Capital Punishment and the Rehnquist Court 1986-1994

by

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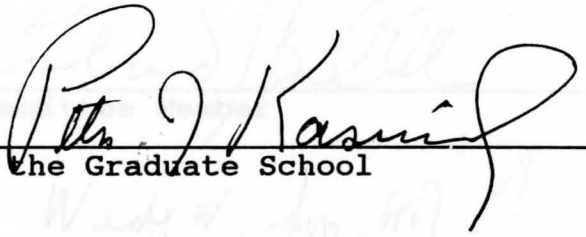

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Abstract

This is a thesis which details the actual cases heard before the Rehnquist Supreme Court from 1986-94. This thesis shows how the Justices voted on the different issues concerning the topic of capital punishment. The conventional wisdom indicates that the Rehnquist Court favors the death penalty. This thesis shows that this Court does indeed support capital punishment, but there are instances when certain issues cause the Justices to vote against the death penalty. This is proved by analyzing the actual opinions handed down by the Court.

Acknowledgement

I want to dedicate this thesis to two special people. First, this is dedicated in the memory of my mother, Sandra, who died in 1992. Well Ma, this is for you. You may not be here physically, but you are with me at all times spiritually.

I also want to dedicate this thesis to my father, Ignatius. Thanks for everything Dee. I hardly say it, but you are the greatest dad. I love you both.

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CHAPTER ONE

Introduction

Need

The United States Supreme Court has an impact on the lives of every American. The Court is powerful because its decisions are final. In essence, the Court has great impact on how our society is molded.

Overall, the Supreme Court annually receives over 5,000 petitions of certiorari from people requesting that their case be heard (Congressional Quarterly, 1990). The Court actually grants oral hearings to about 150 cases per year. Of that number, about 12 cases deal with capital punishment (Savage, 1993). Of these cases, the Justices vote in conference which ones they will accept should be heard for oral arguments. In order for a case to be heard at oral arguments, at least four Justices must vote in favor of it during the conference.

The focus of this thesis is how the Rehnquist Court from 1986 to 1994 views those cases involving the issue of the death sentence. In regarding capital punishment, the death sentences are addressed in both the Eighth and Fourteenth Amendments. The Eighth Amendment states that no, " . . . cruel and unusual punishment inflicted" (United States Constitution, Amendment VIII). Section 1 of the 14th Amendment is also used in capital punishment cases. Section 1 states ". . . nor shall any State deprive any person of

life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws" (United States Constitution, Amendment XIV).

The following are questions to be considered regarding the Court and its decisions on the death penalty: 1) will the confirmation of a Justice who opposes capital punishment shift the balance of the Court; 2) is the current Court already to the point of favoring capital punishment that the appointment of a Justice who opposes it will not make a difference? These two questions are answered in the conclusion of the thesis.

The thesis serves as a focal point to determine if the Court supports capital punishment as it is perceived by academics, lawyers, and the public. Six appointments took place during the 12 years that Ronald Reagan and George Bush held the office of the president. Bill Clinton is the first Democrat since Lyndon Johnson to nominate a Justice to the Court. Johnson, who also tried to reduce crime during his term as president, nominated Thurgood Marshall who opposed capital punishment. It should be noted that Clinton, who also faces a major crime problem, supports capital punishment.

Statistics indicate that crime is a major problem throughout the United States, so it is important to understand how the Supreme Court decides on cases involving capital punishment. The new crime law, which was proposed by Clinton, encourages the imposition of capital punishment for certain offenses.

As of 1992, 2,575 prisoners are on death row throughout the

United States (Greenfeld and Stephan, 1994). During 1992, 265 of these prisoners were sentenced to death with another 117 of them eventually having their sentence overturned (Greenfeld, 1994). Many of these cases eventually find their way to the Supreme Court. There is a need to understand how and why the Court makes its decisions concerning this issue. The finality of the death penalty makes it one of the most controversial issues that faces the Court every year. Thirty-five states have laws imposing capital punishment (Greenfeld, 1994). With the federal government focusing on the reduction of crime, this number will probably increase.

In 1953 there were fewer than 250 inmates on death row. That number began to increase to about 500 in 1972 when the Supreme Court ruled that the death penalty was unconstitutional as then administered. In 1976, the Court upheld the death penalty when the law provided that the courts consider both mitigating and aggravating circumstances. With the beginning of 1980s, the country saw a rise in death penalty sentences during the Reagan and Bush era. In 1981, about 1,000 inmates were on death row. That number continued to climb steadily to about 2,000 by 1986. During the last 13 years, it is apparent that capital punishment is a major issue not only to the criminal justice system, but to society at large (Greenfeld, 1994).

Table 1 Number of Inmates Executed in the United States From 1977 to 1992

YEAR	NUMBER EXECUTED	YEAR	NUMBER EXECUTED
1977	1	1986	18
1979	2	1987	25
1981	1	1988	11
1982	2	1989	16
1983	5	1990	23
1984	21	1991	14
1985	18	1992	31

Source: Greenfeld, 1994

Purpose

The purpose of this study was to analyze the decisions involving death sentences during the Rehnquist Court, in the years 1986-1994. In those years, 11 Justices served on the high court. When Reagan nominated Justice William Rehnquist for the post of Chief Justice in 1986, did Rehnquist bring in a capital punishment era? Will the landmark decisions of the Warren Court erode under the tight control of a Court which presumably favors capital punishment?

During the Rehnquist years, the Court saw the retirement of two Justices, William Brennan and Thurgood Marshall, who both opposed capital punishment. This thesis analyzes the impact of their retirement. Did the Justices, who replaced Brennan and Marshall, David Souter and Clarence Thomas, make a difference when

it came time to hand down decisions involving capital punishment or was the Court already supporting the imposition of capital punishment at the time of Brennan and Marshall's retirement?

Issues

By analyzing the cases of the period, a trend may emerge which shows that the Rehnquist Court does favor capital punishment, but not by that great a margin. Before being appointed to the Court, potential Justices are labeled by the press as either favoring or opposing capital punishment. Many Justices do have personal opinions or ideologies which are formed before they come to the Court. But, over time, some Justices change their stance and ideology while serving on the Court. This thesis attempts to show the change in philosophy of those Justices who have altered their stance on the issue of capital punishment.

Overview

The first chapter introduces the reader to the subject matter and the focus of the thesis. Issues and questions are discussed which are related to the topic of capital punishment.

The second chapter is a profile of the Justices who are a part of the Rehnquist Court and their history and stance on the issue of capital punishment. These brief profiles are provided to give the reader an opportunity to see how each Justice views capital

punishment before actually analyzing each case.

Following the brief summary of the Justices, the third chapter is an analysis of those studies or articles that are relevant to the thesis topic. Law reviews and journals are the primary source of information for the literature review.

The fourth chapter is a review of the landmark cases of the 1970s involving capital punishment. The first case is Furman v. Georgia (1972) which basically nullified all death penalty statutes in the United States. The second case was Gregg v. Georgia (1976) in which the Court ruled that the death sentence for those who committed first degree murder was in itself not cruel and unusual punishment. Interestingly, five Justices on the Rehnquist Court took part in those two landmark decisions.

The fifth chapter is the actual review of those capital punishment cases heard during the Rehnquist Court. The method of analysis will be the review of the actual Court decisions and opinions. By reading the actual decisions handed down, one is able to interpret the meaning of those cases. Also in this chapter are tables which show how each Justice voted.

The sixth chapter is the conclusion which contains an analysis of how each Justice voted. A review is provided on how each Justice ruled on the different issues concerning capital punishment. There is also a discussion of possible trends with any of the Justices. A summary of the thesis also appears in this chapter.

CHAPTER TWO

Profile of Justices

Introduction

This chapter is a brief historical profile of the 13 Justices who have served and/or are currently serving on the Rehnquist Court. In the chart below, the Justices are listed by date of appointment. In the text, the Justices are discussed in alphabetical order with the exception of Chief Justice Rehnquist who is first.

Table 2 Justices Who Have Served on the Rehnquist Court From 1986-1994

Justices	Nominated by	Year
William Rehnquist	Nixon Reagan (C.J)	1971 1986
William Brennan	Eisenhower	1957-90
Byron White	Kennedy	1962-93
Thurgood Marshall	Johnson	1967-91
Harry Blackmun	Nixon	1970-94
Lewis Powell	Nixon	1971-87
John Paul Stevens	Ford	1975
Sandra Day O'Connor	Reagan	1981
Antonin Scalia	Reagan	1986
Anthony Kennedy	Reagan	1988
David Souter	Bush	1990
Clarence Thomas	Bush	1991
Ruth Bader Ginsburg	Clinton	1994

The Justices of the Rehnquist Court

Chief Justice William Rehnquist

Rehnquist became a member of the Court in 1971 when he was nominated by President Richard Nixon. Rehnquist was confirmed by the Senate with a 68-26 vote. In 1986, President Ronald Reagan nominated Rehnquist to the seat of Chief Justice to replace Warren Burger. Rehnquist was once again confirmed by the Senate in a 65-33 vote, but it was the closest vote ever recorded for the position of Chief Justice.

Before becoming a Justice, Rehnquist practiced law in Phoenix, Arizona until 1969 when he became an assistant U.S. attorney general. After graduating from Stanford Law School in 1952, Rehnquist served as a law clerk for Justice Robert H. Jackson in 1952-53. At this time, Rehnquist made his views on capital punishment clear. The young law clerk once wrote a memo to Jackson questioning why the Supreme Court, "must behave like a bunch of old women" when dealing with capital punishment cases (Savage, 1992, p. 34). Law clerks who served for the other Justices said that Rehnquist had no mercy for criminal defendants (Savage, 1992).

Rehnquist's view has not changed since he became part of the Court. The Chief Justice almost always rules in favor of the government in criminal cases (Savage, 1992). He states that the Constitution requires a fair trial, but that is the limit. Once a person is given a fair trial and given "due process of the law" in

court, that the "killer" may be put to death if warranted.

His overall opinion of capital punishment is that it should be decided by the legislatures and the people, not the Supreme Court (Savage, 1992). Rehnquist views those Justices who oppose capital punishment as having a personal agenda in lieu of interpreting the Constitution (Savage, 1992). He believes that, ". . . one is independent not only of public opinion, of the president, and of Congress, but of one's eight colleagues as well" (Rehnquist, 1987).

It should be noted that as Chief Justice, Rehnquist does not switch his vote from the minority to the majority in order to assign the opinion and keep the "liberals" from gaining control (Rohde, Spaeth, 1989). This was a common practice for Rehnquist's predecessor, Burger (Rohde, 1989).

Justice Harry Blackmun

Blackmun was nominated to the Court by Nixon in 1970 and was approved by the Senate in a 94-0 vote. Before joining the Court, the 1932 Harvard University Law School graduate was a judge for the U.S. Court of Appeals for the Eighth Circuit from 1959 to 1970. Blackmun was also the resident counsel for the Mayo Clinic from 1950-1959.

Blackmun retired in 1994, but in those 24 years, his views concerning capital punishment changed. During his confirmation hearing, Blackmun promised to remember the "little people" whose cases are heard at the Court (Savage, 1992). Over the years,

Blackmun usually was "liberal" on cases involving civil rights, free speech, and abortion, but he was not as predictable with criminal cases (Savage, 1992).

In 1994, his last term, Blackmun stated in the case Callins v. Collins, which was denied certiorari, that he could no longer vote in favor of the death penalty. During his retirement announcement, it was stated by Chai Feldblum, a former law clerk for Blackmun, that the retired Justice had evolved into a liberal jurist because of the types of cases he received at the Supreme Court compared to the Court of Appeals (New York Times, 1994).

Blackmun's greatest notoriety did not come in the area of criminal law. He is probably best remembered for his opinion in the case Roe v. Wade (1973) which legalized abortion.

Justice William Brennan

Brennan was nominated to the Court by President Dwight D. Eisenhower in 1956. In January 1957, Brennan was confirmed by a voice vote in the Senate. He retired from the bench in 1990. Before joining the Court, Brennan served as an associate justice on the New Jersey Supreme Court from 1952-1956.

Brennan's view of capital punishment was simple. He thought it was "abominable in any situation, but it was especially so when it was tinged with racism" (Savage, 1992). He believed that to put another human to death was inhumane and unjust (Savage, 1992). Brennan once noted that there were four reasons for his distaste

for capital punishment: 1) capital punishment was the only punishment that requires physical pain, 2) those condemned suffer mental torture, 3) there was often a loss of any right to an appeal, and 4) it was possible that an innocent person might be put to death (Eisler, 1993).

In a tribute to Brennan during his retirement announcement, Thurgood Marshall wrote in the Harvard Law Review that Brennan's greatest commitment to human dignity was in fighting against capital punishment (Marshall, 1990). In the case McGautha v. California (1971), Brennan wrote a 65-page dissent, which is the longest ever, in which he stated that life is very important and it should not be determined whether one lives or not just by the makeup of the Court (Marshall, 1990).

Brennan almost always ruled in favor of death row inmates no matter the facts or precedents involved in the case (Savage, 1992). This at times hurt Brennan when he tried to gather support among the other Justices. During his time on the Court, Brennan issued 1,517 dissents concerning capital punishment cases (Eisler, 1993).

Justice Ruth Bader Ginsburg

Ginsburg became the second woman appointed to the Court when President Bill Clinton nominated her in 1993. The Columbia Law School graduate was a judge of the U.S. Court of Appeals for the District of Columbia from 1980-1993.

At her confirmation hearing, Ginsburg did not disclose her

views concerning capital punishment, but she did reveal in a brief of a case that capital punishment was wrong for those who commit rape (Reuters, 1993).

Justice Anthony Kennedy

Kennedy was Reagan's third choice to replace retired Justice Lewis Powell. After the failed nomination of Robert Bork and the withdrawal of Douglas Ginsburg, Kennedy easily won confirmation by a 97-0 vote. A 1961 graduate of Harvard University Law School, Kennedy was a professor of constitutional law before becoming a judge of the U.S. Court of Appeals for the Ninth Circuit. The Senate Judiciary Committee stated in its report that Kennedy would be "open-minded, fair and independent and will assure continuity on the Supreme Court at this moment of historical transition" (Savage, 1992).

Justice Thurgood Marshall

Marshall became the first African-American to serve on the Court when President Lyndon Johnson nominated him in 1967. Marshall was confirmed by a 69-11 vote in the Senate. A law graduate from Howard University in 1933, Marshall worked for the NAACP as a special counsel from 1936-1950. He became a judge for the U.S. Court of Appeals for the Second Circuit from 1961-1965 before moving on as U.S. solicitor general from 1965-1967.

Until his retirement in 1991, Marshall, like Brennan, fought hard against capital punishment. In almost all capital punishment cases, Marshall ruled in favor of the defendant (Savage, 1992). This view came about from his travels as special counsel for the NAACP.

Marshall opposed capital punishment because in his view it was inherently arbitrary and cruel and that white America was racist (Savage, 1992). Before becoming a Justice, Marshall traveled across the country in the 1940s to represent African-Americans in court for the NAACP. Marshall argued 32 cases before the Supreme Court and had a 29-3 record (Savage, 1992). But, since most of his cases were in the South, he once said that a victory would mean that his client would receive just a life term instead of death (Savage, 1992). Most African-Americans were sentenced to death for petty crimes because of their skin color. Because of this, Marshall had a negative view toward capital punishment. During his years on the Court, Marshall filed more than 250 dissents concerning capital punishment denials of certiorari (Davis, Clark, 1992).

