IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

JOHNNY PAUL PENRY, :

Petitioner :

v. : No. 00-6677

GARY L. JOHNSON, DIRECTOR, :

TEXAS DEPARTMENT OF CRIMINAL :

JUSTICE, INSTITUTIONAL :

DIVISION. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, March 27, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

ROBERT S. SMITH, ESQ., New York, New York; on behalf of the Petitioner.

ANDY TAYLOR, ESQ., First Assistant Attorney General, Austin, Texas; on behalf of the Respondent.

GENE C. SCHAERR, ESQ., Washington, D.C.; on behalf of Alabama, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

QUESTION: Mr. Smith?

ORAL ARGUMENT OF ROBERT S. SMITH

ON BEHALF OF THE PETITIONER

MR. SMITH: Mr. Chief Justice. May it please the Court. I think my first task here is to show you that what the Texas Court did was contrary to or an unreasonable application of your previous decision in Penry in this case, and I believe that your decision in Penry or Penry One as we call it in our brief was fairly clear in saying that as to this man, a retarded man like this with a life long history of really gruesome child abuse where virtually his whole case is based on the retardation and the horrible child abuse, that the three questions of the old Texas statutory scheme just don't work or at least they do not work unless you take the first question which asks whether the defendant acted deliberately and give "deliberately" a definition.

It would have to be a rather unusual definition of deliberately that will tell the jury, contrary to the normal meaning of the word, that you can find that conduct resulting from child -- from retardation maybe even from child abuse, although that's perhaps a stretch, could be a basis for a finding that the defendant did not act deliberately.

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When you summarized in Grand v Collins the Penry holding, you said and I'm quoting from page 474 of 506 US Reports, you said that "in Penry it was impossible to give mitigating effect to Penry's evidence by way of answering the special issues. Grand says that without any qualification. I would assume that one qualification is appropriate because Penry does indicate that there is -- that the definition of deliberately was a possibility for --

QUESTION: It was impossible there under the instructions that were there given, but the instructions here given made it very clear that if you considered the mental deficiency to be a mitigating factor you should answer one of the three questions "no". In defense's closing argument he said the following, I don't understand how the jury could have misunderstood it. "Let me try to simplify it. If when you thought about mental retardation and the child abuse you think that this guy deserves a life sentence and not a death sentence, decide life imprisonment is punishment enough then you've got to answer one of those questions no. The judge has not told you which question and you have to give that answer even if you decide the literally correct answer is yes. Not the easiest instruction to follow and the law does funny things sometimes but it is what it says and I've taken all

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this time with you to make sure you understand what it says." That's pretty clear to me.

MR. SMITH: I think that's clear, Your Honor, indeed I said it and I thought I was being clear when I said it.

QUESTION: I thought you were imminently clear.

MR. SMITH: But I -- but I was not a judge, Your Honor, and there is no one of whom a jury is likely to be more skeptical in a situation like that than defense counsel. I beg to differ with the suggestion that the judge made it clear, and I think it's the instruction that the judge gives that has to be clear for starters. I don't think you -- I don't think you can rely on defense counsel or on the jury's acceptance of defense counsel's interpretation. The instruction is at page --

QUESTION: How about this sentence: if you determine when giving mitigating effect to the mitigating evidence, if any, that a life sentence as reflected by a negative finding to the issue under consideration rather than a death sentence is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

MR. SMITH: I respectfully submit that's much less than clear, Your Honor, and becomes even less clear if you read the preceding sentence. The preceding

sentence says "if you find that there are any mitigating circumstances in this case you must decide how much weight they deserve, if any, and therefore give effect and consideration to them in assessing defendant's personal culpability at the time you answer the special issue."

QUESTION: Right, and then the next sentence explains just what he means by giving, in assessing the defendant's personal culpability. It says "an appropriate response to the personal culpability a negative finding should be given to one of the special issues." I really -- we assume the jury is -- even if the defendant is mentally deficient that the jury is not and that -- that instruction seems clear enough to --

MR. SMITH: I can only respectfully beg to differ, Your Honor, and in doing so I'll -- let me stress a couple of phrases.

