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GRAHAM v. COLLINS 113 S.Ct. 892 (1993)

A rule that generally precludes defendants from taking advantage of post-conviction changes in the law, but allows the State to do so, cannot be reconciled with this Court's duty to administer justice impartially.[14]

Justice Stevens also pointed to an apparent change in the Court's application of the *Strickland* standards for an ineffective assistance of counsel claim: "Strickland makes clear that the merits of an ineffective assistance claim must be 'viewed as of the time of counsel's conduct.'"[15] Stevens argued that this standard should apply to the prejudice prong, as well as to the quality of counsel's performance: "By defining prejudice in terms of the effect of counsel's errors on the outcome of the proceedings, based on the 'totality of the evidence before the judge or jury,' the *Strickland* Court establishes its point of reference firmly at the time of trial or sentencing."[16]

In contrast, the majority opinion maintained that the requirement that counsel's conduct be assessed based at the time of trial did not apply to the prejudice prong because "[prejudice] focuses on the question whether counsel's deficient performance renders the results of the trial unreliable or the proceeding fundamentally unfair."[17] If an open question previously existed as to the timing of the prejudice analysis under *Strickland*, the majority opinion makes it clear that it is the law existing **at the time of review** that is to be considered in determining prejudice.

Now that prejudice under a *Strickland* claim is analyzed in light of changes in the law beneficial only to the State, the need for timely objection at trial is all the more important. After *Fretwell*, even failure to raise a claim that clearly constituted attorney incompetence may not result in relief if the law changes unfavorably. When added to the major hurdle of the *Teague* retroactivity rule, the Court has built an effective roadblock to capital defendants seeking habeas relief.

Summary and Analysis By:
Susan F. Henderson

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14 *Lockhart*, 113 S.Ct. at 852-853 (Stevens, J., dissenting).

15 *Id.* at 849 (quoting *Strickland*, 466 U.S. at 690).

16 *Lockhart*, 113 S.Ct. at 849 (quoting *Strickland*, 466 U.S. at 695 (citation omitted)). Justice Stevens also found that Fretwell's attorney had so fundamentally failed the first prong of the *Strickland* test that Fretwell might be entitled to relief even if he could not show prejudice under the second prong:

> The fact that counsel's performance constituted an abject failure to address the most important legal question at issue in his client's death penalty hearing gives rise, without more, to a powerful presumption of breakdown in the entire adversarial system. . . . In other words, there may be exceptional cases in which counsel's performance falls so grievously far below acceptable standards under *Strickland*'s first prong that it functions as the equivalent of an actual conflict of interest, generating a presumption of prejudice and automatic reversal.

Id. at 851.

17 *Id.* at 844.

GRAHAM v. COLLINS

113 S.Ct. 892 (1993)
United States Supreme Court

FACTS

On May 13, 1981, Gary Graham shot Bobby Grant Lambert to death in the parking lot of a Houston grocery store during the course of a robbery. At trial Graham's mistaken identity defense failed and he was convicted of capital murder. At the sentencing phase, after the state presented evidence that Lambert's murder began a week during which Graham committed a series of violent crimes, Graham attempted to put on evidence in mitigation of his general good character traits, his relative youth, and a positive employment history. Applying the "special questions" scheme of the Texas capital-sentencing statute,[1] the jury sentenced Graham to death. After the Texas Court of Criminal Appeals affirmed the sentence and the state courts rejected Graham's attempts at post-conviction relief, Graham petitioned in federal district court for habeas corpus relief arguing that a jury could not give proper consideration to his mitigating evidence within the confines of the Texas special issues scheme. The district court and the Court of Appeals for the Fifth Circuit denied Graham's petition for

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1 The Texas capital-sentencing statute at the time of Graham's trial required the jury to consider:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased would occur; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Crim. Proc. Code Ann. art. 37.071(b) (Vernon 1981). In order for the death sentence to be imposed the jury was required to unanimously answer all three questions in the affirmative.