He stated that former Chief Justice Earl Warren wrote in the case Trop v. Dulles (1958) that the Eighth Amendment was not "static" (Woodward, 1979). Marshall also stated that he thought the United States had evolved into a more civilized nation and society. He stated that when the Eighth Amendment was written in 1791, other forms of punishment, such as branding, butchering ears, and flogging were common in this country. Those forms of

punishment changed by "the evolving standards of decency that mark the progress of a maturing society" (Woodward, 1979). After retiring from the Court, Marshall said he was against the death penalty because he did not see how anyone could gain from it (Davis, 1992).

Justice Sandra Day O'Connor

O'Connor became the first female to sit on the Court when Reagan nominated her in 1981. She was confirmed by the Senate by a 99-0 vote. One of O'Connor's classmates while attending Stanford Law School (1952 graduate) was Rehnquist. From 1969-1975, O'Connor held elected office in Arizona as a state senator. She then became judge for Maricopa County Superior Court from 1974-1979 before moving on to the Arizona Court of Appeals from 1979-1981.

O'Connor has a law and order reputation, but can be swayed by a sense of justice and fairness (Savage, 1992). In marginal cases of searches and arrests, O'Connor usually gives the benefit to the government or police officer (Witt, 1986). Of all the Reagan appointees to the Court, O'Connor may be the most indecisive when dealing with the capital punishment cases. O'Connor takes into account that her decision would in some way affect a real person (Savage, 1992). This was best shown during her first term on the Court when she joined those who oppose capital punishment in the case Eddings v. Oklahoma (1981).

The case involved a 16-year old male who killed a police officer and was convicted of first-degree murder and sentenced to death. Certiorari was granted on the basis that the trial judge did not take into account during the sentencing phase the mitigating circumstance concerning Eddings upbringing. In a 5-4 decision, the Court reversed in part the lower court's decision and remanded the case.

In O'Connor's concurring opinion, she stated that a prisoner sentenced to death must be guaranteed the opportunity to have all mitigating circumstances be taken into consideration during the sentencing phase. She went on to state that the sentence should not be " . . . imposed out of whim, passion, prejudice, or mistake" (Eddings v. Oklahoma, 118).

Justice Lewis Powell

Powell served only one term on the Rehnquist Court before retiring in 1987. He was nominated in 1971 by Nixon and was confirmed by an 89-1 vote. Before joining the Court, Powell was president of the American College of Trial Lawyers. Powell usually voted in favor of the death penalty, but was considered the "most moderate of the conservatives" (Witt, 1986).

Capital punishment cases often perplexed Powell (Savage, 1992). He was troubled by the unfairness of the criminal justice system when deciding capital punishment cases. Yet, he stated that

those who are appealing to the Court are not "innocent people, but criminals who deserve to be behind bars" (Savage, 1992, p. 98). Even though his view was that the Constitution clearly allowed for capital punishment, Powell questioned the fact regarding if the sentence could be administered fairly (Savage, 1992).

After he retired, the Harvard Law Review published a commentary by Powell in its March 1989 issue. Powell wrote about the problems of capital punishment. He stated that a majority of our society considers the death sentence appropriate for certain crimes. Powell also wrote that even though former Chief Justice Warren stated in his Trop (1958) opinion "cruel and unusual punishment" was not static, he (Warren) went on to write that "the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty" (Powell, 1989).

Powell also addressed his concern dealing with the multiple and dual collateral reviews by an inmate on death row. The former Justice wrote that he believed that this system was being abused which undermines the deterrent effect of capital punishment (Powell, 1989). Because of this problem, Powell concluded by stating, " . . . perhaps Congress and the state legislatures should take a serious look at whether the retention of punishment that is being enforced only haphazardly is in the public interest" (Powell, 1989, p. 1046).

Justice Antonin Scalia

Scalia was nominated in 1986 by Reagan and won confirmation by a 98-0 vote. Scalia became the first Italian-American appointed to the Court. As a former law professor and judge on the U.S. Court of Appeals for the District of Columbia Circuit, Scalia believed that the job of the Justices is to interpret the law, not look at the individuals in the cases (Savage, 1992). Scalia's goal is to have decisions that are intellectually consistent (Savage, 1992).

Because of this need for intellectual consistency, at times Scalia does not vote with the "conservative bloc." Such the case Texas v. Johnson (1989), which involved the First Amendment rights to a person involved with burning the American flag. Scalia, along with Kennedy, voted with those Justices who believed it was permissible to allow people burn the American flag. The majority stated it was the people's right to free expression (Friedelbaum, 1994). Despite voting in favor of Johnson, Scalia signed on with Brennan's opinion, but did not state his reason (Savage, 1992).

Justice David Souter

Souter was nominated in 1990 by President George Bush and won confirmation by a 90-9 vote. Souter was a judge on the New Hampshire Supreme Court and later moved on to become a judge of the U.S. Court of Appeals for the First Circuit before his confirmation.

At his confirmation hearing, Souter, a graduate of Harvard University Law School in 1966, was asked by Sen. Strom Thurmond how he viewed a limit on appeals from death row inmates. Souter stated that he believed on setting a limit "if counsel can properly be provided at the initial stages, then it is fair and appropriate to place limitations upon the time in which collateral review can be sought" (Confirmation Hearing, 1990).

As part of the confirmation hearing, Joseph D. Grano, professor of law, Wayne State University (Detroit), reviewed 72 New Hampshire Supreme Court decisions by Souter involving criminal justice. Grano concluded that Souter "treats these issues fairly in accordance with applicable precedent" (Confirmation Hearing, 1990). Souter does take a hard stance and does not "reverse criminal conviction lightly" (Confirmation Hearing, 1990). If there was a "harmless error" in the cases, Souter usually let the conviction stand (Confirmation Hearing, 1990).

Justice John Paul Stevens

Stevens was nominated by President Gerald Ford in 1975 and was confirmed by the Senate in a 98-0 vote. Stevens served as a law clerk to Justice Wiley Rutledge from 1947-49. After practicing law in Chicago for over 20 years, Stevens became a judge for the U.S. Court of Appeals for the Seventh Circuit from 1970-1975.

Stevens, who is a graduate from Northwestern University School of Law in 1941, is often the most overlooked Justice on the

Rehnquist Court because he is rarely given the opportunity to write any major opinions (Savage, 1992). Since his early days on the Court, Stevens is considered a "judicial maverick" because of his ever changing views (Friedelbaum, 1994 and Savage, 1992). Each year, Stevens often takes a new perspective to major issues (Savage, 1992). It was written that Stevens, " . . . couples an active intellect with an open judicial mind, characteristic that makes him the least predictable member of the Court." (Witt, 1986, p. 91). Because of this, Stevens is considered the "maverick."

During Stevens' early years on the Court, he usually voted with Potter Stewart, who was considered a moderate. Since Stewart's retirement in 1981, Stevens usually votes with those who oppose capital punishment (Witt, 1986).

Stevens wrote the most separate concurrences and dissents of all the Justices during the Rehnquist years. Because of this, Stevens admits he is often ignored. "The audience that I most frequently address does not always seem to be listening to what I have to say" (Savage, 1992, p. 62). In many criminal cases, Stevens will write a separate opinion.

In an interview in The Yale Law Journal, Stevens stated that punishment for heinous crimes should be handled by legal means instead of at the hands of the citizens (Burris, 1987). Stevens went on to say that he believes the Eighth Amendment is defined by society's "evolving standards of decency" (Burris, 1987). Stevens was also quoted in 1984 as saying, "the Court must be ever mindful of its primary role as the protector of the citizen and not the

warden or the prosecutor. The Framers surely feared the latter more than the former" (Witt, 1986, p. 91).

Justice Clarence Thomas

In a highly publicized confirmation hearing, Thomas became the second African-American to sit on the Court when he was confirmed by the Senate in a 52-48 vote in 1991. Thomas was nominated by Bush. A Yale University Law School graduate in 1974, Thomas was a judge for the U.S. Court of Appeals for the District of Columbia from 1990-91.

The focus of Thomas' confirmation hearing dealt with civil rights and issues involving minorities. During the hearings, Thomas did state that he had an interest in natural law, but as a hobby when interpreting political theory (Biskupic, 1992). He told the senators at the hearing that he planned to eliminate agendas and ideologies (Toobin, 1993).

His first two years on the Court indicates that Thomas favors capital punishment (Toobin, 1993). Toobin also wrote that Thomas has an extreme conservative stance when interpreting the Constitution. This may have come about because of his ordeal during the confirmation hearings. A friend of Thomas' was quoted as saying the hearings affected his behavior on the Court and that he is more deeply hurt than people realize (Toobin, 1993). What has been clear during Thomas' early years on the Court is that he has formed a bloc with Scalia. The two voted together 85.9 percent

of the time during the 1991 term (Toobin, 1993). This was more than any other two Justices who voted together that year.

Justice Byron White

White was nominated by President John F. Kennedy in 1962 and won confirmation by a voice vote in the Senate. A 1946 Yale University Law School graduate, White served as a law clerk for Chief Justice Fred M. Vinson in 1946-47. Before becoming a Justice, White was the U.S. deputy attorney general. White retired from the Court in 1993.

Nominated by a Democratic president, White began to vote more conservative in the 1980s (Savage, 1992). By this time, White began to vote against affirmative action and abortion. Despite this evolution, he always took a hard stance on crime (Savage, 1992). White avoided the philosophical and broader principles of the law. Because he lost two friends, John and Robert Kennedy, to assassins' bullets, White favored laws that imposed an automatic death sentence upon conviction for killing the President or Presidential candidate (Woodward, 1979).

At times, White surprised the brethren and proved to be the "swing vote" as he voted against capital punishment. An example was the case Enmund v. Florida (1981) which he delivered the opinion of the Court in a 5-4 decision. The Court held that it was cruel and unusual punishment to sentence a driver of a getaway car to death after he is convicted of first-degree murder for his role

in a killing he did not commit nor witness. White wrote that juries across the country rejected the death penalty in cases such as this. He went on to state that " . . . robbery is a serious crime deserving serious punishment. It is not, however, a crime `so grievous an affront to humanity that the only adequate response may be the penalty of death'" (Enmund v. Florida, 797).

Summary

This chapter provided a brief biographical sketch of each of the 13 Justices who served on the Rehnquist Court from 1986-94. Each Justice had his or her own opinion for supporting or opposing the death penalty. This chapter also provided some information as to how the Justices developed their beliefs.

CHAPTER THREE

Review of Literature

Robert A. Burt's 1987 article "Disorder in the Court: The Death Penalty and the Constitution" which appeared in the Michigan Law Review detailed how the Supreme Court decided cases involving the death penalty. It started from the Warren Court's decision in the case Witherspoon v. Illinois (1968) to the Rehnquist Court's decision concerning the case McCleskey v. Kemp (1987). Only four to five cases were discussed, but Burt did an excellent job in assessing how each Justice voted. The material was presented in an orderly fashion and provided the reader an opportunity to review how each Justice saw these cases.

He noted that in the case Furman v. Georgia (1972), which found the laws at the time pertaining to capital punishment to be unfair, each Justice in the 5-4 vote wrote a separate opinion. This did not present a united front which ended with the Court upholding some of the new state laws four years later in the case Gregg v. Georgia (1976). Robert Woll, in his 1983 article in the Stanford Law Review, stated that Furman forced state legislatures to amend their current death penalty statutes. The new laws took one of two forms: 1) mandatory death sentence or 2) a standard-like form in which juries or judges must weigh aggravating factors against mitigating factors. Woll also noted that the Court ruled

in favor of those states which adopted the standard-like form instead of a mandatory sentence. James Acker wrote in his 1990 article "Dual and Unusual: Competing Views of Death Penalty Adjudication" which appeared in Criminal Law Bulletin that the Court rejected mandatory punishment for two conditions. The first condition was that the automatic sentence did not allow the sentencer an opportunity to provide any mitigating circumstances. The second condition was that mandatory sentencing did not reduce the chance that the penalty would be imposed arbitrarily.

Acker wrote in another article which was published in 1993 in Law & Society Review, contended the Court's decision from Gregg caused researchers to study the social issues which were relevant to capital punishment. Acker examined how social science played a role in the 28 capital punishment cases the Court heard from 1986 to 1989. He concluded that the Justices did not display a willingness to use social science findings as part of their decisionmaking. Acker noted that the three dominant social issues in the capital punishment cases he studied were: 1) race discrimination, 2) jury matters, and 3) moral development of offenders.

In his 1990 article, Acker analyzed two of the Court's decisions concerning the death penalty from the 1988 term. He pointed out that the Court was divided into two factions concerning this issue: positivist versus normative. A positivist " . . . assumes a minimalist interpretive role" which is essentially judicial restraint (Acker, 1990). Acker stated that this belief

was often associated with the conservative bloc, especially that of Scalia and Kennedy. A normative approach where the Justices who independently determined if the death penalty was excessive.

The only two members of the Court who did not sway from their opinion and belief were Justices William Brennan and Thurgood Marshall. Both voted to invalidate the death penalty in all cases. As Burt explained, this stance often isolated the two. In most instances they refused to grant certiorari because they did not want the Court to make decisions in favor of the death penalty.

Burt stated that he did not foresee any clear conclusion in the near future regarding the issue of capital punishment. He surmised that if a definite change was to occur over this issue, it most likely would have happened prior to the Reagan era. Despite having a "liberal" view under Warren, the Court did not take a clear cut stance on the issue and rule against the penalty. In essence, he concluded with this view, " . . . In conflicts among implacably opposed adversaries, nothing is ever sensibly resolved or learned" (Burt, 1987).

Acker contended that the retirement of Brennan and Marshall caused the Court to have less 5-4 decisions and a more solid majority. In the article "Seed to Root to Branch: Briefwriters' Contributions to Supreme Court Capital Punishment Doctrine" which appeared in Criminal Justice Review the Court did not have any consistency when dealing with jurisprudence concerning capital punishment. Acker made it clear that legal briefs, from that of the Legal Defense Fund, played a role in formulating the Court's

decisions.

Welsh S. White wrote in his book The Death Penalty in the Nineties that "defendants can expect only limited success in the Supreme Court" in the future (White, 1991, p. 24). White stated he did not expect the Court to make any changes in its views pertaining to those cases involving just the legality of capital punishment. In such cases of "limited significance" or relating to other issues, the defendant may have a chance to gain a reversal. White stated it is possible for a defendant to gain the support of a Justice, such as O'Connor or Souter, in cases which involve mitigating circumstances or sentencing procedures.

Raymond Paternoster wrote in his book Capital Punishment in America, which was published in 1991, that the public does not support the death penalty as strongly as opinion polls may indicate. This may lead the Supreme Court to change its views concerning capital punishment especially if an effective alternative is found. Paternoster wrote that a future alternative to the death penalty was that of life without the possibility of parole with restitution (LWOP+R). He stated that the offender would be confined to a maximum security prison, have basic freedoms limited, and be put in a controlled environment. The key was that by not paroling or executing the offender the government would show its abhorrence of murder and respect for life. A drawback to LWOP+R was that the prisons may become even more overcrowded. This could lead to alternative types of corrections for those less serious offenders.

Summary

This chapter detailed other studies that have been completed concerning capital punishment and the Court. The authors of these works wrote about their theories and revelations concerning the Court. Before analyzing the cases which came before the Rehnquist Court, it is important to research other capital punishment cases which set precedents.