Give effect and consideration to the mitigating circumstances at the time you answer the special issue. I respectfully submit to you that that is impossible. That is as if I said to this court would you please give effect and consideration to Estelle v. Smith at the time you resolve the Penry issue in this case.

If I said that I think I would get nothing but blank looks because I think that is a meaningless statement, but it's identical.

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QUESTION: This is also the jury that you told on I guess it was you doing the voir dire as well -

MR. SMITH: No, it wasn't.

QUESTION: Now this instruction that you got, this is almost like a fourth issue in that you will hear this other evidence that comes in about the defendant, you will take that into consideration when you are answering these three issues.

MR. SMITH: That was a voir dire, that wasn't me actually Your Honor that was a voir dire back in March.

QUESTION: That was pretty well done too I thought.

MR. SMITH: Done by Joe Price, who's a very able man but he was doing it back in March and the jury didn't deliberate until July. I know of no case where the court has held that an improper instruction or even an ambiguous instruction was clarified by voir dire questions asked four months previously or by voir dire questions. I don't think that works. The prosecutor did not, neither Mr. Price nor his colleague, they did not say in their closing argument, they did not reinforce what I had said to the jury. They did not differ from it, they did not reinforce it. They chose to remain silent and get whatever benefit they could get out of what I think is an extraordinarily confusing situation.

To me the important fact was not the -- not defense counsel's argument, but the jury one might expect would pay somewhat more attention to the piece of paper that they were handed to write their verdict on from the court which was identical 100 percent verbatim identical with the piece of paper they were handed in Penry One and which said in it as part of the instructions as -- or actually as part of the verdict form, there's nothing about mitigating evidence on that piece of paper but there is something that says if you want to answer no, it has to be because there's a reasonable doubt as to I believe it's the facts pertaining or the evidence pertaining to the special issue. In other words they had to find that there was reasonable doubt as to whether the state had proved --

QUESTION: Do we have the verdict form that you're talking about? That would be helpful if we could look at it

MR. SMITH: You certainly do and I believe it's at 676 of the joint appendix. If that's not it, it's close. Yes, that's where it is. The question is to -- to vote no to any question the foreperson had to sign a statement that said "We the jury because at least ten jurors have a reasonable doubt as to the matter inquired about in this special issue find and determine that the

answer to this special issue is no. The matter inquired about in this special issue had nothing to do with mitigating evidence. They were supposed to understand from what I submit with all due respect, Justice Scalia, is a very obscure instruction however lucidly explained by a defense lawyer who they did not have to trust that a -- they had to understand that those words that I just read did not mean what they said, and I think that that is not reasonable to ask of a jury.

QUESTION: What is confusing about the instruction "If you determine when giving mitigating effect to the mitigating evidence, if any, that a life sentence as reflected by a negative finding to the issue under consideration rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues"?

MR. SMITH: Well, what is -- a number of things I think are confusing about it including the extraordinary fact that it doesn't give them any hint which one to pick, but the words I would focus on are most strongly -

QUESTION: If it had given them a hint as to which one to pick, you'd object to that, the fact is that we all acknowledge as we held in Penry One, it doesn't naturally come under any one of them so the judge's

instruction was the Supreme Court has said this mitigating evidence doesn't come under any one of the three, so in effect, as counsel said in the voir dire, I'm creating a fourth special issue and if you find mental incapacity, say no to any one of the three and I think that's what this sentence says.

MR. SMITH: I submit it would have been significantly less confusing if they had indeed put a fourth question on the piece of paper Your Honor, but I also want to call your attention in the instruction to the words "as reflected by a negative finding to the issue under consideration". I suggest to you that those words, if they have any meaning at all, if the possible defense of them is if they have no meaning at all, that's the best that can be said for them, but if they have a meaning they mean that you cannot give effect to the mitigating evidence unless you can reflect it to -- I mean a negative finding to the issue under consideration, whatever that is.

