



Fall 9-1-1989

**SOUTH CAROLINA v. GATHERS 109 S. Ct. 2207,104 L. Ed. 2d 876
(1989) United States Supreme Court**

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Recommended Citation

SOUTH CAROLINA v. GATHERS 109 S. Ct. 2207,104 L. Ed. 2d 876 (1989) United States Supreme Court, 2 Cap. Def. Dig. 5 (1989).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol2/iss1/5>

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waiver of juvenile court jurisdiction in capital cases involving 15 year olds was unacceptable under *Trop. Thompson* still means that Virginia cannot execute 15 year olds unless the General Assembly votes to allow it. However, Justice O'Connor in the cases at bar was not persuaded that a national consensus exists against executing 16 or 17 year olds. Therefore the state legislatures are not required specifically to authorize their execution.

Also *Stanford* establishes the supreme importance of presenting a persuasive, individualized case in mitigation. The entire Court held that some 16 and 17 year old offenders may be so undeveloped that they are not sufficiently blameworthy to warrant the death

penalty. In Virginia, age is a statutorily enumerated mitigating factor. The plurality held that finding lack of moral blameworthiness is the jury's responsibility. Thus the defense must persuade the jury during individual examination that the defendant is not sufficiently blameworthy to impose the death penalty. The dissenters mentioned societal shared blame for the crimes of young offenders with disastrous childhoods. The plurality did not discount the value of such mitigating evidence. It held that all mitigation evidence is for the jury to examine and evaluate.

Summary and analysis by: Kerry D. Lee

SOUTH CAROLINA v. GATHERS
109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989)
United States Supreme Court

In a five to four decision the Supreme Court (Justice Brennan, joined by Justices Marshall, Blackmun, Stevens and White [concurring]), held that a prosecutor's comments pertaining to personal characteristics of the victim made during the sentencing phase of a capital trial were irrelevant to the sentencing decision, and necessitated a new sentencing hearing. Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined. Justice Scalia filed a separate dissent.

FACTS

Demetrius Gathers and several accomplices had been walking through a park when they encountered the victim, Richard Haynes. After Haynes failed to respond to Gathers' attempt to start a conversation, Gathers and his friends beat the victim severely. While the victim was apparently unconscious, Gathers forced an umbrella into the victim's anus causing a perforated rectum. A short time later Gathers returned to the scene, stabbed the victim, and proceeded to search through his belongings in an attempt to find something of value to steal.

Gathers was convicted in the General Sessions Court of Charleston County on the charges of murder and first-degree criminal sexual conduct. He was sentenced to death during the sentencing phase of South Carolina's bifurcated capital trial system. He appealed to the Supreme Court of South Carolina which affirmed his conviction, but reversed the death sentence. In its decision the court cited *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L. Ed. 2d 440 (1987), and held that comments made by the prosecution during its closing arguments deprived Gathers of his Eighth and Fourteenth Amendment rights by allowing the jury to consider evidence that was irrelevant to the sentencing decision. *State v. Gathers*, 295 S.C. 476, 369 S.E.2d 140 (1988). South Carolina petitioned the Supreme Court for certiorari, and in an opinion filed by Justice Brennan the Supreme Court affirmed the reversal of the death sentence.

HOLDING

In the plurality opinion, the Court affirmed the reversal of Gathers' death sentence and restated its holding in *Enmund v. Florida*, that "'for purposes of imposing the death penalty . . . the defendant's punishment must be tailored to his personal responsibility and moral guilt.'" *Gathers*, 109 S. Ct. at 2210, quoting *Enmund v. Florida*, 458 U.S. 782, (1982), 102 S. Ct. 3368, 73 L. Ed. 2d 1140.

ANALYSIS

In *Gathers*, the prosecution's closing arguments encouraged the jury to draw inferences about the victim's personal life from items he had in his possession at the time of his death. In particular, the prosecutor drew elaborate analogies to the victim's character from a laminated prayer and a voter registration card. Both of these items, the Court pointed out, were unlikely to have been seen or read by the accused. In holding that this evidence was irrelevant to the sentencing decision, the Court stated that "the content of the various papers . . . was purely fortuitous, and cannot provide any information relevant to the defendant's moral culpability . . . [and] their content cannot be said to relate directly to the circumstances of the crime." *Id.* at 2211. Although the Court stated that the content of the items was irrelevant, it indicated that the act of searching through the victim's belongings and callously scattering them about, was a proper factor to be considered by the jury. However, because the evidence showed that Gathers had no knowledge of the victim's possessions or background when he made his decision to kill, prosecutorial comment beyond the act itself was improper.

In reaching its decision, the Court relied heavily on its previous holding in *Booth v. Maryland*, 482 U.S. 496 (1987). In *Booth*, the Court held that the use of a victim impact statement during the sentencing phase of a capital trial was improper because it focused on the victim, and on "factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Id.* at 505. Specifically, the victim impact statements in *Booth* were a compilation of the emotional, physical and economic harm which the family suffered as a result of the killing of their parents.

The holding and analysis in *Booth* was also relevant to Gathers' claim that his Eighth and Fourteenth Amendment rights had been violated by allowing the jury to administer arbitrary and capricious punishments. The Court in *Booth* held that the admission of irrelevant evidence, similar to the evidence admitted in *Gathers*, "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 503. The Court reasoned that the admission of such evidence could foster arbitrary findings by: 1) "divert[ing] the jury's attention away from the defendant's background . . . and the circumstances of the crime"; and 2) by the random variations of each family's communicative abilities "in expressing their grief." *Id.* at 505. "[T]here [is no] justification for permitting such a decision [life or death] to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." *Id.* at 506.