CHAPTER FOUR

Past Cases With A Major Impact on Capital Punishment

Introduction

Below are the historical cases reviewed by the Court in the 1970s involving capital punishment. These cases have a major impact on the decisions that the current Rehnquist Court makes. These cases also need to be reviewed briefly because some of the Ju..ices involved in the 1970s cases are now a part of the Rehnquist Court. It should be noted that the voting record is listed by seniority with the Chief Justice always going first. Asterisks next to names indicates he/she wrote the opinion of the Court.

Cases

FURMAN V. GEORGIA

In a 5-4 decision the Furman v. Georgia (1972) ruling was the lead case of three which struck down the death penalty as it was presently imposed. At the time, the Court ruled the death penalty illegal, but did not ban it entirely. As it was presently being imposed, it was considered cruel and unusual punishment which violated the Eighth and 14th Amendment. The ruling spared over 600 inmates on death row in the United States. This proved to be the

longest decision ever written by the Court as there were nine separate opinions which came to a total of 243 pages (Woodward, 1979).

In the majority, Brennan, Douglas, and Marshall regularly voted against capital punishment. All three Justices wanted to abolish the death penalty entirely. Their opinions did not differ from any other capital punishment cases.

The swing votes that proved to be the difference were that of Stewart and White. Both voted in the majority to rule against the current laws. They both believed that the current capital punishment laws were unconstitutional, but they did not want to completely abolish the death penalty. They did not agree with how the current laws were being imposed.

In his opinion, Stewart stated that the death penalty was "so wantonly and so freakishly imposed" and that "[T]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual" (Furman v. Georgia, 238). Stewart did not want to decide if the death penalty should be completely eliminated. Instead he wanted to address the specific state laws (Woodward, 1979). The randomness of how the penalty was administered is what bothered Stewart the most (Woodward, 1979).

White took a different view in his opinion. He did not believe that the death penalty was unconstitutional. He went on to state, "[B]ut the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve" (Furman v.

Georgia, 312). His main point was that the death penalty was used so infrequently that it did not serve as a deterrent. He believed that the death penalty was no longer a "credible threat" to deter crime (Furman v. Georgia, 312).

In the Furman dissent, Burger, revealed that personally he had a different view of capital punishment. He wrote, "[I]f we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall or, at the very least, restrict the use of capital punishment . . ." (Furman v. Georgia, 375). Since Burger was the Chief Justice, and not a legislator, he stated in his opinion that because of Stewart and White's reluctance to completely abolish capital punishment, the case at hand only decided if legislatures are to authorize capital punishment.

Blackmun's opinion was very revealing in that he almost made the ruling 6-3. He stated:

> Cases such as these provided for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated (Furman v. Georgia, 405).

Like Burger, Blackmun wrote, "Were I a legislator, I would vote against the death penalty . . . " (Furman v. Georgia, 406).

Despite his strong personal feelings, Blackmun went on to state that the matter of capital punishment should not be decided by the court, but by the legislature. "Our task here . . . is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences . . . [to] guide our judicial decision . . . " (Furman v. Georgia, 411). Because of this, he ruled in favor of capital punishment.

The crux of Rehnquist's dissent built upon the facts that the Founding Fathers of the country deemed it necessary. He also stated that elected representatives of the people created legislation and that the people of the country did not reject it. Rehnquist believed that the majority decision exceeded the authority of judicial review.

Powell made it clear in the first paragraph of his dissent that the five Justices who voted to strike down the death penalty did so without any "constitutionally adequate foundation" (Furman v. Georgia, 414). He went on to state that the Justices needed to use "judicial restraint" with the Furman decision since the case dealt with legislation. Powell also wrote that the judicial branch of the government should proceed with caution when ruling on legislative matters.

In summation, it was clear that there was not a solid majority involving these cases. In each of the dissenting opinions, there were some talk concerning the right of the judicial branch of the government intruding into legislative issues. Rehnquist and Powell

built their dissent upon this premise. Each felt that the matter of capital punishment should be decided by the people and their representatives, not the Court.

Almost all Justices had different reasons for accepting or rejecting the death penalty. White, Stewart, and Blackmun were not content with how they voted (Woodward, 1979).

Table 3 Voting Record Involving the Case Furman v. Georgia

Against capital punishment	In favor of capital punishment
William O. Douglas	Warren Burger
William Brennan	Harry Blackmun
Potter Stewart	Lewis Powell
Byron White	William Rehnquist
Thurgood Marshall	

Note. - All nine Justices wrote separate opinions.

The 1976 Cases

Four years after the Court ruled against the death penalty, another series of cases came before the Court involving capital punishment. During the ensuing four years, many state legislatures enacted into law different circumstances in which the death penalty could be imposed. Some states created the aggravating/mitigating circumstances. Other states made the death penalty mandatory for certain crimes.

Table 4 Five Cases Involving Capital Punishment From 1976

Gregg v. Georgia - Georgia state law specified that a jury had to find one of ten aggravating circumstances in order to impose the death penalty. The Georgia Supreme Court must then review and agree to the sentence.
Woodson v. North Carolina - The state of North Carolina made a mandatory death sentence for all premeditated murder or murder in the course of committing a felony. In question is whether the death sentence for first-degree murder under North Carolina law violates the Eighth and 14th Amendments.
Roberts v. Louisiana - Louisiana law required the death penalty for all first-degree murder convictions. It did allow a jury to impose a lesser sentence in second-degree murder or manslaughter cases.
Jurek v. Texas - Texas law allowed the death penalty for those convicted of murder in certain situations and where other aggravating factors were present.
Profitt v. Florida - Florida law required a separate sentencing hearing for a person convicted of first-degree murder. The jury must consider eight mitigating factors. The jury's decision could be overruled by the judge, who has final say, or by the state supreme court.

Source: Woodward, 1979

The case Gregg v. Georgia (1976) proved to be the case which made capital punishment once again legal in the United States for first degree murder. In a 7-2 decision, the opinion handed down stated that a sentencing judge or jury must consider the individual character of the offender and the circumstances of the crime before deciding whether to impose the death penalty.

A two-part procedure is required. The first part is to determine the guilt or innocence while the second part determines

the sentence. In the second part, the sentencing phase, the jury or judge must weigh the aggravating circumstances against the mitigating circumstances.

The plurality of the Court also reasoned that capital punishment was excessive under two conditions. The first was if the death sentence involved unnecessary pain. The second condition was if the penalty would be " . . . grossly out of proportion to the severity of the crime" (Gregg v. Georgia, 173).

There were two ends of the spectrum with the key votes in the middle. Brennan and Marshall voted to strike the Georgia law and abolish capital punishment entirely. Brennan stated in his opinion "that the law has progressed to the point where we should declare that the punishment of death . . . is no longer morally tolerable in our civilized society" (U.S. Law Week, 1976). Marshall stated that he abhorred capital punishment because the death penalty was excessive and that a fully informed society would reject it.

On the opposite side were Burger, White, Rehnquist, and Blackmun who voted in favor of capital punishment. Burger and Rehnquist signed on with White's opinion. Blackmun filed a statement concurring in judgment. Despite not writing an opinion, Blackmun once again believed that capital punishment was morally wrong (Woodward, 1979).

Even though White voted to strike the death penalty four years earlier, he stated in his opinion that he did so because death sentences were not being carried out regularly. Since Furman, the state of Georgia formed new legislation which dealt with

aggravating and mitigating circumstances. White was pleased with this inclusion which was a reason he voted to support the death penalty. He stated:

> Mistakes will be made and discrimination will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways on which it achieves the task is through criminal laws against murder" (Gregg v. Georgia, 211).

The swing votes were that of Stewart, Powell, and Stevens. In Furman, Stewart opposed the death penalty while Powell was in favor of it. Stevens was not on the Court at that time. This time, Stewart, Powell, and Stevens announced the judgment and filed an opinion delivered by Stewart in favor of capital punishment by a 7-2 vote. In the opinion, Stewart stated that capital punishment was accepted by the Framers of the Constitution and that capital punishment for the crime of murder was not invalid. He wrote that because of the severity of the crime of murder, capital punishment could be viewed as disproportionate.

In summation, this case saw two Justices, White and Stewart, change their position from the Furman case four years earlier. Both Justices voted against the death penalty in 1972, but four years later they voted in favor of the death sentence. Stewart was surprised that state legislatures across the country imposed new death penalty laws after the Furman decision (Woodward, 1979). Personally, Stewart did not like ruling in capital punishment cases

and he hoped that the Furman case would have ended the petitions to the Court (Woodward, 1979).

White was not surprised by the overwhelming response by the states. He believed that the standards of society were in favor of capital punishment. He was also pleased by the laws requiring juries to consider all mitigating circumstances (Woodward, 1979). These changes led him to vote in favor of capital punishment in Gregg. In both cases, White's opinions were built on that of law and order. In Furman, he questioned the deterrence value of capital punishment while in Gregg he wrote about protecting citizens.

Interestingly, White was originally assigned, by Burger, to write the opinions to all five cases (Woodward, 1979). Stevens, Powell, and Stewart, eventually gained the task after some of the Justices changed their vote. The three justices, known as the "troika," worked as a team in drafting the opinions (Woodward, 1979).

It should also be noted that Powell, who later served on the Rehnquist Court, had some concerns about this capital punishment case. He believed that capital punishment was constitutional, but he feared that by making the death penalty once again legal, there would be a wholesale slaughtering of those inmates sitting on death row (Woodward, 1979). He was in favor of those laws, like Georgia and Florida, which had a mandatory check by the state supreme court (Woodward, 1979).

Table 5 Voting Record Involving the Case Gregg v. Georgia

In favor of capital punishment	Against capital punishment
Warren Burger	William Brennan
Potter Stewart*	Thurgood Marshall
Byron White	
Harry Blackmun	
Lewis Powell	
William Rehnquist	
John Paul Stevens	

Table 6 Voting Record of the Remaining Four Capital Punishment Cases from July 2, 1976

Justices	Profitt v. Florida	Jurek v. Texas	Woodson v. North Car.	Roberts v. Louisiana
Burger	c/favor	c/favor	d/favor	d/favor
Brennan	d/against	d/against	c/against	c/against
Stewart	c/favor	c/favor	c/against	c/against
White	c/favor	c/favor	d/favor	d/favor
Marshall	d/against	d/against	c/against	c/against
Blackmun	c/favor	c/favor	d/favor	d/favor
Powell	c/favor	c/favor	c/against	c/against
Rehnquist	c/favor	c/favor	d/favor	d/favor
Stevens	c/favor	c/favor	c/against	c/against
	7-2, Fla.	7-2, Texas	5-4,Woodson	5-4, Rob.

Note. d - indicates dissent; c - indicates concur against means against death penalty; favor means in favor of death penalty

In these remaining four cases, the "troika" of Powell, Stevens, and Stewart proved to be the deciding votes. In Woodson, Stewart wrote that it was "capricious to treat two different things the same way" (Woodward, 1979). In Furman, Stewart wrote that it was capricious to impose the death sentence randomly. Now he wrote that it was wrong for a mandatory sentence because each defendant was different. Sentencing guidelines were necessary to determine the death penalty (Woodward, 1979). This was basically the same reasoning behind the Roberts case. Powell originally was in favor of the Louisiana law, but later changed his vote after Stewart showed that the facts were similar to that of Woodson (Woodward, 1979).

COKER V. GEORGIA

The 7-2 decision from the Court made it unconstitutional for a person to receive the death penalty for committing the crime of rape. The petitioner, who was serving time for murder, rape, kidnapping and aggravated assault, escaped from a Georgia prison and committed armed robbery and rape of an adult woman. He was convicted of those actions and the jury sentenced him to death after finding two aggravating circumstances. The Court granted certiorari on the claim that the punishment of death for a rape violated the Eighth Amendment.

White, who delivered the opinion for the Court, stated that

the sentence of death for the crime of rape was grossly disproportionate and excessive punishment. White also wrote in the opinion that:

> Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair (Coker v. Georgia, 598).

This part of the opinion drew criticism from Powell who concurred with the judgment but dissented in part.

Powell did not question the plurality's decision in reversing the death sentence. His qualm came with the statements that White wrote about rape itself. Powell wrote that rape is never committed accidental and is usually premeditated. He went on to write, "But there is indeed `extreme variation' in the crime of rape" (Coker v. Georgia, 603). It was obvious that Powell had a different view of rape than did White, but no matter the differences, the fact remained that Powell voted against the death penalty.

Rehnquist signed on with Burger's dissenting opinion which insisted that the Court look at this case by itself instead of the entire issue of rape. Burger wrote that Coker raped three women and killed another within a three year time span. Because of this atrocity, Burger believed that the Court should look at the Coker case only and let the lower court's decision stand. He claimed

that the issue at hand was Coker, not the entire issue of rape.

Table 7 Voting Record Involving the Case Coker v. Georgia

Against capital punishment	In favor of capital punishment
William Brennan	Warren Burger
Potter Stewart	William Rehnquist
Byron White	
Thurgood Marshall	
Harry Blackmun	
Lewis Powell	
John Paul Stevens	

Summary

This chapter detailed previous capital punishment cases which had an impact on the issue of capital punishment. In 1972, the Court ruled against capital punishment because it was unconstitutionally imposed. The Court did stop short of completely abolishing capital punishment. This led to the 1976 rulings in which the Court once again stated capital punishment was legal if certain requirements were met. In 1977, the Court also stated that it was unconstitutional to put someone to death for committing the crime of rape. All these cases set precedents which many decisions during the Rehnquist Court were based.

CHAPTER FIVE

The Capital Punishment Cases Heard By the Rehnquist Court From 1986-94

This chapter details the cases the Rehnquist Court decided from 1986-94. The cases are broken down by each yearly term with two to three cases being the main focus of that term. The remaining capital punishment cases from that term will be summarized in boxes. This is done to make reading easier because of the great number of cases involved in this study. A chart is provided to detail how each Justice voted in each case.

1986-87 Term

The 1986-87 term began the era of the Rehnquist Supreme Court. During this term, the Court and its new Chief Justice heard oral arguments on eight different cases dealing in some way or another with capital punishment. Also joining the Court for his first term was Justice Antonin Scalia.

McCLESKEY V. KEMP

The case involved McCleskey, an African-American, who was convicted of armed robbery and murder of a white police officer and

was sentenced to death. After exhausting all postconviction appeals, McCleskey sought habeas corpus relief in federal court. He claimed his sentence was administered in a racially discriminatory manner which violated his Eighth and 14th Amendment rights. McCleskey supported his claim with the Baldus study which statistically indicated that the death sentence in Georgia was applied with a racial bias. It showed that black defendants who killed white victims had a greater probability to receive the death penalty. The Federal District and 11th Circuit Court of Appeals rejected the petitioner's appeal. The Court ruled 5-4 to affirm the lower court's decision.

Powell, who delivered the opinion of the Court, rejected both of McCleskey's claims that the Georgia capital punishment statute violates the Eighth and 14th Amendments. The only way for McCleskey to prevail was to " . . . prove that the decisionmakers in his case acted with discriminatory purpose" (McCleskey v. Kemp, 292). Powell went on to write that it is insufficient to state that the Baldus study proves that McCleskey's sentence was racially discriminatory.

The Court admitted that the Baldus study showed some type of racial discrepancy, but it was minimal. This discrepancy was part of the criminal justice system. "The discrepancy indicated by the Baldus study is a far cry from the major systemic defects identified in Furman" (McCleskey v. Kemp, 313).