QUESTION: At any rate the verdict form that they got gave them the three questions. It didn't contain this fourth question?

MR. SMITH: There was no fourth question.

QUESTION: So if a jury is hearing fleetingly this long instruction then gets a piece of paper with

three choices answer yes or no, maybe it's not so clear.

MR. SMITH: I figure it was not so clear especially if they do not necessarily take defense counsel's word unsupported by the prosecutor --

QUESTION: How would you have done it, Mr. Smith. Do you think the judge had authority to override the Texas statute which only provided for these three questions and simply invent a fourth of his own?

MR. SMITH: I don't think he had authority. I think you'd already done that for him Your Honor?

QUESTION: Well, I don't think we created a fourth question under Texas statutory law. I think what we said is that the mental incapacity has to be one of the factors the jury is allowed to take into account and I think it's a perfectly reasonable way for the judge to say find no to one of the Texas special issues in the statute, if that's -- if that's what you -- what you think is the case.

MR. SMITH: I think it's fair to characterize what you did in Penry and Penry One, Justice Scalia, as holding the Texas statute unconstitutional as applied to Penry and when the statute is held unconstitutional of course the state court on retrial need not observe it. There was the escape hatch that was one of giving a definition of the word deliberately. I have no idea, I

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cannot imagine why the trial court did not do that or why the prosecution did not suggest that they do that, but they didn't. That -- I admit that that's not without its difficulties but the suggestion --

QUESTION: Did you ask for that?

MR. SMITH: Yes we did, Your Honor. We actually asked for two definitions of deliberately. There's one that's in the appendix the joint appendix and I think I realize in going over it I think maybe the better one is the one that's not in the joint appendix. There are two definitions of deliberately; request for instruction number 11 which is not in the appendix but it's in volume three of the record at 107172 is an attempt, and it's moot whether it would have been successful, to use the jury instruction to cure the Penry problem. We also -- we also proposed several instructions that would -- well I think one that would have given a fourth question, one that would at least have said in plain English nullify, give a false answer, you don't have to tell the truth in response to these questions. I think if the judge had done that, I think he runs into problems under Roberts against Louisiana.

QUESTION: I don't know whether he runs into problems under Roberts, because what Roberts as I have read the opinion objects to is the capriciousness, the

fact that the jury could act with no evidence at all. And here the instruction is quite clear as to what sort of evidence the jury would act on.

MR. SMITH: It is true that Roberts was -- depended in part on the capriciousness, but the thrust of Roberts I think is that it's intolerable to tell the jury to disregard what they are being told to do.

QUESTION: Roberts had a reason and the reason that Roberts gave why it was intolerable was that the jury was just invited on no evidence whatever to move the offense downward which would have been the exact thing that Furman objected to.

MR. SMITH: As I understand what the state was contending in Roberts is not that dissimilar from what the state is contending here. The state was saying sure we could give effect to mitigating evidence. We have all these proposed verdicts and we tell them that they can render a false one if they want to. That's exactly what the state's arguing. That's what they propose to do here.

QUESTION: The state is arguing that you can respond to evidence which you believe in this particular way. It isn't saying just, you know, if you feel like -- if you just feel generally this guy shouldn't get the death sentence go ahead and find another verdict

MR. SMITH: Well it -- in Roberts as I

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understand the argument that was rejected in Roberts, no one was -- no one was saying oh, there's no problem with the statute because the jury can do whatever it wants. They were saying yes we can give individualized consideration to individual offenders. We do it in this perhaps rather unusual way by having the jury give false answers. And the Court said that's not an acceptable way of doing it. That's my reading of Roberts.

QUESTION: In any case you didn't get that alternative instruction so we don't get into Roberts, right?

MR. SMITH: That's right. I don't think we got a nullification instruction. I'm not sure what position my adversaries are going to take. I've read their brief and I don't know what their position is on whether we got that instruction. The --

QUESTION: Mr. Smith, you mentioned one instruction you proposed that's in the record but not the joint appendix. Was there another one that's in the joint appendix?