The Texas legislature amended the death penalty statute in 1991 in response to *Penry v. Lynaugh*, 492 U.S. 302 (1989). The current law instructs the jury that "it shall consider all evidence . . . including evidence of the defendant's background or character or the circumstances of the offense which militates for or mitigates against the imposition of the death penalty." Tex. Crim. Proc. Code Ann. art. 37.071(d)(1) (Vernon 1993).

relief.[2] While Graham's petition to the United States Supreme Court was pending, the Court decided *Penry v. Lynaugh*,[3] which held that Texas' special issues scheme prevented a jury from giving effect to evidence of child abuse and mental retardation under the facts of that case.

In light of *Penry*, the Supreme Court remanded Graham's case for further consideration, and a divided panel of the Court of Appeals reversed and vacated the death sentence.[4] On rehearing en banc, however, the Fifth Circuit reinstated the sentence, and rejected Graham's claim on the merits, holding that the second special issue concerning future dangerousness adequately encompassed Graham's mitigating evidence of relative youth and good character.[5] The court further noted that the Texas capital-sentencing scheme had been upheld in 1976 in *Jurek v. Texas*,[6] and in order to rule in Graham's favor in this case, the court would have been required to fashion and retroactively apply a new rule in violation of *Teague v. Lane*.[7]

HOLDING

Because this case came before the United States Supreme Court on collateral review, the Court noted that it was required to determine whether the requested relief required the creation of a new constitutional rule.[8] The Court held that Graham's claim was barred by *Teague*, because reasonable jurists in 1984 could have believed that the Texas special issues scheme was constitutional.[9] According to the majority, ruling in Graham's favor would have required the Court to create a "new rule" and retroactively invalidate *Jurek v. Texas*. The Court also held that Graham's case fell outside *Teague*'s two exceptions because (1) it "would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons,"[10] and (2) this case did not involve the announcement of a watershed rule of criminal procedure.[11]

Furthermore, to the extent Graham relied on *Penry v. Lynaugh* in his appeal, the majority ruled that *Penry* was inapplicable to Graham's case. Penry's challenge succeeded because on the facts of that case the jury was incapable of **giving effect** to Penry's mitigating evidence **within the structure of the Texas special issues scheme.** By contrast, the majority found that Graham was fully capable of putting his mitigating evidence before the jury and the jury was able to give it proper effect.[12]

ANALYSIS/APPLICATION IN VIRGINIA

In *Teague v. Lane*, the United States Supreme Court held that a habeas petitioner may not employ a new rule from a case decided after his sentence became final unless the case falls under one of two exceptions.[13] Like most cases involving a *Teague* threshold determination, an analysis of this case requires examination of the law which was available at the time the petitioner's sentence became final.

Graham based his petition for habeas corpus relief on *Penry v. Lynaugh*. *Penry* represented the first major break from *Jurek v. Texas*, which had held that the Texas special issues scheme offered juries adequate opportunity to consider mitigating evidence. Penry claimed that the Texas special issues framework made it impossible for a jury to give mitigating effect to his evidence of child abuse and mental retardation. Such evidence, in fact, operated as an aggravating factor under the special issue of future dangerousness, because his mental retardation meant that Penry was likely to repeat his past behavior. Penry successfully argued to the Court that because his mitigating evidence of mental retardation could not be given effect by the jury and act as a mitigating factor, his sentence violated the Eighth Amendment.

In *Penry*, the Supreme Court was able to rule that its decision did not amount to a new rule because it was dictated by *Lockett v. Ohio*[14] and *Eddings v. Oklahoma*,[15] which both held that a sentencer may not be precluded from considering, and may not refuse to consider, any relevant evidence offered by the defendant as the basis for a sentence less than death.[16] Based on these two cases, a reasonable jurist at the time of Penry's trial would have had to conclude that the Texas sentencing scheme was deficient as applied to Penry. Because the relief sought by Penry was dictated by *Lockett* and *Eddings*, *Teague* therefore presented no obstacle to their application in *Penry*.