In his dissenting opinion, Blackmun blasted his colleagues on the fact that the plurality did not want to grant relief because it

would lead to more constitutional challenges. Blackmun stated he felt this was not a sufficient reason to deny McCleskey a relief. Blackmun believed a relief in this case might force a greater scrutiny on the entire criminal justice system which might lead to the eradication of discrimination in that system.

Stevens wrote in his dissenting opinion that the Court feared that capital punishment may be abolished in Georgia if it accepted McCleskey's claim. By rejecting McCleskey, the Court sent out a message that it was permissible to have a racially discriminatory death penalty. Stevens stated that a way to rectify the racial problem was to have Georgia ". . . narrow the class of death eligible defendants . . ." (McCleskey v. Kemp, 367).

Table 8 Voting Record Involving the Case McCleskey v. Kemp

In favor of capital punishment	Against capital punishment
William Rehnquist	William Brennan
Byron White	Thurgood Marshall
Lewis Powell*	Harry Blackmun
Sandra Day O'Connor	John Paul Stevens
Antonin Scalia	

TISON V. ARIZONA

Tison v. Arizona (1987) involved the case of the Tison brothers who helped their father and another inmate escape from prison. The brothers armed the two inmates with guns and helped them escape. Later they helped abduct, detain and rob a family of four in the Arizona desert. In the end, the Tison brothers watched their father and the other inmate brutally murder the family with shotguns. Neither brother made an effort to help the victims as they both stated they were surprised by the shooting. The Arizona Supreme Court affirmed the death penalty for the two brothers. The Court voted 5-4 in favor of the death penalty but vacated and remanded the case.

The opinion of the Court was written by O'Connor. She stated that the Eighth Amendment did not consider the death penalty disproportionate for those who participate in a felony which a murder takes place and has a mental state of reckless indifference toward human life. She wrote, "Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this along with intentional murders" (Tison v. Arizona, 157). This is known as the felony-murder doctrine.

In his dissent, Brennan hammered away at the felony-murder doctrine in which he referred to it as ". . . a living fossil from a legal era in which all felonies were punishable by death . . . " (Tison v. Arizona, 159). He went on to write that it was wrong to sentence a defendant to death if that person did not commit the

act. When imposing the death penalty, the courts must look at the defendant's mental state at the time of the incident.

Table 9 Voting Record Involving the Case Tison v. Arizona

In favor of capital punishment	Against capital punishment
William Rehnquist	William Brennan
Byron White	Thurgood Marshall
Lewis Powell	Harry Blackmun
Sandra Day O'Connor*	John Paul Stevens
Antonin Scalia	

BOOTH V. MARYLAND

Booth was found guilty of two counts of first-degree murder and sentenced to death. During the sentencing phase, the state introduced a victim impact statement by the family of the two victims. The victim impact statement provided information on the emotional impact of the families and the personal characteristics of the victims. Booth claimed that the victim impact statement was irrelevant and violated his Eighth Amendment rights. The Maryland Court of Appeals affirmed the conviction. The Court vacated in part the decision and the case was remanded by a 5-4 vote.

In the Court's opinion, written by Powell, it was stated that victim impact statements are "irrelevant to a capital sentencing decision, and that its admission created a constitutionally unacceptable risk that the jury may impose the death penalty in an

arbitrary and capricious manner" (Booth v. Maryland, 503). Powell went on to write that if such statements are permitted, the defendant must be given the opportunity to challenge the victim's character. In this situation, a "mini-trial" would take place concerning the victim's character which would distract from the sentencing phase (Booth v. Maryland, 507).

In her dissent, O'Connor's main focus was that by not allowing victim impact statements, the jury was not hearing the full impact of the crime. She wrote, ". . . just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family" (Booth v. Maryland, 517). She went on to question the Court's contention that a "mini-trial" would arise which would take the focus off the sentencing phase. She stated this was only "speculative and unconnected to the facts of this case" (Booth v. Maryland, 518). O'Connor stated though that a defendant should be given the opportunity to rebut the victim's character.

Table 10 Voting Record Involving the Case Booth v. Maryland

Against Capital Punishment	For Capital Punishment
William Brennan	William Rehnquist
Thurgood Marshall	Byron White
Harry Blackmun	Sandra Day O'Connor
Lewis Powell*	Antonin Scalia
John Paul Stevens	

Table 11 Remaining Five Capital Punishment Cases from the 1986-87 Term

California v. Brown - Brown was found guilty of rape and first-degree murder of a 15-year-old girl. At the sentencing phase, the judge told the jury to consider all mitigating and aggravating circumstances but not to be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." California Supreme Court reversed the death sentence because the judge's remarks denied respondent's right to sympathy factors. The Court reversed and remanded the case because the instruction does not violate the Eighth or Fourteenth Amendment when given during the penalty phase.
Gray v. Mississippi - Gray was sentenced to death but during the jury selection, a prospective juror was not selected because she was uncertain on how she viewed the death penalty. In question is if a court misapplies Witherspoon v. Illinois (1968) and excludes a prospective juror who is qualified to serve, under Davis v. Georgia (1976), the death sentence cannot stand. The Mississippi Supreme Court affirmed the conviction. The Court reversed the case in part and was remanded because Bounds was qualified to serve as a juror under Witherspoon thusly Davis is reaffirmed.
Sumner v. Shuman - While serving a life sentence for murder, Shuman killed another inmate and was sentence to mandatory death. In a habeas corpus appeal, the Federal Court and Ninth Court of Appeals vacated the sentence stating that mandatory capital punishment violated the Eighth and 14th Amendments. The Court affirmed on the same grounds.
Burger v. Kemp - Burger was found guilty of murder and sentenced to death in Georgia. In a habeas corpus appeal, Burger stated he did not receive adequate representation because his lawyer failed to present any mitigating circumstances. This he claimed violated his Sixth Amendment right. The Federal Court and 11th Court of Appeals rejected Burger's claim. The Court affirmed because the lawyer's failure to present mitigating evidence was supported by reasonable professional judgment.

Hitchcock v. Dugger - Hitchcock was found guilty of first-degree murder and sentenced to death. At the sentencing hearing, the judge advised the jury not to consider certain mitigating circumstances. After losing postconviction appeals, Hitchcock filed a habeas corpus petition in Federal Court stating his mitigating circumstances were not considered. Both the District Court and 11th Court of Appeals denied the claim. The Court reversed and remanded the case because the proceedings did not meet the requirement that the jury may neither refuse to consider nor be precluded from considering any mitigating evidence.

Table 12 Voting Record of the Remaining Five Capital Punishment Cases from the 1986-87 Term

Justices	Brown v. Calif.	Gray v. Mississ.	Sumner v. Shuman	Burger v. Kemp	Hitch.v. Dugger
Rehn.	c/favor*	d/favor	d/favor	c/favor	c/agst.
Brennan	d/against	c/against	c/against	d/against	c/agst.
White	c/favor	d/favor	d/favor	c/favor	c/agst.
Marshall	d/against	c/against	c/against	d/against	c/agst.
Blackmun	d/against	c/agst*	c/agst.*	d/against	c/agst.
Powell	c/favor	c/against	c/against	d/against	c/agst.
Stevens	d/against	c/against	c/against	c/favor*	c/agst.
O'Connor	c/favor	d/favor	c/against	c/favor	c/agst.
Scalia	c/favor	d/favor	d/favor	c/favor	c/agst.*
	5-4 Calif	5-4 Gray	6-3Shuman	5-4 Kemp	9-0Hitch

NOTE. (* - delivered the opinion of the Court.)
(d - dissent/c - concur)
(favor - favors death sentence/against - against death sentence)

Summary of Term. The opinions during the first year of the Rehnquist Court were neither in support or against the death penalty. Two of the most significant cases of the term (McCleskey and Tison) went in the favor of those who support capital punishment. But, it should be noted that those who oppose the death penalty did prevail in three cases excluding the case which was unanimously decided. Those Justices who favor capital punishment were Rehnquist, White, and Scalia, and all three voted the same in each of the eight capital punishment cases. O'Connor voted with this bloc except in Shuman. Technically her vote did not matter as Shuman already had a majority with it.

The end of the term marked the retirement of Powell, who proved to be the swing vote in two cases that were decided by 5-4 votes. Even though Powell usually voted in favor of capital punishment, he changed his stance and voted with the Brennan bloc in both the Booth and Gray cases. Overall, of the eight cases the Court heard, Powell voted five times to reject the death sentence. He also voted against the death penalty in the Sumner case which was decided by a 6-3 vote. In looking more closely at the three cases, Powell did not reject the death penalty itself. He rejected the death penalty because it was imposed improperly. In Booth, Powell did not agree with victim impact statements. In Gray he went by the precedent already set in Witherspoon and Davis concerning a jury member. The Sumner case involved the mandatory use of the death sentence which violates the Court's opinions in the 1970s. It is clear that Powell rejected not the death penalty,

but the manner in which it was imposed.

Those Justices who supported the death penalty in all the cases during the term were Brennan, Marshall, and Blackmun. Stevens was also a part of this bloc on seven of the eight decisions. On the one case, Burger, Stevens proved to be the swing vote needed by those in favor of capital punishment in a 5-4 decision. In the opinion of the Court, Stevens wrote that the attorney, Leaphart, did not present any mitigating circumstances or put Burger on the stand because the petitioner never showed any remorse about the crime. Psychologist's testimony shows that Burger may have even "bragged" about the crime (Burger v. Kemp, 791).

1987-88 Term

This Court heard eight cases concerning capital punishment during this term. Three of the eight cases were habeas corpus types of cases. Also, this marked the first term for newly the appointed Justice Anthony Kennedy.

THOMPSON V.OKLAHOMA

Of the eight capital punishment cases the Court heard, this had major implications because it involved whether a 15 year old should receive the death penalty. Thompson was convicted of premeditated murder and sentenced to death for the killing of his brother-in-law, Charles Keene. Thompson made it known on the night

of January 22, 1983 that he and his friends were going to kill Keene because he physically abused Thompson's sister. Thompson was tried as an adult and sentenced to death which the Court of Criminal Appeals of Oklahoma affirmed. The Court ruled 5-3 to vacate and remand the case.

Stevens wrote that one reason the Court voted to vacate the Oklahoma decision was that of the "evolving standards of decency" clause. When reviewing how the other 50 states treat a person under the age of 16, it is near unanimity that a person of this age is considered a minor. The second reason for this decision was that the 18 states that have an established minimum age for the death sentence have set the age at 16 at the time of the offense.

In her concurring opinion, O'Connor rebuffed the plurality opinion by questioning that just because 18 states set an age limit for capital punishment, that does not necessarily mean that there was a national consensus. She brought up the fact that 19 states did not set a minimum age. Personally, she believed there was a national consensus against executing anyone under the age of 16. She questioned the evidence the plurality used to come to this decision. She believed the case should be "set aside on narrower grounds" (Thompson v. Oklahoma, 849).

In his dissent, Scalia wrote that the question raised by this case is "whether there is a national consensus that no criminal so much as one day under 16 . . . can possible be deemed mature and responsible enough to be punished with death for any crime" (Thompson v. Oklahoma, 859). Scalia believed there was not a basis

based on the evidence of the plurality.

Table 13 Voting Record Involving the Case Thompson v. Oklahoma

Against capital punishment	In favor of capital punishment
William Brennan	William Rehnquist
Thurgood Marshall	Byron White
Harry Blackmun	Antonin Scalia
John Paul Stevens*	
Sandra Day O'Connor	

NOTE. - Anthony Kennedy took no part in the case.

MILLS V. MARYLAND

Mills, a prison inmate in Maryland, was convicted of first-degree murder of his cellmate and sentenced to death. The petitioner questioned that the jury's instructions were to impose the death sentence if they unanimously found an aggravating circumstance, but could not unanimously find a mitigating circumstance. The jury did not all agree on the same mitigating circumstance, the sentence would be death. The Maryland Court of Appeals affirmed the sentence. The Court ruled 5-4 to vacate and remand the case.

Blackmun wrote that it is very reasonable that the jury did not fully understand the judge's instructions on completing the verdict form. It is possible they may have thought they were not allowed to consider any mitigating circumstances unless all 12

jurors agreed on that circumstance. Because of this possible confusion, the Court vacated the judgment. In his concurring opinion of three sentences, White said the Court reached the best solution in answering the question raised.

In his dissent, Rehnquist stated that "a reasonable juror could have understood the charge as meaning" (Mills v. Maryland, 390). The reasonable juror standard was employed the last term in the case California v. Brown (1987). He also said that the trial court repeated many times that the determination of sentencing had to be unanimous. Because of the reasonable juror standard and the repeated instructions of being unanimous, Rehnquist wrote that the sentence should be upheld.

Table 14 Voting Record Involving the Case Mills v. Maryland

Against capital punishment	In favor of capital punishment
William Brennan	William Rehnquist
Byron White	Sandra Day O'Connor
Thurgood Marshall	Antonin Scalia
Harry Blackmun*	Anthony Kennedy
John Paul Stevens	

FRANKLIN V. LYNAUGH

The question in this case was whether certain jury instructions were needed in consideration of mitigating evidence that petitioner requested in the sentencing phase. Franklin, who said he was mistakenly identified, was found guilty of the stabbing death of a San Antonio nurse. At the sentencing phase, the trial court submitted two "special issues" to the jury and asked them if they felt beyond a reasonable doubt that: 1) the murder was committed deliberately and 2) petitioner was a continuing threat to society. If the jury answered yes to both questions, Franklin would be sentenced to death. Franklin requested that five "special requested" jury instructions be given so that any mitigating evidence be taken into account and negate the yes answers. The court declined this request. The jury sentenced Franklin to death and the Federal District and Fifth Court of Appeals affirmed. The Court also affirmed by a 6-3 vote.

In the judgment of the Court, White wrote the denial of the petitioner's request for special instructions did not violate the Eighth Amendment and there is no merit that this deprived the jury to consider any "residual doubt." White also denied Franklin's claim that the Texas sentencing procedure denied him the opportunity for the jury to consider any mitigating circumstance.

Concurring in the decision was O'Connor and Blackmun. O'Connor wrote, in which Blackmun joined, that sentencing procedure may have kept the jury from considering any "residual doubt," but overall, that did not violate the Eighth Amendment.

Table 15 Voting Record Involving the Case Franklin v. Lynaugh

In favor of capital punishment	Against capital punishment
William Rehnquist	William Brennan
Byron White*	Thurgood Marshall
Harry Blackmun	John Paul Stevens
Sandra Day O'Connor	
Antonin Scalia	
Anthony Kennedy	

JOHNSON V. MISSISSIPPI

In 1982, Johnson was convicted of the murder of a police officer and sentenced to death. One of the aggravating circumstances during the sentencing phase was the fact that Johnson was convicted and sentenced to prison for second-degree assault with intent to commit first-degree rape in New York in 1963. After the Mississippi Supreme Court upheld Johnson's sentence, the New York Court of Appeals reversed the 1963 conviction. The Mississippi Supreme Court denied Johnson's request for a postconviction relief. The Court ruled 9-0 to reverse and remand the case.

Speaking for the Court, Stevens wrote that the reversal of the conviction does not prove that Johnson was guilty of the crime committed in New York. Hence, since Johnson was not guilty of the crime in New York, the prosecution in Mississippi cannot use that claim as an aggravating circumstance. Also noted in the opinion,

Stevens also wrote that the prosecution's use of the New York conviction during the sentencing phase may have been prejudicial anyway.

