SUPREME COURT OF THE UNITED STATES

No. 96–8400

DOUGLAS MCARTHUR BUCHANAN, JR., PETITIONER *v.* RONALD J. ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.

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

[January 21, 1998]

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The imposition of a penalty of death must be "directly related to the personal culpability of the criminal defendant," and "reflect a reasoned *moral* response to the defendant's background, character, and crime." *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring). Consequently, a judge's instructions during penalty phase proceedings may not preclude the jury "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (emphasis omitted). The majority recognizes that "the standard for determining whether jury instructions satisfy these principles [is] 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Ante*, at 7 (quoting *Boyde* v. *California*, 494 U. S. 370, 380 (1990)). In my view, the majority misapplies this standard.

The relevant instruction, read in its entirety, indicates that there is a "reasonable likelihood" that the jury under-

stood and "applied the challenged instruction" in a way that prevented it from considering "constitutionally relevant evidence," namely, the extensive evidence that the defendant presented in mitigation. The instruction, which petitioner argued should have been supplemented by additional discussion of mitigation, App. 74–76, read as follows:

> "[1] You have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.
>
> "[2] Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.
>
> "[3] If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.
>
> "[4] If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the defendant at life imprisonment.
>
> "[5] In order to return a sentence of death, all twelve jurors must unanimously agree on that sen-

tence." *Id*., at 73–74.

The majority believes that paragraph 3 contains language telling the jury it may consider defendant's mitigating evidence, specifically the phrase:

> or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment."

See *ante,* at 8. I believe that these words, read in the context of the entire instruction, do the opposite. In context, they are part of an instruction which seems to say that, if the jury finds the State has proved aggravating circumstances that make the defendant eligible for the death penalty, the jury may "fix the punishment . . . at death," but if the jury finds that the State has not proved aggravating circumstances that make the defendant eligible for the death penalty, then the jury must "fix the punishment . . . at life imprisonment." To say this without more– and there was no more– is to tell the jury that evidence of mitigating circumstances (concerning, say, the defendant's childhood and his troubled relationships with the victims) is not relevant to their sentencing decision.

The reader might now review the instructions themselves with the following paraphrase in mind: Paragraph 1 tells the jury that it must decide between death or life imprisonment. Paragraph 2 sets forth potential aggravating circumstances of the crime, thereby explaining to the jury what experienced death penalty lawyers would understand as "aggravators" (*i.e.*, the criteria for "death eligibility"). This paragraph says that the jury cannot impose the death penalty unless the Commonwealth proves (beyond a reasonable doubt) that at least one of the murders was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery."

Paragraph 3– the key paragraph– repeats that, if the

jury finds that the Commonwealth has proved death eligibility, the jury "may fix the punishment . . . at death." It immediately adds in the same sentence "or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at life imprisonment." It is the stringing together of these two phrases, along with the use of the connective "or," that leads to a potential understanding of the paragraph as saying, "If you find the defendant eligible for death, you may impose the death penalty, but if you find (on the basis of 'all the evidence') that death penalty is not 'justified,' which is to say that the defendant is not eligible for the death penalty, then you must impose life imprisonment." Without any further explanation, the jury might well believe that whether death is, or is not, "justified" turns on the presence or absence of Paragraph 2's aggravating circumstances of the crime– not upon the defendant's mitigating evidence about his upbringing and other factors.

Paragraph 4 makes matters worse. It adds that the Commonwealth's failure to prove the aggravating factors which make the defendant eligible for the death penalty means that the jury must fix the punishment at life imprisonment. It is the position of the paragraph, coming just after the key phrase "or if you believe from all the evidence that the death penalty is not justified," that suggests reading it as a further explanation of when the death penalty is not "justified." So read, this paragraph reinforces the misconception that paragraph 3 creates.

Were the jury made up of experienced death penalty lawyers, it might understand these instructions differently– in the way that the Court understands them. Lawyers who represent capital defendants are aware of the differences between the "eligibility" phase, with its "aggravators," and the "selection" phase, with its mitigating evidence. Thus, they might read Paragraph 2 as setting forth the "eligibility" criteria, Paragraph 3 as setting

forth what happens next should the jury find the defendant death-eligible, and Paragraph 4 as setting forth what happens next should the jury find the defendant ineligible for death. Such lawyers might then read Paragraph 3's "or" as connecting the two "selection phase" alternatives— the first (death) if there is insufficient mitigation, and the second (life imprisonment) if there is sufficient mitigation. These lawyers, however, would be parsing the instructions in a highly complicated, technical way that they alone are likely to understand. Theirs is not the meaning that a natural reading of the language suggests, either to lawyers who are not well versed in death penalty litigation, or to jurors who are not lawyers.