MR. SMITH: Yes, and it is -- it is in the joint appendix and it is cited in my brief, I do not have the -- I can find it pretty quickly. I think I can. If not I will defer Your Honor's - it's in the third volume of the appendix. It is at page 669, and I would say Your

Honor that -- if the question is whether that particular instruction would have cured the Penry error, I would have to answer no. That one would not have. I think the other one we proposed might or might not have. It's moot because we didn't get any of them. If the question is whether we proposed things that would have cured the Penry error, it's very clear the answer is yes. We did it this way, we did it the other way, we did it -- there are plenty of proposed instructions that we think could have complied with Penry. The court gave none of them.

QUESTION: Was the so-called Penry instruction on paper at the time of this resentencing hearing, the law that is in effect in Texas now?

MR. SMITH: No, no, was it on paper? It certainly had not been enacted and as far as I know did not exist, Your Honor?

QUESTION: What happens if we find for you in this case? It goes back. Would this case, if the state wishes to do so be resubmitted to a jury under the new statute?

MR. SMITH: Under the new statute, yes.

QUESTION: And is that okay? Is that constitutional?

MR. SMITH: I think so, Your Honor. I am not above trying to think of a way to --

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QUESTION: You haven't thought of one yet though.

MR. SMITH: I don't think I have -- I don't think I --

QUESTION: No, no, You don't have to commit yourself, but that's presumably what would happen or what the state would try to make happen.

MR. SMITH: Yes, yes and I would -- while I might not give it up, I would have a tough time saying that Penry was not complied with under the new Texas procedure.

QUESTION: Did the judge say it was simply beyond his authority to alter these three special issues?

MR. SMITH: He did not say that. One can infer that's what he believed Your Honor. He did not say anything.

QUESTION: I'm not sure what the judge is supposed to do if this court says one thing and the legislature says the other. Obviously, he can't ignore the mandate of this Court. On the other hand I don't know if he can just hold the matter in abeyance. Was there any suggestion that there be a delay in these proceedings while the legislature got its act together?

MR. SMITH: I'm not aware of such a suggestion, Justice Kennedy. I do submit respectfully the answer to

your previous question is clear enough although it's unfortunate when a judge is sitting with the United States Supreme Court saying one thing and the Texas legislature saying another. The Court wins. He has to follow what this Court says.

QUESTION: In the sense that the instructions as drafted, as legislated, cannot be given, I'm not sure if he has the further authority to go ahead and invent additional instructions under Texas law. I just don't know.

MR. SMITH: I guess I would answer by saying if the Texas statute has been held unconstitutional as applied then it's perfectly appropriate for a Texas judge not to implement it. I see nothing wrong with that.

Let me try to talk briefly about my second task, if I can,

which is to show that the -- this Peebles psychiatric report was contrary to or an unreasonable application of this Court's decision in Estelle v Smith. Based on the briefs I think that issue is going to boil down to whether the Peebles report was the sort of rebuttal that is permitted under Buchanan against Kentucky. I think it is quite clear that it is not. The Peebles report which is at page 60 of the joint appendix served one function in this case for the prosecution and that was to introduce one sentence which says it is -- "it is my further professional opinion that if Johnny Paul Penry were released from custody that he would be dangerous to other persons". That is the heart of that -- that statement is summarizes perfectly what the state was trying to prove on its affirmative case of future dangerousness. On that issue the defendant produced no mental status evidence, no psychiatric evidence and there was no occasion for rebuttal. They didn't rebut anything we said.