Table 16 Remaining Four Capital Punishment Cases from the 1987-88 Term

Lowenfield v. Phelps - Petitioner, Lowenfield, was charged with killing five people and found guilty on three counts of first degree murder. He was sentenced to death. Lowenfield questioned that: 1) the jury was coerced into its decision after having trouble reaching a decision and 2) the aggravating circumstances was the same as the circumstance used during the penalty phase. Louisiana Supreme Court affirmed. Federal Court denied habeas corpus relief and the Fifth Court of Appeals affirmed. The Court also affirmed because the jury was not coerced to return a death sentence.
Satterwhite v. Texas - After being charged with murder, Satterwhite was examined by a court-appointed psychologist to determine his sanity and threat to society. This was all done prior to being represented by counsel. During the sentencing phase, another psychiatrist testified over defense's objection. Petitioner was sentenced to death. Texas Court of Criminal Appeals said psychiatrist's testimony violated Sixth Amendment, but the violation was a harmless error, so they let decision stand. The Court reversed and remanded the case stating the psychiatrist's testimony violated the Sixth Amendment.
Maynard v. Cartwright - Respondent, Cartwright, was found guilty of first-degree murder. During sentencing phase, the jury found two aggravating circumstances, one which was that the murder was "especially heinous, atrocious, or cruel." Oklahoma Court of Appeals affirmed. District Court denied habeas corpus petition but 10th Court of Appeals reversed the sentence because words "heinous," "atrocious," and "cruel" do not instruct the jury to avoid the problems raised during Furman. The Court affirmed because the statutory aggravating circumstance was unconstitutionally vague.

Ross v. Oklahoma - Ross, who is African-American, was found guilty of first-degree murder and sentenced to death. When selecting the jury, trial court denied Ross' motion to remove a juror, Hulig, who said he would vote in favor of the death penalty if Ross was found guilty. Using all of its nine peremptory challenges, the defense did not challenge for cause the 12 jurors who heard the case. After jury selection, trial court rejected Ross' objection that the 12 jurors were all white. Oklahoma Court of Appeals affirmed. The Court affirmed.

Table 17 Voting Record of the Remaining Four Capital Punishment Cases from the 1987-88 Term

Justices	Lowenfield v. Phelps	Satterwhite v. Texas	Maynard v. Cartwright	Ross v. Oklahoma
Rehnquist	c/favor*	c/against	c/against	c/favor*
Brennan	d/against	c/against	c/against	d/against
White	c/favor	c/against	c/against*	c/favor
Marshall	d/against	c/against	c/against	d/against
Blackmun	c/favor	c/against	c/against	d/against
Stevens	c/favor	c/against	c/against	d/against
O'Connor	c/favor	c/against*	c/against	c/favor
Scalia	c/favor	c/against	c/against	c/favor
Kennedy	no vote	c/against	c/against	c/favor
	6-2, Phelps	9-0,Sttwht.	9-0, Cartw.	5-4, Okla.

Summary of Term. This term was a revealing judicial year. Of the eight cases the court heard, three cases were decided by 9-0 decisions in which the Court ruled against the death penalty. It

should be noted that those Justices who usually voted in favor of capital punishment, such as Rehnquist, Scalia, O'Connor, Kennedy, and White, relented and voted against the death penalty in each of these three cases.

Those who support capital punishment were part of the majority in three of the remaining five cases, but suffered defeats in two of the most prominent cases of the term, Thompson and Mills. In both cases, those Justices against capital punishment gained the swing votes from O'Connor and White.

1988-89 Term

This term saw only five cases dealing with capital punishment, but two of those cases had major implications. One case dealt with the legality of imposing the death sentence on a person under the age of 18. The other case dealt with whether it was cruel and unusual punishment to sentence a mentally retarded person to death.

STANFORD V. KENTUCKY

Because of its similarity, the case Wilkins v. Missouri (1989) was also read together with the Stanford v. Kentucky (1989) decision. The question in both cases was whether it was cruel and unusual punishment to sentence someone at the age of 16- or 17-years old to death whether it be at the time of the crime or when the execution was to take place.

In the Stanford case the petitioner, who was 17 years and 4 months old at the time of the incident, was charged with raping and murdering a female gas station attendant. After conducting hearings, the juvenile court ruled that he stand trial as an adult. He was convicted and sentenced to death. The State Supreme Court affirmed the sentence.

In the Wilkins case, the petitioner was charged with first-degree murder, armed robbery and carrying a concealed weapon. Wilkins repeatedly stabbed a convenience store clerk when he was 16 years and 6 months old. He was sentenced to death and the State Supreme Court upheld the sentence.

In both cases, the Court affirmed the lower court's decision and upheld the death penalty by a 5-4 vote.

In his opinion for the Court, Scalia wrote, that in order to determine if a punishment was cruel and unusual, one must prove that it was at the time the Bill of Rights was adopted. The petitioners also argued that this type of punishment goes against the "evolving standards of decency." Scalia rejected this claim by writing that the pattern of state and federal laws showed that only 15 of the 37 states which had capital punishment declined to impose it on a 16-year old. He went on to write that only 12 of the 37 states refused to impose it on a 17-year old.

O'Connor filed an opinion which concurred in part and concurred in judgement. Her one objection to the plurality's opinion was that the Court has a constitutional obligation " . . . [to] judge whether the nexus between the punishment imposed and the

defendant's blameworthiness is proportional" (492 U.S. 382). She stated that the Court has this obligation to conduct a proportional analysis.

In his dissent, Brennan stated clearly that there may be evidence that the execution of a juvenile violates contemporary standards of decency because a majority of states do not even allow for juveniles to be sentenced to death. Brennan also stated that he does not believe that the execution of a juvenile contributes to deterrence.

Table 18 The Voting Record Involving the Case Stanford v. Kentucky

In favor of capital punishment	Against capital punishment
William Rehnquist	William Brennan
Byron White	Thurgood Marshall
Sandra Day O'Connor	Harry Blackmun
Antonin Scalia*	John Paul Stevens
Anthony Kennedy	

PENRY V. LYNAUGH

The petitioner, Johnny Paul Penry, was charged with capital murder in Texas. The court found him competent to stand trial despite being mildly to moderately retarded with a mental age of 6 and a half years old. Two questions were raised in this case. The first is whether Penry's sentence violated the Eighth Amendment because the jury was not instructed to consider mitigating

evidence. The second issue was whether the Eighth Amendment prohibits the execution of someone mentally retarded.

Involving this first issue, O'Connor wrote that the jury was not able to consider as mitigating evidence the mental retardation and child abuse suffered by Penry. Thusly, the instructions given to the jury prohibited them to consider mitigation evidence.

In the second issue, in a 5-4 decision, the Court rejected Penry's claim that the Eighth Amendment prohibits the execution of the mentally retarded. O'Connor wrote that the common law prohibits against punishing those people who are labeled "idiots" and "lunatics" and are unable to understand and distinguish between good and evil. Penry did not meet these requirements since he was found competent to stand trial. The case Ford v. Wainwright (1986) prohibits the execution of those who are insane, but Penry was not considered insane. O'Connor concluded that at the time of the case, there was not a national consensus against the execution of a person such as Penry. This caused for a rejection in the "evolving standards of decency" claim.

Table 19 Remaining Three Capital Punishment Cases from 1988-89 Term

South Carolina v. Gathers - Gathers was convicted and sentenced to death for the killing of Richard Haynes. During the sentencing phase, the prosecutor read to the jury from a religious tract found on the possession of Haynes and commented on Haynes' personal qualities such as his voter registration card. The South Carolina Supreme Court reversed the death sentence because the prosecutor's comments were unnecessary and conveyed the message that Gathers deserved the death sentence. The Court affirmed because the personal characteristics were irrelevant to the decision to kill. The card and papers were purely fortuitous.
Dugger v. Adams - Adams was charged with the first degree murder of an eight year old girl. During jury selection, trial judge instructed prospective jurors that they could only recommend a sentence, but court would make the actual sentence. Adams appealed stating that the jury was misinformed. Florida Supreme Court refused to address the claim and District Court stated claim was procedurally barred. The 11th Court of Appeals reversed stating instructions violated Eighth Amendment. The Court reversed the decision because Adams did not question then at trial or challenge them during appeal.
Murray v. Giarratano - Respondents, headed by Giarratano, were indigent death row inmates in Virginia. They claimed that they must be provided counsel at the state's expense for the purpose of pursuing collateral proceedings. The District Court and Fourth Court of Appeals ruled in favor of the inmates. The Appeals Court stated that because these inmates were on death row, the state must develop a program for those indigent death row inmates to pursue appeals. The Court reversed the lower court's decision and remanded the case.

Table 20 Voting Record of the Remaining Three Capital Punishment Cases from the 1988-89 Term

Justices	S. Carolina v. Gathers	Dugger v. Adams	Murray v. Giarratano
Rehnquist	d/favor	c/favor	c/favor*
Brennan	c/against*	d/against	d/against
White	c/against	c/favor*	c/favor
Marshall	c/against	d/against	d/against
Blackmun	c/against	d/against	d/against
Stevens	c/against	d/against	d/against
O'Connor	d/favor	c/favor	c/favor
Scalia	d/favor	c/favor	c/favor
Kennedy	d/favor	c/favor	c/favor
	5-4, Gathers	5-4, Dugger	5-4, Murray

Summary of Term. Overall, this term went well for those who supported capital punishment. The two major cases of the term, Stanford and Penry, went in their favor. The voting pattern was similar to what was expected where those Justices who favor the death penalty voted that way. The only break in this pattern took place in the Gathers case where White voted with Brennan. In his opinion, White stated that unless Booth v. Maryland (1987) is overturned, he had to vote with Brennan involving this case.

1989-90 Term

During the eight years of this study, the Justices heard more cases, nine, than of any other term. This also began Brennan's last term on the Court.

WHITMORE, SIMMONS V. ARKANSAS

This case determined whether a third party, who has standing, can challenge the death sentence imposed on a defendant who has decided to forgo his/her right to appeal. Ronald Simmons was convicted and sentenced to death of multiple murder charges. After his trial, Simmons waived his right to appeal to the state Supreme Court in Arkansas. It was judicially determined that Simmons knowingly and intelligently waived his right. Whitmore, who was also a death-row inmate tried to intervene by stating that the Eighth Amendment granted both he and Simmons certain rights to an appeal. Whitmore also stated that he was Simmons' "next friend" and wanted Simmons to have an appeal. The state Supreme Court denied Whitmore's claim stating that he lacked standing. The U.S. Supreme Court heard this case on the ground that a third party who has standing can challenge the validity of the death sentence imposed on a defendant who elected to forgo his/her right to an appeal. The Court ruled 7-2 against Whitmore to grant certiorari.

Writing for the majority, Rehnquist stated that the Court denied Whitmore's claim of standing on the grounds established under Article III. The Court also denied the "next friend" claim

on the basis that a "next friend" can only be used when the defendant is of mental incompetence or other disability or if the "next friend" has some major relationship with the party.

In his dissent, Marshall wrote that the Court did not focus on the correct issue pertaining to this case. He stated that the Court decided on the issue of standing instead of addressing the constitutional claim of whether a state must provide automatic review despite a defendant's choice to waive such appeal.

Table 21 Voting Record Involving the case Whitmore v. Arkansas

In favor of capital punishment	Against capital punishment
William Rehnquist*	William Brennan
Byron White	Thurgood Marshall
Harry Blackmun	
John Paul Stevens	
Sandra Day O'Connor	
Antonin Scalia	
Anthony Kennedy	

CLEMONS V. MISSISSIPPI

During the sentencing hearing for Chandler Clemons, who was found guilty of murder, the judge instructed the jury to consider two aggravating circumstances: 1) that the murder took place during a robbery and 2) that it was "especially heinous, atrocious or cruel killing" if Clemons was to be sentenced to death. The jury

voted for the death penalty and the state Supreme Court affirmed. Even though the state Supreme Court affirmed, it did acknowledge that the words "especially heinous" were constitutionally invalid, but it still upheld the sentence because it believed the jury's decision would have been the same no matter if the words were excluded. The Court voted 9-0 to remand the case because it was unclear whether the state Supreme Court reweighed the case correctly.

Speaking for the Court, White stated that there was no evidence that the Mississippi Supreme Court correctly reweighed the case ". . . by disregarding entirely the `especially heinous' factor and weighing only the remaining aggravating circumstance against the mitigating evidence, or by including in the balance the `especially heinous' factor as narrowed by its proper decisions and embraced in this case" (Clemons v. Mississippi, 751).

In summary, the Court stated that an appellate court may reweigh aggravating and mitigating circumstances which are questioned because of a technicality.

Brennan, Blackmun, Stevens, and Marshall all concurred with the decision to vacate the decision and remand the case. But, the four justices did not agree with the Court's ruling that it is permissible to reweigh a case.

WALTON V. ARIZONA

Jeffrey Walton was found guilty of first-degree murder in Arizona and sentenced to death in a separate hearing by the judge. The judge in the case found the presence of two aggravating circumstances, the crime was committed "in an especially heinous, cruel, or depraved manner" and it was committed for pecuniary gain. The judge also believed there was no mitigating circumstance to call for leniency. The State Supreme Court affirmed the decision. In his appeal to the U.S. Supreme Court, Walton questioned the validity of Arizona's system of determining the death sentence. In a 5-4 ruling, the Court affirmed the lower court's decision and stated that Arizona's death sentence procedure was valid.

In the opinion of the Court, White stated that Arizona's law does not require the death penalty if the judge finds any aggravating circumstances. He also said that Arizona sufficiently defines the terms pertaining to the phrase, "especially heinous . . . " hence it does not violate the Eighth or Fourteenth Amendments.

In dissent, Blackmun wrote that the Eighth Amendment was violated twice in that it is wrong for the sentencer (judge) to consider all the mitigating circumstances which are proved by only a preponderance of evidence. The second violation is that it is wrong for the accused to bear the burden of establishing mitigating circumstances for the call of leniency. Stevens also dissented because he believed the Sixth Amendment requires a jury to determine whether the death penalty may be imposed.

Table 22 Voting Record Involving the Case Walton v. Arizona

In favor of capital punishment	Against capital punishment
William Rehnquist	William Brennan
Byron White*	Thurgood Marshall
Sandra Day O'Connor	Harry Blackmun
Antonin Scalia	John Paul Stevens
Anthony Kennedy	

BLYSTONE V. PENNSYLVANIA

Scott Blystone was convicted of robbery, first-degree murder and other related crimes and sentenced to death by a jury which found one aggravating circumstance and no mitigating circumstance. Blystone argued that the state's death penalty statute was unconstitutional because it relied on the weighing process. The State Supreme Court rejected the claim. The Court affirmed the decision by a 5-4 vote.

Speaking for the Court, Rehnquist stated that the Pennsylvania statute is constitutional because it allows the jury to consider all relevant mitigating circumstances and does not impose an automatic death sentence. Brennan dissented because the Pennsylvania statute states that the death sentence must be imposed when the jury finds at least one aggravating and no mitigating circumstance. Brennan wrote that this mandatory type of a sentence deprives the jury of any discretion.