A further explanation of the special sense of "not justified"— so that the jury did not read those words as referring to the absence of Paragraph 2's "aggravators"— would have cleared matters up. So would some mention of mitigating evidence anywhere in the instructions. But there was no clarification of "not justified," and the instructions say nothing at all about mitigating evidence. Why then would a lay jury, trying to follow the instructions, not have believed that its life or death decision depended simply upon the presence or absence of Paragraph 2's "aggravators"? So interpreted, this instruction would clearly violate *Lockett*'s requirement that instructions permit the jury to give effect to mitigating evidence.

The majority cannot find precedent supporting its position. In *Boyde*, the Court found a set of jury instructions constitutionally sufficient, but those instructions explicitly referred to mitigation and told the jury about weighing aggravating against mitigating circumstances. *Boyde*, *supra*, at 373–374, and n. 1. In *Johnson* v. *Texas*, 509 U. S. 350 (1993), the Court found a set of jury instructions constitutionally sufficient which concededly did not expressly mention mitigation. But those instructions told the jury to take account of factors (the defendant's future

dangerousness) broad enough to cover the mitigating circumstance (youth) that the defendant there had raised. *Id.*, at 354. See also *Franklin* v. *Lynaugh*, 487 U. S. 164, 183–188 (1988) (O'CONNOR, J., concurring in judgment) (same). And in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), the Court found constitutionally *inadequate* a set of jury instructions similar to those in *Johnson*, but applied in a case involving mitigating evidence (mental retardation) that was *not* encompassed by the factors specifically mentioned in the instructions (the deliberateness of the defendant's actions; the defendant's future dangerousness; and provocation by the deceased).

All the state pattern jury instructions that the parties or *amici* have cited explicitly mention the jury's consideration of mitigating evidence. After this Court decided *Franklin*, *Penry*, and *Johnson*, Texas adopted a pattern instruction that specifically mentions mitigation. 8 M. McCormick, T. Blackwell, & B. Blackwell, Texas Practice §§98.18-98.19 (10th ed. 1995); see also Tex. Crim. Proc. Code Ann., Art. 37.071 (Supp. 1996–1997). Virginia, too, has recently amended its pattern instructions so that, unlike the instruction now before us, they require the jury to consider "any evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment." Virginia Model Jury Instructions, Criminal, Instruction No. 34.127 (1993 and Supp. 1995).

Finally, unlike the majority, I do not believe that "the entire context in which the instructions were given," *ante* at 8, can make up for their failings. I concede that the defense presented considerable evidence about the defendant's background. But the *presentation* of evidence does not tell the jury that the evidence presented is relevant and can be taken into account– particularly in the context of an instruction that seems to exclude the evidence from

the universe of relevant considerations. Cf. *Hitchcock* v. *Dugger*, 481 U. S. 393, 397–398 (1987); *Penry*, *supra*, at 319 ("it is not enough simply to allow the defendant to present mitigating evidence to the sentencer"). I also realize that the defense attorney told the jury the evidence was relevant, and the prosecution conceded the point. But a jury may well consider such advice from a defense attorney to be advocacy which it should ignore or discount. And the jury here might have lost the significance of the prosecution's concession, for that concession made a brief appearance in lengthy opening and closing arguments, the basic point of which was that the evidence did not sufficiently mitigate the crime but warranted death.

Though statements by counsel can help a jury understand a judge's instructions, they cannot make up for so serious a misinstruction, with such significant consequences as are present here. The jury will look to the judge, not to counsel, for authoritative direction about what it is to do with the evidence that it hears. *Taylor* v. *Kentucky*, 436 U. S. 478, 488–489 (1978); see also *Carter* v. *Kentucky*, 450 U. S. 288, 302, n. 20 (1981). For the reasons I have mentioned, taking the instructions and the context together, the judge's instructions created a "reasonable likelihood" that the jury "applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, *supra*, at 380. To uphold the instructions given here is to "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U. S., at 605. To do so therefore breaks the promise made in *Brown* that the imposition of the punishment of death will "reflect a reasoned moral response to the defendant's background, character, and crime." (Emphasis deleted.)

For these reasons, I dissent.