Graham's attempt to rely on *Lockett* and *Eddings*, however, failed because the special issues scheme did not foreclose Graham's attempts to have the jury give effect to his evidence. Graham's evidence of relative youth and good character fit within the accepted parameters of the statute. The Court noted in *Graham* that defense counsel had urged the jury to answer "no" to the special issues,[17] and if the jury had believed that the mitigating evidence of good character and relative youth outweighed the possibility of future dangerousness, they could have **given effect** to Graham's evidence by answering "no" to the second special issue.[18]

Because *Lockett* and *Eddings* did not dictate a different result in *Graham*, the Court ruled that his appeal amounted to a facial attack on the former Texas death penalty statute.[19] To extend *Penry* as Graham suggested, by allowing him a special jury instruction on his particular mitigating evidence, the Court stated it would have to violate *Teague* by creating a new rule and retroactively overrule its cases that had approved of the Texas sentencing scheme.

Furthermore, the Court held that the first *Teague* exception did not apply because "the rule Graham seeks 'would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons'."[20] The Court held that the second exception did not apply because the denial of special jury instruction on his mitigating evidence did not diminish the "'likelihood of obtaining an accurate determination' in his sentencing proceeding."[21] The Court reiterated the extremely difficult standard the *Teague* court set for the second exception: "'because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge'."[22]

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2 *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir. 1988). The Fifth Circuit based its denial on *Franklin v. Lynaugh*, 487 U.S. 164 (1988), which held that the Texas special issues scheme did not foreclose a jury from consideration of a clean prison record.

3 492 U.S. 302 (1989).

4 *Graham v. Collins*, 896 F.2d 893 (5th Cir. 1990).

5 *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992)(en banc).

6 428 U.S. 262 (1976).

7 489 U.S. 288 (1989).

8 *Graham v. Collins*, 113 S.Ct. 892, 897 (1993).

9 *Id.* at 898.

10 *Id.* at 903 (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)).

11 *Graham*, 113 S.Ct. at 903.

12 *Id.* at 902.

13 *Teague*, 489 U.S. at 310.

14 438 U.S. 586 (1978).

15 455 U.S. 104 (1982).

16 *Penry*, 402 U.S. at 319.

17 *Graham*, 113 S.Ct. at 902.

18 *Id.*

19 *Id.*

20 *Id.* at 903 (quoting *Saffle v. Parks*, 494 U.S. at 495).

21 *Graham*, 113 S.Ct. at 903 (citing *Butler v. McKellar*, 494 U.S. 407, 416 (1990)).

22 *Graham*, 113 S.Ct. at 903 (quoting *Teague*, 489 U.S. at 313).

Graham clearly demonstrates the powerful role which *Teague* continues to play in the appellate process for capital cases. The Court generally has taken a narrow view of what reasonable jurists at the time of a defendant's trial would have held,[23] and therefore innovative theories of law put forth on collateral review will rarely succeed. There is little defense counsel can do at this point to combat the harshness of *Teague* other than to try and place a claim within the realm of prior precedent. So long as the *Teague* new rule doctrine is in force defendants will be trapped in time, with only the remedies available to them when their sentences became final to rely upon during their appeals.

The other notable aspect of this case is Justice Thomas' concurrence. Echoing Justice Scalia's sentiments in *Walton v. Arizona*,[24] Justice Thomas used his concurrence to argue that the *Lockett-Eddings* line of mitigation cases represent a regression towards the days of less rational sentencing schemes. Justice Thomas examined at great length the history of racially discriminatory practices in the use of the death penalty, and argued that justice and fairness require less and not more discretion on the part of juries in capital cases. Too much discretion, he suggested, would allow racism to infiltrate the sentencer's decision.