Table 23 Voting Record Involving the Case Blystone v. Pennsylvania

In favor of capital punishment	Against capital punishment
William Rehnquist*	William Brennan
Byron White	Thurgood Marshall
Sandra Day O'Connor	Harry Blackmun
Antonin Scalia	John Paul Stevens
Anthony Kennedy	

Table 24 Remaining Five Capital Punishment Cases from the 1989-90 Term

McKoy v. North Carolina - Dock McCoy was convicted of first-degree murder and sentenced to death by a jury. In his appeal, the State Supreme Court rejected the claim that the unanimity requirement is unconstitutional. In a 6-3 vote, the Court vacated and remanded the case because the unanimity requirement prevents a jury from considering any mitigating factors that the jury does not unanimously find.
Sawyer v. Smith - The petitioner, Robert Sawyer, was found guilty and sentenced to death in Louisiana of first-degree murder. Sawyer, sought habeas corpus relief on the argument that while the penalty phase of his trial was concluding, the Court decided on the case Caldwell v. Mississippi (1985). Sawyer claimed that he could use the Caldwell decision to challenge his sentence in a habeas corpus action. The Federal Court and Appeals Court denied relief on the count that a new rule after a petitioner's conviction cannot be used to attack the decision (see Teague v. Lane 1989.) The Court affirmed the lower court's ruling by a 5-4 vote.
Lewis v. Jeffers - The respondent, Jimmie Jeffers, was found guilty and sentenced to death in Arizona. One of the aggravating circumstances that the sentencing jury used was that the murder was done in an "especially heinous, cruel, or depraved manner." On a habeas corpus appeal the Court of Appeals vacated the death sentence because the circumstance was unconstitutionally vague as applied to Jeffers. The Court ruled 5-4 to reverse and remand the case because the phrase "especially heinous . . ." was not unconstitutionally vague and it was not applied in an arbitrary or capricious manner.

Boyde v. California - Richard Boyde was found guilty of murdering and kidnapping a store clerk and sentenced to death. On his appeal to the State Supreme Court, Boyde questioned the validity of two California jury instructions which had been modified. The State Supreme Court affirmed the decision and stated that the instructions did not violate the Eighth and Fourteenth Amendments. The Court also affirmed by a 5-4 vote.

Selvage v. Collins - The petitioner, Selvage, filed a writ of certiorari to review U.S. Court of Appeals decision not to grant a stay of execution. The Court stayed the execution and withheld the petition pending the decision on the case Penry v. Lynaugh (1989). In question is whether the Texas Court of Appeals can procedurally bar Selvage's claim under Texas law. The Court handed down a per curiam decision to remand the case back to the Court of Appeals to decide on the question at hand. It is for the Court of Appeals to decide whether the Penry claim can be barred.

Table 25 Voting Record of the Remaining Five Capital Punishment Cases from the 1989-90 Term

Justices	McKoy v. N. Caro.	Sawyer v. Smith	Lewis v. Jeffers	Boyde v. Calif.	Selv. v. Collins
Rehn.	d/favor	c/favor	c/favor	c/favor*	per cur.
Brennan	c/against	d/against	d/against	d/against	
White	c/against	c/favor	c/favor	c/favor	
Marshall	c/agnst.*	d/against	d/against	d/against	
Blackmun	c/against	d/against	d/against	d/against	
Stevens	c/against	d/against	d/against	d/against	
O'Connor	d/favor	c/favor	c/favor*	c/favor	
Scalia	d/favor	c/favor	c/favor	c/favor	
Kennedy	c/against	c/favor*	c/favor	c/favor	
	6-3, McKoy	5-4, Smith	5-4, Lewis	5-4, Calif.	9-0, Selvage

Summary of Term. In his last term on the Court, Brennan was in the minority in almost every capital punishment case. His only success was in the case McKoy v. North Carolina (1990) in which White and Kennedy joined to make it a 6-3 decision. Like in past terms, Marshall and Brennan were inseparable as the two Justices voted the same in all the cases. The bloc of Brennan, Marshall, Blackmun, and Stevens voted together in all but one case.

Rehnquist wrote three opinions of the Court during the term which was the most of any Justice. When not writing the opinion, Rehnquist assigned the task to Justices White, O'Connor, and Kennedy. With the conservative bloc ruling on most of the cases, it is interesting to see if the liberal bloc will crumble without the presence of Brennan.

1990-91 Term

This marked the first term since 1957 that Brennan was not a part of the Court. Taking his place was former New Hampshire justice, David Souter. The Court heard six cases concerning capital punishment during the term.

PAYNE V. TENNESSEE

The question before the Court concerning this case is whether the Eighth Amendment bars the use of victim impact statements during the sentencing phase of a capital case. Precedent had been

set in the cases Booth v. Maryland (1987) and South Carolina v. Gathers (1989) that victim impact statements cannot be used.

Pervis Payne was convicted of first-degree murder of a lady and her two-year old daughter and the intent to murder her three-year old son. During the sentencing, Payne called his parents, girlfriend, and a clinical psychologist to testify to mitigating circumstance. The prosecution called on the three-year old child's grandmother who testified how the child misses his mother and sister. Payne was sentenced to death and lost his appeal to the State Supreme Court. The Court ruled 6-3 to affirm the lower court's decision and overturn Booth and Gathers.

Speaking for the Court, Rehnquist wrote that Booth and Gathers decision was based on two premises that dealt with the "blameworthiness." He stated that victim impact statements are just another way the prosecution could show just how much harm the defendant has done. It should also be noted that the defendant had no limits placed on the amount of mitigating circumstances which may have led to the murder. Rehnquist also stated that to be fair, the prosecution has to have the right to counteract such evidence. In his dissent, Marshall stated that the majority did not present any extraordinary showing to overturn the precedents set.

Table 26 Voting Record Involving the Case Payne v. Tennessee

In favor of capital punishment	Against capital punishment
William Rehnquist*	Thurgood Marshall
Byron White	Harry Blackmun
Sandra Day O'Connor	John Paul Stevens
Antonin Scalia	
Anthony Kennedy	
David Souter	

PARKER V. DUGGER

Robert Parker was found guilty of first-degree murder of Richard Padgett and Nancy Sheppard. The jury found sufficient aggravating circumstances to justify the death sentence to both murders. But, sufficient mitigating circumstances existed to outweigh the aggravating factors. Because of this, the jury recommended life imprisonment on both counts. The trial judge, who has ultimate sentencing authority, accepted the recommendation concerning the Padgett murder, but sentenced Parker to death for the Sheppard murder. The judge said he found six aggravating circumstances to the murder and no mitigating. The State Supreme Court affirmed. On habeas corpus appeal, the Federal District Court ruled the sentence was unconstitutional, but the Court of Appeals reversed that decision. The Court ruled 5-4 to reverse and remand the case stating the sentence was unconstitutional.

O'Connor wrote that the State Supreme Court erred when it

concluded that the trial judge did not find any mitigating circumstances to balance against the aggravating circumstances. The State Supreme Court did not independently reweigh the evidence and took into account only the trial judge's findings. Because the State Supreme Court based its decision on nonexistent findings, it deprived Parker of individualized treatment which is guaranteed under the Constitution.

Table 27 Voting Record Involving the Case Parker v. Dugger

Against capital punishment	In favor of capital punishment
Thurgood Marshall	William Rehnquist
Harry Blackmun	Byron White
John Paul Stevens	Antonin Scalia
Sandra Day O'Connor	Anthony Kennedy
David Souter	

LANKFORD V. IDAHO

During Bryan Lankford's arraignment for two counts of first-degree murder, the trial judge advised him that he could receive the maximum punishment, which was life imprisonment or death, if convicted on either charge. After a finding of guilt on both counts, the court entered an order requiring the State to provide notice if it was going to seek death. The State filed a negative response and the there was no discussion of the death penalty at

the sentencing hearing. At the conclusion of the sentencing hearing, the trial judge did not believe Lankford's testimony and felt the crimes committed warranted severe punishment, so he ordered Lankford to death based on five aggravating circumstances.

The State Supreme Court affirmed by rejecting Lankford's appeal that the trial court violated the Constitution by not giving him notice that it was considering death as an option. The court stated that Lankford was given notice during the arraignment. The Court reversed and remanded the case by a 5-4 vote.

Stevens wrote the opinion of the Court and stated that the sentencing phase violated the Due Process Clause of the Fourteenth Amendment because Lankford and his counsel were not given adequate notice. Stevens also wrote that without a notice, the Court is denied the opportunity of the adversary process. He wrote, "If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error and with that, the possibility of an incorrect result" (Lankford v. Illinois, 188).

In the dissent, Scalia wrote that the death penalty had always been an issue throughout the trial and that the trial judge did not mislead Lankford. Scalia also noted that Idaho case law stated that the court is not bound by the State's recommendation.

Table 28 Voting Record Involving the Case Lankford v. Idaho

Against capital punishment	In favor of capital punishment
Thurgood Marshall	William Rehnquist
Harry Blackmun	Byron White
John Paul Stevens*	Antonin Scalia
Sandra Day O'Connor	David Souter
Anthony Kennedy	

Table 29 Remaining Three Capital Punishment Cases from the 1990-91 Term

Schad v. Arizona - Edward Schad was found with a murder victim's belongings and car and was indicted for first-degree murder. At the trial Schad said the circumstantial evidence proved at the most he was a thief, not a murderer. The court refused his request that the jury be instructed on theft as a lesser charge. He was convicted of first-degree murder and sentenced to death. The State Supreme Court affirmed rejecting his claim that the jury be instructed of a lesser offense and that the trial court erred in permitting the jury to agree on a single theory. The Court affirmed 5-4.
McCleskey v. Zant - The case involved the abuse of the writ of habeas corpus. The petitioner, Warren McCleskey, filed a federal habeas corpus claim stating that he was tricked into a confession when the State had McCleskey's cellmate testify. The federal court rejected this. McCleskey then filed a second habeas corpus claim in which his statements made violated Massiah v. United States (1964). The District Court granted McCleskey relief, but the Court of Appeals rejected on the basis of the doctrine of abuse of the writ. The Court affirmed 6-3.

Coleman v. Thompson - The petitioner, Roger Coleman, was convicted of murder and sentenced to death in Virginia in which the State Supreme Court affirmed. Coleman then filed a habeas corpus action in the County Circuit Court and was rejected on many constitutional claims. Coleman then filed a habeas corpus petition with the Federal District Court presenting seven constitutional claims he first raised in the state habeas corpus petition. The District Court rejected Coleman's claim because he procedurally defaulted the seven claims. The Court of Appeals affirmed. The Court affirmed 6-3 because a federal habeas court "generally cannot review a state court's denial of a state prisoner's federal claim if the state court's decision rests on a state procedural default" (Coleman v. Thompson, 651).

Table 30 Voting Record of the Remaining Three Capital Punishment Cases from the 1990-91 Term

Justices	Schad v. Arizona	McCleskey v. Zant	Coleman v. Thompson
Rehnquist	c/favor	c/favor	c/favor
White	d/against	c/favor	c/favor
Marshall	d/against	d/against	d/against
Blackmun	d/against	d/against	d/against
Stevens	d/against	d/against	d/against
O'Connor	c/favor	c/favor	c/favor*
Scalia	c/favor	c/favor	c/favor
Kennedy	c/favor	c/favor*	c/favor
Souter	c/favor*	c/favor	c/favor
	5-4, Arizona	6-3, Zant	6-3, Thompson

Summary of Term. Of the six capital punishment cases that the Court heard, four of the decisions favor those who support the death penalty. With the retirement of Brennan, one could have assumed those who favor capital punishment would have had the decisions overwhelmingly in its favor. This was not the case. Those Justices who opposed it consisted of Marshall, Blackmun, and Stevens. All three voted together in the six cases. Those who opposed capital punishment were joined by O'Connor twice and Kennedy and Souter once in the two cases in which they were the majority. Of the four decisions which went in favor of those who support the death sentence, three were decided by a 6-3 vote and the other by a 5-4 vote. The biggest victory of the term went to Rehnquist with the decision from the case Payne v. Tennessee (1991) which overturned two prior cases which were heard just a few years ago.

1991-92 Term

For the second straight term, the Court welcomed a new Justice as Thurgood Marshall retired after serving on the Court since 1967. Replacing Marshall was the second African-American to serve on the Court, Justice Clarence Thomas. During this term, the Court heard three capital punishment cases.

MORGAN V. ILLINOIS

Derrick Morgan was on trial for a capital offense in Illinois. During the voir dire, Morgan requested that the potential jurors be asked if they would automatically impose the death penalty if he was found guilty. The court refused this request. Morgan was convicted and sentenced to death. The State Supreme Court affirmed the decision stating that a trial court is not required in voir dire examinations to ask a "life-qualifying" question. The Court reversed and remanded the case by a 6-3 vote.

White delivered the opinion of the Court and stated that a trial court's refusal to ask whether possible jurors would automatically impose the death penalty is not consistent with the Due Process Clause of the Fourteenth Amendment. During voir dire, the court must inquire about the possible juror's views concerning capital punishment if the defense requests.

Table 31 Voting Record Involving the Case Morgan v. Illinois

Against capital punishment	In favor of capital punishment
Byron White*	William Rehnquist
Harry Blackmun	Antonin Scalia
John Paul Stevens	Clarence Thomas
Sandra Day O'Connor	
Anthony Kennedy	
David Souter	

SAWYER V. WHITLEY

Robert Sawyer was convicted of murder in Louisiana. His conviction was upheld upon appeal for state postconviction relief. His first federal habeas corpus appeal was denied. On his second habeas petition, the District Court denied his claim that the police failed to produce exculpatory evidence or that his lawyer did not introduce mental health records as mitigating evidence. The Court of Appeals affirmed. The Court unanimously affirmed. Speaking for the Court, Rehnquist stated that the mental records withheld did not prove Sawyer's innocence. And, in order to show "actual innocence" one must show clear and convincing evidence that a reasonable juror would not have found the petitioner eligible for death.

STRINGER V. BLACK

James Stringer was found guilty of capital murder in Mississippi and sentenced to death. The jury found that there were three aggravating factors which warranted the death penalty. One factor was that the murder was "especially heinous, atrocious or cruel" even though that term was not defined in the trial court's instructions.

The State Supreme Court affirmed upon direct review. The District Court and Court of Appeals rejected Stringer habeas corpus relief. The court said he could not rely on the decisions handed

down in the cases Clemons v. Mississippi (1990) and Maynard v. Cartwright (1988) because those decisions were made final after Stringer's sentence was announced. The Court reversed and remanded the case by a 6-3 vote.

Writing for the Court, Kennedy stated that when a petitioner seeks federal habeas corpus relief based on a decision announced after a final judgment, under Teague v. Lane (1989), a federal court must determine whether the decision in question announced a "new rule." Kennedy also wrote that at the time of Stringer's sentencing, the Court did not allow state appellate courts to use a rule of automatic affirmance to any death sentence which was supported by an invalid aggravating circumstance.

Table 32 Voting Record Involving the Case Stringer v. Black

Against capital punishment	In favor of capital punishment
William Rehnquist	Antonin Scalia
Byron White	David Souter
Harry Blackmun	Clarence Thomas
John Paul Stevens	
Sandra Day O'Connor	
Anthony Kennedy*	

Summary of Term. Even though the Court decided on only three capital punishment cases, each decision was unique. In two of the cases, the death sentence was not affirmed. In both cases, the vote was by a 6-3 count with White, O'Connor, and Kennedy siding with Blackmun and Stevens, the only two remaining members of those Justices who opposed capital punishment. For the second consecutive term, O'Connor and Kennedy sided with those who were against the death penalty. Scalia and Thomas were the only two Justice who supported the death penalty in all the cases this term. Both Rehnquist and Souter broke rank and voted against the death penalty at least once during the term.