The holdings in *Booth* and *Gathers* are somewhat analogous to the holding in *California v. Brown*, 479 U.S. 538, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987). In *Brown*, the Court held that it was permis-

sible to have a jury instruction indicating that the jurors were not to be swayed by sympathy or passion as long as they were still able to consider legitimate mitigating factors. Conversely, in a situation similar to the one in *Gathers* a jury should *not* be swayed or influenced by emotion or sympathy for the victim or victim's family, but instead should focus on the acts and intentions of the defendant.

Upon review the Court concluded that evidence regarding factors about which the accused was unaware and that did not influence his decision to kill were inadmissible during the sentencing phase of a capital trial. Therefore, the Court held that the death sentence must be reversed and the defendant granted a new sentencing hearing. *Gathers* at 2211. It should be noted that Justice White, who filed the dissenting opinion in *Booth*, filed a separate concurring opinion in *Gathers*. Justice White's concurrence was apparently based solely on his refusal to overrule the Court's prior holding in *Booth*. *Id.*

Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined. In the dissent Justice O'Connor argued that the holding of the majority was a broad reading of *Booth* that effectively barred the admission of any evidence pertaining to the victim. *Gathers* at 2212. This assertion is made in spite of the majority's statement that, "Our opinion in *Booth* . . . left open the possibility that the kind of information contained in victim impact statements could be admissible if it related directly to the circumstances of the crime." *Id.* at 2211. Thus, while limiting the type of evidence pertaining to the victim and circumstances under which it is admissible, the majority opinion has *not* totally barred the admission of such evidence.

It should be noted that even prior to the holding in *Gathers*, Virginia law barred prosecutorial commentary on the "harm" the accused's acts caused the victim's family. *Dingus v. Commonwealth*, 153 Va. 846, 149 S.E. 414 (1929). In *Dingus*, the prosecutor stated that if it were not for the act of the defendant, the victim's wife would not be a widow. *Id.* at 850. In reversing the verdict of guilty and remanding for a new trial, the Court in *Dingus* stated, "Whatever liberties are permitted to counsel . . . to appeal for mercy for their clients . . . the prosecutor has no corresponding liberty . . . the Commonwealth does not rely either upon prejudice or sympathy for the enforcement of its laws." *Id.* This bar on prosecutorial commentary is effective, despite the fact that such evidence may be admissible during the guilt phase to prove, for example, that the victim was not the aggressor.

As stated previously, the *Gathers* error occurred during the prosecution's closing arguments offered in the sentencing phase of *Gathers*' trial. Attorneys representing capital defendants in Virginia should consider that the longstanding custom of not objecting to an opponent's closing argument is *not*, as *Gathers* demonstrates, applicable in a capital proceeding. The arguments of the Commonwealth Attorney may also be objectionable on additional grounds. (See, discussion of *Caldwell v. Mississippi* in the summary of *Dugger v. Adams*—[this issue]). Further, capital defense attorneys should recognize that failure to contemporaneously object to the arguments of the Commonwealth Attorney could effectively bar appellate review of potential Constitutional errors.

Summary and analysis by: Thomas Marlowe

DUGGER v. ADAMS
109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989)
United States Supreme Court

FACTS

In 1978 Adams was brought to trial for first-degree murder and the state of Florida sought to impose the death penalty. At voir dire, the trial judge informed the veniremen that their recommendations were not binding on the court: "The Court is not bound by your recommendation. . . . You are merely an advisory group to me in Phase Two. . . . So that this conscience part of it as to whether or not you're going to put the man to death or not, that is not your decision to make. . . ." 109 S. Ct. at 1213. "In addition, the judge interrupted counsel's voir dire on two occasions to repeat that the court, not the jury, was responsible for sentencing, and again instructed the jury to that effect before it began its deliberations. Defense counsel did not object at any point to these instructions." *Id.* Veniremembers ultimately selected for the trial heard the judge's explanation of the law at least once and several heard it more than once. *Id.* On direct appeal and in his initial state and federal motions for habeas relief Adams did not cite these instructions as error on either state or federal grounds.

While Adams was still pursuing his first round of federal habeas appeals, the U.S. Supreme Court decided *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". When his initial habeas motion failed, Adams filed a second motion for postconviction relief in which he challenged, for the first time, the statements of the trial judge on *Caldwell* grounds. Adams, in this second motion, argued that "the

judge's instructions violated the Eighth Amendment by misinforming the jury of its role under Florida law. According to respondent, although the Florida death penalty statute provided that the jury's recommendation was only advisory, the Florida Supreme Court had held that a trial judge could only override the jury's verdict if the facts were "so clear and convincing that virtually no reasonable person could differ." . . . Since the trial judge . . . told the jurors that the sentencing responsibility was solely his and failed to tell them that he could override their verdict only under limited circumstances, respondent argued, the judge misled the jury in violation of *Caldwell*." *Adams*, 109 S. Ct. at 1214, citing *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). The Florida Supreme Court, on grounds that Adams did not raise the argument on direct appeal, refused to address the merits of the *Caldwell* argument, and in a second federal habeas petition the District Court held the *Caldwell* claim to be procedurally barred, and in the alternative, that it was without merit. The Eleventh Circuit reversed, holding that "respondent's *Caldwell* claim was so novel at the time of . . . trial in . . . 1978 and his sentencing and appeal in early 1979 that its legal basis was not reasonably available at that time." *Adams v. Wainwright*, 816 F.2d 1493, 1498 (11th Cir. 1987).

HOLDING

The United States Supreme Court did not decide whether the trial judge's action violated *Caldwell* due to its determination that there was no acceptable excuse for Adams' failure to object to the judge's action at trial and thereby give the Florida court a chance to rule on the matter. As the 11th Circuit decided, there is a recognized excuse for failing to raise claims at trial and so preserve them on