Amendment, when racial discrimination infected the administration of the death penalty "particularly in Southern States, and most particularly in rape cases." *Ante*, at 2. And JUSTICE THOMAS is surely correct that concern about racial discrimination played a significant role in the development of our modern capital sentencing jurisprudence. *Ante*, at 3–7. Where I cannot agree with JUSTICE THOMAS is in the remarkable suggestion that the Court's decision in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), somehow threatens what progress we have made in eliminating racial discrimination and other arbitrary considerations from the capital sentencing determination.

In recent years, the Court's capital punishment cases have erected four important safeguards against arbitrary imposition of the death penalty. First, notwithstanding a minority view that proportionality should play no part in our analysis,[1] we have concluded that death is an impermissible punishment for certain offenses. Specifi-cally, neither

[1]See *Harmelin* v. *Michigan*, 501 U. S. ___ (1991).

the crime of rape nor the kind of unintentional homicide referred to by JUSTICE THOMAS, *ante*, at 7, may now support a death sentence. See *Enmund* v. *Florida*, 458 U. S. 782 (1982); *Coker* v. *Georgia*, 433 U. S. 584 (1977).

Second, as a corollary to the proportionality requirement, the Court has demanded that the States narrow the class of individuals eligible for the death penalty, either through statutory definitions of capital murder, or through statutory specification of aggravating circumstances. This narrowing requirement, like the categorical exclusion of the offense of rape, has significantly minimized the risk of racial bias in the sentencing process.[2] Indeed, as I pointed out in my dissent in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), there is strong empirical evidence that an adequate narrowing of the class of death-eligible offenders would eradicate any significant risk of bias in the imposition of the death penalty.[3]

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[2]As an indication of the difference such narrowing can make, it is worthwhile to note that at the time we decided *Furman* v. *Georgia*, 408 U. S. 238 (1972), in addition to defendants convicted of first-degree murder, almost all defendants convicted of forcible rape, armed robbery, and kidnaping were eligible for the death penalty. See *Walton* v. *Arizona*, 497 U. S. 639, 715 (STEVENS, J., dissenting).

[3]"The Court's decision appears to be based on a fear that the acceptance of McCleskey's claim would sound the death knell for capital punishment in Georgia. If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder `for whites only') and no death penalty at all, the choice mandated by the Constitution would be plain. But the Court's fear is unfounded. One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and

Third, the Court has condemned the use of aggravating factors so vague that they actually enhance the risk that unguided discretion will control the sentencing determination. See, *e.g.*, *Maynard* v. *Cartwright*, 486 U. S. 356 (1988) (invalidating "especially heinous, atrocious, or cruel" aggravating circumstance); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (invalidating "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance). An aggravating factor that invites a judgment as to whether a murder committed by a member of another race is especially "heinous" or "inhuman" may increase, rather than decrease, the chance of arbitrary decisionmaking, by creating room for the influence of personal prejudices. In my view, it is just such aggravating factors, which fail to cabin sentencer discretion in the determination of death-eligibility, that pose the "evident danger" of which JUSTICE THOMAS warns. See *ante*, at 2.

Finally, at the end of the process, when dealing with the narrow class of offenders deemed death-eligible, we insist that the sentencer be permitted to give effect to all relevant mitigating evidence offered by the defendant, in making the final sentencing determination. See, *e.g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978). I have already explained my view that once the class of death-eligible offenders is sufficiently narrowed, consideration of relevant, individual mitigating circumstances in no way compromises the "rationalizing principle," *ante*, at 12, of *Furman* v.

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discriminatory imposition of the death penalty would be significantly decreased, if not eradicated. As JUSTICE BRENNAN has demonstrated in his dissenting opinion, such a restructuring of the sentencing scheme is surely not too high a price to pay." *McCleskey* v. *Kemp*, 481 U. S. 279, 367 (1987) (STEVENS, J., dissenting) (internal citation omitted).

Georgia, 408 U. S. 238 (1972). See *Walton* v. *Arizona*, 497 U. S. 639, 715–719 (STEVENS, J., dissenting). To the contrary, the requirement that sentencing decisions be guided by consideration of relevant mitigating evidence reduces still further the chance that the decision will be based on irrelevant factors such as race. *Lockett* itself illustrates this point. A young black woman,[4] Lockett was sentenced to death because the Ohio statute "did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." 438 U. S., at 597. When such relevant facts are excluded from the sentencing determination, there is more, not less, reason to believe that the sentencer will be left to rely on irrational considerations like racial animus.

I remain committed to our "mitigating" line of precedent, as a critical protection against arbitrary and discriminatory capital sentencing that is fully consonant with the principles of *Furman*. Nothing in JUSTICE THOMAS' opinion explains why the requirement that sentencing decisions be based on *relevant* mitigating evidence, as applied by *Penry*, increases the risk that those decisions will be based on the *irrelevant* factor of race. More specifically, I do not see how permitting full consideration of a defendant's mental retardation and history of childhood abuse, as in *Penry*, or of a defendant's youth, as in this case, in any way increases the risk of race-based or otherwise arbitrary decisionmaking.

JUSTICE SOUTER, in whose dissent I join, has demonstrated that the decision in *Penry* is completely consistent with our capital sentencing jurisprudence. In my view, it is also faithful to the goal of eradicating racial discrimination in capital sentencing, which I

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[4]See Brief for Petitioner in *Lockett* v. *Ohio*, O. T. 1977, No. 76–6997, p. 10.

share with JUSTICE THOMAS.