Interestingly, the other capital case heard this term was a unanimous decision to uphold the death sentence. One wonders the impact Marshall, and especially Brennan would have had on this term. Would the presence of these two have influenced Blackmun and Stevens to vote against the death penalty? This would have made it a 5-4 decision instead of 9-0. One also wonders if O'Connor and Kennedy would have voted as they did if Brennan and Marshall were still part of the Court?

1992-93 Term

The Court made judgment on four capital punishment cases during the term. The makeup of the Court did not change for the first time in three years.

GRAHAM V. COLLINS

Gary Graham, who was 17-years old at the time of the murder, was charged and found guilty of capital murder and sentenced to death. After unsuccessfully seeking relief in the Texas state courts, Graham filed a habeas corpus action in the District Court. He claimed that the state's three "special issues" during sentencing did not allow the jury to consider any mitigating evidence, such as his youth and unstable family. These "special issues" were not consistent with the Eighth and Fourteenth Amendments. Both the District Court and Court of Appeals denied relief. The Court affirmed 5-4.

In the opinion of the Court, White stated that Graham's relief was denied because it would require a new rule of constitutional law on the basis of Teague v. Lane (1989).

Interestingly, Thomas concurred with the opinion, but wrote a separate opinion stating that he did not agree with the Court's decision in the case Penry v. Lynaugh (1989) because it hampered any progress in eliminating racial discrimination from capital cases. The Penry case was decided during the 1988-89 term in which the Court decided two issues involved in that case. On the first issue, the Court stated that it was unconstitutional to not permit the jury to hear mitigating evidence. The Court then ruled, on the second issue, that a person who is mentally retarded could be sentenced to death.

Table 33 Voting Record Involving the Case Graham v. Collins

In favor of capital punishment	Against capital punishment
William Rehnquist	Harry Blackmun
Byron White*	John Paul Stevens
Antonin Scalia	Sandra Day O'Connor
Anthony Kennedy	David Souter
Clarence Thomas	

JOHNSON V. TEXAS

Dorsie Johnson was convicted of a capital murder which was committed when he was 19-years old. During the sentencing phase, the jury was asked to answer two special issues: 1) was Johnson's act deliberate, and 2) does he still pose a threat to society. The jury was also told to consider all mitigating and aggravating evidence. The jury sentenced Johnson to death and the State Court of Criminal Appeals affirmed.

Shortly thereafter, the Court issued Penry v. Lynaugh (1989). In the Penry decision, the Court ruled that it was unconstitutional to not permit the jury to hear mitigating evidence. It that case that it was not cruel or unusual for a person who is mentally retarded to be put to death for committing murder. The part of the Penry decision which concerned this case involved the mitigating evidence. The state denied Johnson's request for a new hearing despite his claim that the special issues did not allow the jury to give adequate consideration to mitigating evidence and that Penry

required a separate instruction. The Court affirmed 5-4.

Speaking for the Court, Kennedy wrote that based on prior precedents, the Texas procedures were consistent with the Eighth and Fourteenth Amendments. He stated that the special issues did allow the jury to consider Johnson's youth as mitigating evidence.

In her dissent, O'Connor stressed that the Eighth Amendment require an additional mitigating evidence instruction with this case because Johnson was not allowed to use his strongest mitigating evidence, his youth. She claimed that the Court used a "highly selective version of stare decisis" (Johnson v. Texas, 310) when determining this case.

Table 34 Voting Record Involving the Case Johnson v. Texas

In favor of capital punishment	Against capital punishment
William Rehnquist	Harry Blackmun
Byron White	John Paul Stevens
Antonin Scalia	Sandra Day O'Connor
Anthony Kennedy*	David Souter
Clarence Thomas	

Table 35 Remaining Two Capital Punishment Cases from the 1992-93 Term

Herrera v. Collins - In 1982, Leonel Herrera was charged with the murder of two police officers. He was convicted of capital murder of Officer Carrisalez and sentenced to death. Evidence which led to his sentence was that there were two eyewitnesses who identified Herrera, there were pieces of circumstantial evidence, and a handwritten letter by Herrera admitting guilt. Eight months later he pled guilty to the murder of Officer Rucker. Herrera unsuccessfully appealed the Carrisalez conviction in state and federal court. In 1992, in a second habeas corpus proceeding, Herrera said newly found evidence showed that he is innocent of both murders. Affidavits show that his now dead brother actually did the killings. District Court granted a stay, but the Court of Appeals vacated the stay stating the claim was not cognizable. The Court affirmed 6-3 because his claim of actual innocence does not entitle him to habeas corpus relief. Because he was found guilty by a trial, his constitutional presumption of innocence ends.
Arave v. Creech - The respondent, Thomas Creech, pled guilty to first-degree murder for the murder of a fellow inmate in Idaho. The state trial court sentenced him to death because he "exhibited utter disregard for human life." The State Supreme Court affirmed because it said the "utter disregard" term is reflective of a cold-blooded, pitiless killer. The Federal District Court denied habeas corpus relief, but the Court of Appeals found the "utter disregard" term invalid because it is unconstitutionally vague. The Court ruled 7-2 to reverse in part and remand the case because the term was specific and provided detailed guidance.

Table 36 Voting Record of the Remaining Two Capital Punishment Cases from the 1992-93 Term

Justices	Arave v. Creech	Herrera v. Collins
Rehnquist	c/favor	c/favor*
White	c/favor	c/favor
Blackmun	d/against	d/against
Stevens	d/against	d/against
O'Connor	c/favor*	c/favor
Scalia	c/favor	c/favor
Kennedy	c/favor	c/favor
Souter	c/favor	d/against
Thomas	c/favor	c/favor
	7-2, Arave	6-3, Collins

Summary of Term. Only four cases were decided this term and all supported the conservative orientation. Despite the success by those who support the death penalty, it was not by an overwhelming majority. Only one case went 7-2 where all the "traditional" conservatives voted together.

Of the remaining three, two cases were decided by 5-4 votes with the other case being 6-3. In all three cases, Souter broke from tradition and voted with Blackmun and Stevens. O'Connor was the other justice to vote with Blackmun, Stevens, and Souter on two different occasions. This marked the third term where O'Connor broke from the voting bloc of Rehnquist, Scalia, and Thomas.

1993-94 Term

Another change occurred with the Court as Byron White retired. Taking White's place was the second woman ever nominated to the Court, Ruth Bader Ginsburg. During Ginsburg's first term, the Court heard six capital punishment cases.

SIMMONS V. SOUTH CAROLINA

During the penalty phase of Johnathan Simmons trial, the prosecution stated that the jury should consider his danger to society when deciding whether to sentence him to death. In his defense, Simmons' lawyers stated that he is only dangerous to elderly women and thus, he would be of no danger to anyone if he was sentenced to life imprisonment. The court also refused to instruct the jury that Simmons was ineligible for parole. The jury was instructed to consider the terms life imprisonment and death sentence in plain terms. The jury returned a death sentence. The State Supreme Court affirmed even though the court failed to inform the jury of Simmons' parole ineligibility. The Court reversed and remanded the case by a 7-2 vote.

Speaking for the Court, Blackmun wrote that due process requires that a sentencing jury be informed that a capital offender is prohibited from parole by state law. Blackmun went on to state that Simmons cannot be put to death since he was unable to deny or explain the information at hand. Also writing a concurring opinion was O'Connor, which was signed on by Rehnquist and Kennedy. O'Connor agreed with Blackmun that a sentencing jury must be

informed if the defendant could be sentenced to life imprisonment without a chance for parole.

In his dissent, Scalia stated that it should be understood that capital murderers who are sentenced for life are not usually paroled. He also wrote that Blackmun's and O'Connor's opinions were based solely on the due process clause of the Fourteenth Amendment. If that was the case, Scalia notes, he would agree that the petitioner's rights were violated.

Table 37 Voting Record Involving the Case Simmons v. South Carolina

Against capital punishment	In favor of capital punishment
William Rehnquist	Antonin Scalia
Harry Blackmun*	Clarence Thomas
John Paul Stevens	
Sandra Day O'Connor	
Anthony Kennedy	
David Souter	
Ruth Bader Ginsburg	

ROMANO V. OKLAHOMA

John Romano was found guilty of first degree murder in Oklahoma for the 1985 murder of Roger Sarfaty. In 1986, Romano murdered and robbed Lloyd Thompson. Romano was tried separately for each murder. In the first trial, Romano was found guilty and

sentenced to death for the murder of Thompson. He then stood trial for the Sarfaty murder in which he was found guilty.

During the sentencing phase of the Sarfaty murder, the prosecution introduced a copy of the judgment and death sentence from the Thompson trial. The jury sentenced Romano to death because the aggravating circumstances outweighed the mitigating circumstances. On direct appeal, Romano claimed that admission of evidence concerning his previous conviction and sentence tainted the jury. The Oklahoma Court of Criminal Appeals affirmed even though they stated that Romano's earlier death sentence was irrelevant and did not violate the Eighth or Fourteenth Amendments. The Court affirmed 5-4.

Rehnquist wrote that the trial court erred in allowing the prosecution to introduce Romano's prior death sentence, but that it did not lead to a constitutional error or mislead the jury. The information was irrelevant and did not infect the jury's decision making.

Table 38 Voting Record Involving the Case Romano v. Oklahoma

In favor of capital punishment	Against capital punishment
William Rehnquist*	Harry Blackmun
Sandra Day O'Connor	John Paul Stevens
Antonin Scalia	David Souter
Anthony Kennedy	Ruth Bader Ginsburg
Clarence Thomas	

McFARLAND V. SCOTT

Petitioner, Frank McFarland was convicted of capital murder and sentenced to death in Texas. The Texas Court of Criminal Appeals affirmed and the Court denied certiorari. Four days before he was to be executed, McFarland filed a pro se motion stating he be given a stay so that he could prepare to file a habeas corpus petition. The District Court denied relief because McFarland was not entitled to an appointment of counsel and that the court lacked jurisdiction to grant a stay. After the Court of Appeals denied a stay, the Court granted a stay and eventually certiorari in order to resolve the matter. The Court ruled 6-3 that a defendant does not need to file a habeas corpus petition in order to have counsel and enter a stay of execution.

Blackmun wrote that McFarland filed a motion for appointment of counsel and for a stay of execution. Therefore the District Court had the authority to grant relief. He did stress that the outcome of this decision did not grant all capital defendants a right to an automatic stay.

O'Connor concurred in the judgment, but dissented in part. She agreed that a capital defendant seeking habeas corpus relief should be entitled to an attorney. But, in this case, she did not believe McFarland should not have been given a stay of execution while counsel prepared a habeas petition. She went on to state that a capital defendant must raise a credible federal claim before a stay of execution may be entered.

Table 39 Voting Record Involving the Case McFarland v. Scott

Against capital punishment	In favor of capital punishment
Harry Blackmun*	William Rehnquist
John Paul Stevens	Antonin Scalia
Sandra Day O'Connor	Clarence Thomas
Anthony Kennedy	
David Souter	
Ruth Bader Ginsburg	

Table 40 Remaining Three Capital Punishment Cases from the 1993-94 Term

Tuilaepa v. California & Proctor v. California - Petitioners, Paul Tuilaepa and William Proctor, were convicted of first-degree murder in separate cases and sentenced to death. The State Supreme Court affirmed. During the penalty phase of a capital trial in California, the jury must consider numerous factors of whether to impose the death penalty. The two questioned the constitutionality of the penalty phase. The Court affirmed 8-1 stating that the penalty phase was not unconstitutional.
Schiro v. Farley - Thomas Schiro was on trial for three counts of murder. Count I was that he "knowingly" killed the victim while Count II was that he killed the victim while raping her. The jury returned a guilty verdict to Count II and left the other verdict sheets blank. The court sentenced Schiro to death. The sentence was affirmed twice during state proceedings and once again by the Indiana Supreme Court. Schiro claimed that since the jury did not convict him on Count I, that counted as an acquittal of murder. Thus, the Double Jeopardy Clause should be invoked. The Court of Appeals affirmed the sentence as did the Court by a 7-2 vote. The Court stated that the Clause was written to protect against the risk of trial and conviction, not punishment.

Burden v. Zant - The Court ruled 9-0 per curiam that the Court of Appeals mistakenly upheld the denial of habeas corpus relief. The case was reversed and remanded. The Court of Appeals decision was a mistake because: 1) denial was made on a finding not decided by the Federal District Court; and 2) evidence supported the accused's claim of ineffective counsel.

Table 41 Voting Record of the Remaining Three Capital Punishment Cases from the 1993-94 Term

Justices	Tuilaepa v. California	Schiro v. Farley	Burden v. Zant
Rehnquist	c/favor	c/against	per curiam
Blackmun	d/against	d/against	
Stevens	c/favor	d/against	
O'Connor	c/favor	c/favor*	
Scalia	c/favor	c/favor	
Kennedy	c/favor*	c/favor	
Souter	c/favor	c/favor	
Thomas	c/favor	c/favor	
Ginsburg	c/favor	c/favor	
	8-1, California	7-2, Farley	9-0, Burden

Summary of Term. Overall, the term went in favor of those who supported capital punishment. But, when analyzing the record in more detail, two of the major decisions were to strike the death penalty. In his last term, Blackmun had more success than Brennan

did four years ago during his last term. Blackmun wrote both opinions in the two cases where the death penalty was reversed. It should also be noted that for the first time since the 1987-88 term, Blackmun and Stevens voted differently in a case. Twice during the term, each of the two Justices was the lone dissenter in 8-1 rulings.

In her first term, Ginsburg had an overall moderate stance. She voted in favor of capital punishment three times and against it three times.

Summary

This chapter detailed the actual cases heard by the Rehnquist Court from 1986-94. The cases ranged from whether the death sentence was considered cruel and unusual punishment to whether jury instructions were constitutionally correct. A wide array of issues were involved with the main topic of capital punishment.

The opinions handed down by the Court were analyzed on how each Justices interpreted the various issues surrounding capital punishment. The following chapter summarizes the findings on how each Justice voted concerning the different issues.

CHAPTER SIX

Conclusion/Summary

By analyzing chapter five and the capital punishment cases the Rehnquist Court heard from 1986-94, it could be concluded that the Supreme Court supports capital punishment. But, that support is not as strong as one might suspect even though the Reagan-Bush era stacked the Court with six supposedly "conservative" Justices who supposedly supported capital punishment.

When analyzing the decisions of the Justices, it is convenient to begin by discussing those who are on the far extremes in favor and against capital punishment. These Justices have a definite stance and seldom waver from it.

On one extreme are those Justices who usually vote in favor of capital punishment. The staunch Justices in favor of the death penalty are Scalia and Thomas.

Scalia wrote the opinion of the Court in the case Stanford v. Kentucky (1989) which was one of the most publicized cases during this study. The Court ruled it was not cruel and unusual to impose the death sentence on someone who committed a capital crime when they are at the age of 16 or 17 years old. Scalia based his judgement on the premise that this type of punishment was not considered cruel and unusual at the time the Bill of Rights was adopted.

Scalia has wavered from this position on few occasions.

During the 1986-97 term, which was Scalia's first on the Court, he wrote for a unanimous Court which reversed and remanded the case Hitchcock v. Dugger (1987). He stated that the proceedings did not allow the jury to consider mitigating circumstances. When studying this case, Scalia did not strike the death penalty per se. Instead, his decision was based on the proceedings, not whether Hitchcock should live or die.