Justice Thomas focused much of his attack on *Penry* itself, arguing that the type of leniency which that case allows opens the door to discriminatory practices: "We have consistently recognized that the discretion to accord mercy — even if 'largely motivated by the desire to mitigate' — is indistinguishable from the discretion to impose the death penalty."[25] Justice Thomas sought to uphold rational responses over moral ones, and therefore advocated giving *Eddings* a narrow reading through which it would act more as a rule of evidence than a rule of substantive law.[26] In the end Justice Thomas viewed the *Penry* decision as too big a step away from rationality and argued that it should be overturned.

Summary and Analysis by:
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23 *But see Stringer v. Black*, 112 S.Ct. 1130 (1992) (holding that *Clemons v. Mississippi* was not a "new rule" for *Teague* purposes). In *Stringer*, the Court looked beyond the *Teague* threshold issue in order to effectuate the requirement that the aggravating factors be stated with specificity. *See* case summary of *Stringer*, Capital Defense Digest, Vol. 5, No. 1, p. 11, nn. 84-92 and accompanying text (1992).

24 497 U.S. 639, 661 (1990)(Scalia, J., dissenting). *See* case summary of *Walton*, Capital Defense Digest, Vol. 3, No. 1, p. 5 (1990).

25 *Graham*, 113 S.Ct. at 913 (quoting *Furman*, 408 U.S. at 313-14 (White, J., concurring)).

26 *Graham*, 113 S.Ct. at 910.

RICHMOND v. LEWIS

113 S.Ct. 528 (1992)
United States Supreme Court

FACTS

On August 25, 1973, Bernard Crummet met Rebecca Corella in an Arizona bar where she agreed to perform an act of prostitution with Crummet. The two left the bar and met the petitioner, Willie Lee Richmond, and his girlfriend in the parking lot. Petitioner, Richmond drove the group to Corella's hotel where he indicated to the group that he intended to rob Crummet.

After the encounter between Crummet and Corella concluded, the group again went for a drive. Once outside Tucson, Richmond stopped the car, got out and struck Crummet to the ground. He then threw several large rocks at the deceased, and either Richmond or Corella or both of them proceeded to rob Crummet. Finally, either the petitioner or Corella, whoever was driving, drove the car over Crummet twice and caused his death.

Richmond was convicted of both robbery and first degree murder, with the murder conviction being returned by a general verdict. The trial judge then held the required penalty hearing and found that two statutory aggravating factors existed: that petitioner had a prior felony conviction involving the use or threat of violence on another person and that the petitioner had committed the offense in an especially cruel or depraved manner. The judge sentenced Richmond to death.

Although Richmond unsuccessfully sought state postconviction relief of his specific sentence,[1] the Supreme Court of Arizona eventually held the Arizona death penalty statute unconstitutional because it limited defendants to statutory mitigating factors.[2] Consequently, the Arizona court vacated every pending death sentence, including Richmond's.[3]

At Richmond's resentencing hearing, petitioner's witnesses testified to the fact that Richmond was not the driver of the car and presented evidence of petitioner's rehabilitation in prison. However, the judge sentenced Richmond to death, this time finding three statutory aggravating factors: a prior violent felony, the offense was especially heinous, cruel or depraved, and a prior felony meriting life imprisonment.[4] Once again, the judge did not specifically find that Richmond had been the driver of the car. In addition, the judge found no mitigating circumstances sufficiently substantial to warrant leniency.

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1 *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976). In applying for state postconviction relief, Richmond attached two affidavits by persons who stated that Corella had claimed that she, not the petitioner, had driven the car over the victim. The Supreme Court of Arizona affirmed the conviction and sentence. In affirming the sentence, the court did not reach defendant's vagueness challenge to the "especially heinous, cruel or depraved" factor because it found that his death sentence was supported by another valid statutory aggravating factor and that no mitigating factors applied.

Soon after denial of state relief, federal habeas proceedings took place and the petitioner's conviction was affirmed but the sentence was found invalid. *See State v. Watson*, 120 Ariz. 441, 444-445, 586 P.2d 1253, 1256-57 (1978).

2 *Id.*

3 *Id.*

4 *See* Ariz. Rev. Stat. Ann. §13-703(F).