Scalia voted against the death penalty three times during the 1987-88 term. Each of these cases were 9-0 decisions and he did not write any opinion. When looking at the questions raised by each case, one can see that the cases involved a procedural issue, not one as to the constitutionality of the death sentence. In the case Maynard v. Cartwright (1988), the question raised was whether the consideration of aggravating circumstances is unconstitutionally vague. The case of Satterwhite v. Texas (1988) dealt with the introduction of psychiatric testimony. The third case, Johnson v. Mississippi (1988), dealt with whether a reversal of a past conviction in a another state was a valid use of aggravating circumstance.

During the 1993-94 term, Scalia wrote a dissenting opinion involving the case, Simmons v. South Carolina (1994). The last paragraph of his dissent revealed some of Scalia's beliefs. He stated that the Court should insist that the State admit all relevant mitigating circumstances, a requirement which is more demanding than what the Due Process Clause requires according to Scalia. He concluded the dissent by stating that providing all

relevant mitigating circumstances would be at the expense of swift justice. He went on to state that those who are against the death penalty are outnumbered, but they are able to slow down the judicial process by using a new front in their "guerrilla warfare." This last statement best shows the views of Scalia. It is not often that he votes against the death penalty, but when it does occur, he is part of a 9-0 decision.

Like Scalia, Thomas also votes in favor of capital punishment. Since joining the Court in the 1991-92 term, Thomas has always voted in favor of capital punishment. In the case Graham v. Collins (1993), Thomas concurred in the opinion of the Court to affirm the death penalty, but wrote a separate opinion to state his reasons. Thomas stated that he agrees with the Court's decision, but believes that the case Penry v. Lynaugh (1989), which was decided in 1989, was wrong and jeopardized the chance to eliminate racial discrimination.

During the 1993-94 term, Thomas wrote a dissenting opinion concerning the case McFarland v. Scott (1994) which addressed whether a capital defendant needed to file a formal habeas corpus petition in order to invoke his right to counsel. Thomas stated that he believed that it is reasonable to leave a prisoner without counsel during the preapplication period. In concluding the discussion concerning Thomas, it is difficult to get a true grasp of his views concerning capital punishment since he has written a few opinions. The best way to understand Thomas is to analyze Scalia's views, since the Justices have voted together concerning

capital punishment. Since Thomas joined the Court at the beginning of the 1991-92 term, Scalia and Thomas have voted together in all 13 capital punishment cases which were not decided by 9-0 ruling.

On the other extreme from Scalia and Thomas are Brennan and Marshall. Both Brennan and Marshall, at all times, voted against the death penalty no matter the circumstance or situation. One sentence was found in almost every opinion by Brennan which summed up his view of the capital punishment issue. With minor changes, the phrase usually included was "Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and 14th Amendments". In most instances, Marshall joined in Brennan's opinion.

Marshall abhorred the death penalty. The analysis of his views could be summed in an opinion he wrote. In one of his most striking dissents, Marshall lashed out at his colleagues concerning the case Payne v. Tennessee (1991) which was decided during the 1990-91 term which was Marshall's last. The case centered around the reversal of the Court's previous decision that victim impact statements were not permitted during the sentencing phase. In his dissent, Marshall began by stating that power, not reason, was the concluding factor in the Court's overruling of the issue which was decided only four terms earlier. Marshall feared that this reversal was just the beginning of a ". . . more extensive upheaval of this Court's precedents . . ." (Payne v. Tennessee, 748). Marshall wrote that he feared that those who are condemned to death will be "cast aside" (Payne v. Tennessee, 756). He concluded that,

"Tomorrow's victims may be minorities, women or the indigent. Inevitably, this campaign to resurrect yesterday's `spirited dissents' will squander the authority and the legitimacy of this Court as a Protector of the powerless" (Payne v. Tennessee, 756).

There is not much to analyze concerning the positions of Brennan and Marshall since they always voted against capital punishment no matter what the question. At times, Brennan was masterful in gaining the swing vote needed so he would have the majority and assign the opinion. Such was the case of Mills v. Maryland (1988), when White voted with Brennan to provide a 5-4 decision to vacate and remand the lower court's decision.

Powell and Ginsburg were two Justices whose views were difficult to determine because each only served one term during the time frame of this study.

Powell's last year on the Court was during the 1986-87 term. He was part of the majority, whether in support of or against the death penalty, in all but one case. Powell wrote the opinion of the Court in McCleskey v. Kemp (1991), which was one of the most significant cases during this study. The case involved the Baldus study, which was a complex statistical study, which indicated a racial bias in death penalty cases.

Maybe the best way to summarize Powell's stance concerning capital punishment was the opinion of the Court he wrote in the case Booth v. Maryland (1987). The decision stated that victim impact statements during the sentencing phase violated the Eighth Amendment. No where throughout the opinion did Powell state that

he was against or for the death penalty. It was an unbiased opinion which did not indicate any personal philosophy. As shown in chapter two, Powell had stated in articles that he was in favor of capital punishment, but in his last term, there were cases in which he rejected his personal philosophy, such as Booth, and answered the question at hand by interpreting the Constitution.

Like Powell, Ginsburg only served for one term during the time frame of this study. During her first term, which was 1993-94, Ginsburg split her vote and decided three times in favor of capital punishment and three times against capital punishment. (The one other case during the term was per curiam.) In a dissenting opinion concerning the case, Romano v. Oklahoma (1994), Ginsburg stated that she would vacate the death penalty in this case. No where in the opinion could it be found concerning her views or any possible trends. As stated earlier in this chapter, it is difficult to find any trends concerning the voting record of Ginsburg because she was part of the Court for only one term during this study.

Kennedy was appointed to the Court starting in the 1987-88 term replacing Powell. When joining the Court, Kennedy was labeled as a Justice who supported capital punishment. That has not always been the case. During the 1989-90 term, Kennedy was one of the Justices who provided the swing vote in a 6-3 decision in McKoy v. North Carolina (1990). The case dealt with the unanimity requirement. In his opinion, in which he concurred only in judgment, Kennedy wrote that a death sentence should not be

"imposed on the basis of a single juror's vote where 11 jurors think the penalty is undeserved" (McKoy v. North Carolina, 453).

Beginning in the 1990-91 term, Kennedy did not vote in favor of the death sentence when the issue was due process. During the 1990-91 term, Kennedy joined the majority to reverse and remand the death sentence concerning the case Lankford v. Idaho (1991). Kennedy signed on with the majority opinion which stated that the imposition of the death penalty after the state recommended against it violates the 14th Amendment's due process clause. The next term, Kennedy once again signed on with the majority opinion of the Court. The opinion in the case Morgan v. Illinois (1992) stated an Illinois trial court violated due process by not allowing the defense to ask potential jurors whether they would automatically impose death if the defendant was found guilty.

The one Justice who may have had the most impact on the Court when dealing with the imposition of the death sentence on a minor was O'Connor. During the 1987-88 term, O'Connor voted to vacate and remand the death sentence which was imposed on a boy who was 15 years old when he participated in a murder. O'Connor proved to be the swing vote in the case Thompson v. Oklahoma (1988). In her opinion in which she concurred in judgment, she wrote that some age is needed before which a juvenile's crime cannot be punished by death. She also used the test of whether there is a national consensus which forbids the imposition of death. In this case, she believed there was a national consensus to set aside the death sentence.

The following term, O'Connor voted in favor of the death sentence which was imposed on a 17- and 16- year-old in the case Stanford v. Kentucky (1989). Using the same test as she did one term earlier, O'Connor stated the death sentence should stand because there was clear evidence that there is no national consensus forbidding the death of a 16- or 17- year-old involved in a capital murder.

In her most controversial opinion, O'Connor wrote for the Court in the case Penry v. Lynaugh (1989) which decided that it did not violate the Eighth Amendment to execute a person who is mentally retarded. She wrote that the Court cannot state that all people who are mentally retarded lack the knowledge or volition to act with the degree of culpability. She went on to state that it is insufficient to claim a person's mental age as a basis for violating the Eighth Amendment because it is imprecise and there are varying instances.

It is safe to state that O'Connor usually supports capital punishment, but there are situations in which she wavers from her position. During the 1993-94 term, she concurred in part in the judgment of the case McFarland v. Scott (1994) which stated that a capital defendant should be entitled to an attorney while pursuing habeas corpus relief. She did not agree that a defendant should be granted a stay of execution while counsel prepares a habeas petition.

It is evident from this study that O'Connor supports capital punishment. She does however, have the ability to be objective

when certain questions arise concerning differing issues regarding capital punishment.

Souter, who replaced Brennan, was adamantly against the death penalty. When analyzing Souter's decisions, one can state that he does not have Brennan's view of capital punishment, but he could be considered a moderate. Since his appointment, Souter has decided on 19 cases other than 9-0 decisions. Of those 19 cases, he has voted in support of capital punishment 11 times and against it eight times.

Souter often strikes the death sentence when the question raised involves due process, habeas corpus, or any procedures during the trial, such as not allowing mitigating evidence. Three times during the 1993-94 term, Souter joined those Justices who regularly vote against capital punishment. In the case Simmons v. South Carolina (1994), Souter wrote a concurring opinion where he stated that there is a need for heightened reliability. He wrote that the Eighth Amendment guarantees a defendant to a jury which is capable of a reasoned moral judgment.

Overall, it could be concluded that Souter does not have a definite pattern of how he would vote concerning the issues surrounding the capital punishment issue. This study shows that Souter views each case separately and with separate merit. This makes Souter a moderate because he does not hide behind any moral or political philosophy.

As stated in chapter two, Blackmun announced during his last term, 1993-94, that he could no longer vote in favor of the death

penalty no matter the circumstances. In his dissenting opinion concerning the case Romano v. Oklahoma (1994), Blackmun wrote that he would vacate the death sentence because he considered that it not be imposed fairly within the limits of the Constitution. His announcement against capital punishment was bold, yet too late for those who oppose capital punishment. During the course of this study, it was discovered that Blackmun did vote with those Justices who favor capital punishment.

Such was the case during the 1987-88 term when he signed on with the opinion of the court written by Rehnquist concerning the case Lowenfield v. Phelps (1988). He also signed on with the concurring opinion written by O'Connor in the case Franklin v. Lynaugh (1988). The Lowenfield dealt with aggravating circumstance while Franklin considered the defendant's request concerning the use of mitigating circumstances.

It could be concluded that Blackmun took a different stance on his opposition to the death penalty than did Brennan and Marshall. Both Brennan and Marshall believed capital punishment was inherently wrong and cruel and unusual. Blackmun took the view that it could not be imposed fairly within the constraints of the Constitution.

Stevens was another Justice who voted similarly with Blackmun. Stevens rarely voted in support of capital punishment. Unlike Blackmun, however, Stevens never publicly stated that he would not vote in support of capital punishment. In fact, during the 1993-94 term, in the case Tuilaepa v. California (1994) which questioned

the penalty phase of a trial, Stevens wrote in a concurring judgment that the factors in question were consistent with the defendant's rights and that death is an appropriate punishment.

Stevens also wrote the opinion of the Court in Burger v. Kemp (1987) which denied the defendant's claim that he received ineffective legal assistance. Stevens wrote that the defendant did not have a claim that he received ineffective legal assistance. The lawyer's decision not to present mitigating evidence was supported by other reasonable professionals stated Stevens.

Stevens usually does not support the death penalty stance. When the only issue is whether a person should be put to death, he will vote not to. But at times, when the issue is of a procedure or interpreting a current law, he may vote to uphold the sentence.

White usually voted in favor of capital punishment, but like most of the Justices, this was not always the case. At times he provided the swing vote which reversed or vacated a death sentence. Most of White's opinions are dominated with legal terminology. He does not write how he personally views the issues surrounding capital punishment which makes it difficult to interpret his thinking or personal philosophy. By reading his opinions one can surmise that he based many decisions on precedent and the Constitution. An example of this involves the case South Carolina v. Gathers (1989) in which he joined the majority to affirm the lower court's decision to reverse the death sentence. His concurrence was only two sentences long, but it may have illustrated White's opinion. He stated, "Unless Booth V. Maryland

is to be overruled, the judgment below must be affirmed" (South Carolina v. Gathers, 812). When reading into this one sentence, one can see that personally, he probably would not have joined the majority to affirm the lower court's decision. But, based on precedent, not personal philosophy, he had to rule the way he did.

Another glimpse of White's thinking could be found in his dissent in the case Booth v. Maryland (1987) which the Court decided that victim impact statements could not be used during sentencing in a capital case. Even though he stated he believed victim impact statements were constitutional, he supported his reasoning. He stated that victim impact statements are reasonable because they allow the State to counteract the mitigating evidence of the defendant. He went on to write, however, that he could understand why the State could not be allowed to show the harm the defendant caused not only to society, but also to the victim's family. White stated that most jurors would look unfavorably upon a defendant if victim impact statements are permitted. White supported that claim by stating that "a murderer [should be] accountable not only for his internal disposition in committing the crime but also for the full extent of the harm he cause[d]" (Booth v. Maryland, 516).

It could be concluded that White was a Justice who based his judgments on precedents and clear legal reasoning. He was not a Justice who "fired from the hip" with great rhetoric just to push his personal philosophy. Whether a person is in favor or against capital punishment, one can easily be swayed by White's logic.

The last Justice to be analyzed is Chief Justice Rehnquist. Overall, he supports capital punishment, but unlike Scalia and Thomas, Rehnquist is objective at times and rules with those who oppose capital punishment.

It should be noted that Rehnquist did gain a major victory during the eight years of this study concerning victim impact statements. During his first term as Chief Justice, the Court ruled 5-4, in the case Booth v. Maryland (1987), against the use of victim impact statements during the sentencing phase of a trial. Four years later, with the makeup of the Court changed, that decision was overturned 6-3 in the case Payne v. Tennessee (1991). Writing for the Court, Rehnquist stated that victim impact statements should be permitted because it permits the jury to consider the harm done along with the mitigating evidence. He went on to express the view of former Justice Benjamin Cardozo in which he stated that "justice, though due to the accused, is due to the accuser also" (Payne v. Tennessee, 736).

In conclusion, the start of the 1994-95 term will begin Rehnquist's ninth year as Chief Justice. As the second-oldest Justice on the Court, it will be interesting to see if Rehnquist will keep his position in support of capital punishment, or will he vote more moderately as the Court enters a new era with the appointment of Stephan Breyer.

It is clear from this study that the Rehnquist Court does have a favorable view toward capital punishment. Yet, this view is not as overwhelming as some people think. With the retirement of

Brennan and Marshall, those who oppose capital punishment feared the Rehnquist Court would overturn many precedents which opposed capital punishment. That has not been the case. Some change is definite with Breyer about to begin his first term on the Court and Ginsburg beginning her second term. Both Breyer and Ginsburg may be the Justices to pull the Court in one direction or the other on the issue. With Reagan and Bush "stacking" the Court with those Justices who support the death sentence, there was a fear of a mass slaughter of those inmates on death row. This appears to be exaggerated. Follow-up research should be done when Rehnquist decides to leave the Court and a new Chief Justice is appointed to see if any new trends come about. It should be interesting to see if Breyer and Ginsburg will shift the Court in favor of those who oppose capital punishment.

Summary

This chapter analyzed the opinions and trends of the Justices when deciding capital punishment cases. The results showed that the Rehnquist Court does support capital punishment, but not by a wide margin. It clear that some Justices have a changing view of the death penalty when certain issues are at question. The question of whether capital punishment is constitutional is not the only issue the Justices encounter. There is a wide array of issues surrounding the theme, capital punishment.

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