That is, no -- no court below by the way found that it was rebuttal. The theories of the courts below are so weak that as I read my adversary's briefs they do not defend the theories of the courts below. The state does and its allied amici do at some length argue harmless

error. I do not see how you can think an error was harmless or the admission of a piece of evidence was harmless when you look at what the prosecution did with that piece of evidence, and that is at page 7 of our brief. This is the last page, the last paragraph of the prosecution's rebuttal summation. This is the climax, this is what he saved to have ringing in the jury's ears when they went out to deliberate. "He was examined by Doctor Felix Peebles who found that he was sane. He knew the difference between right and wrong and he was competent to stand trial." But Doctor Peebles went on and made an additional finding that was really out of the ordinary and I have never seen this in any kind of a report. I'm quoting the prosecutor, closing out. He just added it, he said that "it is my further professional opinion that if Johnny Paul Penry were released from custody that he would be dangerous to other persons". The question of course comes why -- why did the state love that report so much? They say and they're right the dangerousness was not a tough issue for them, but I think the Curt must remember that the jury wasn't just answering yes or no to the second issue. Under your decision in Penry the jury had to take into account had to weigh the mitigating evidence against the perfectly horrible and very real evidence of man's dangerousness. And I submit

to you that it was a very tough and very close case because the --

QUESTION: Close case, on which issue?

MR. SMITH: It was a close case on how you come out at the end when you consider that there's a ton of mitigating evidence and also very serious evidence of dangerousness.

QUESTION: Well, but of course the evidence of dangerousness is perhaps more precise than the mitigating evidence. The jury doesn't have to credit any particular evidence even though it believes the witness, it doesn't have to believe that that is mitigating

MR. SMITH: It doesn't have to Your Honor, I do not -- I can only refer Your Honor to the record on this. The record of the mental retardation and the child abuse is as appalling as you could want. If you browse through about pages 139 to 219 of the record which is the testimony on the child abuse, it is the most painful reading you'll ever -- you'll ever have in your life. This was first of all it's a retarded man but it's a retarded child whose mother beat him physically, abused him verbally, humiliated him in the most revolting ways.

QUESTION: But you don't weigh future dangerousness against that as you put it. They are two separate issues. That goes to the issue of personal

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culpability.

MR. SMITH: Yes.

QUESTION: And future dangerousness is a totally different issue. You don't weigh the one against the other. I don't see how anything you said with regard to his dangerousness would affect the jury's determination regarding how culpable he was.

MR. SMITH: I beg to differ. Of course it would not affect the jury's determination of how culpable he was but the jury had the power to decide I don't care how much abuse he had and how much retardation he had. I don't feel safe with this man still alive. They had the power to make that decision. That's the decision the prosecutor was asking them to make. That's why dangerousness was the prosecutor's big point and the Peebles report was the prosecutor's big exhibit. If you read the prosecutor's summation he clearly thought --

QUESTION: But there was other evidence of future dangerousness.

MR. SMITH: There was indeed but this was the one he liked best.

QUESTION: Well, the fact that the counsel may have used this in his summation doesn't really go to the harmless error question, if there's a whole lot of other evidence as to future dangerousness.

MR. SMITH: I think it does, Your Honor, because I do think it was important not just whether the jury thought he was dangerousness -- dangerous but whether -- but how disturbed the jury was by the dangerousness. I think the degree of dangerousness and the impact it had was terribly important at the trial.

QUESTION: One sentence?

MR. SMITH: One -- one sentence which - it is a sentence which as the prosecutor points out appears to have been stuck in there by this professional, this uncross-examined professional with no axe to grind who from reading the report you would think he took one look at the man and said this man is so dangerous I've got to volunteer it to the court. I don't know if that's what really happened but that's what the prosecutor suggested to the jury.

QUESTION: But I still don't see how that means that this one sentence is so controlling that all the other evidence of future dangerousness can't be looked at to decide whether it was harmless error.

MR. SMITH: I'm not saying it can't be looked at but I think to decide whether it's harmless you have to say how different is the case without it, different enough that the prosecutor would not have had this key point.

QUESTION: Maybe it wasn't an Estelle v Smith

violation at all. I mean I don't know -- I'm not sure you get into harmless error. Maybe it wasn't error.

MR. SMITH: Well we think it was Your Honor. I think the argument the main argument against that it wasn't Estelle error is Buchanan against Kentucky and I've tried to show this certainly wasn't rebuttal, they weren't rebutting anything. There are other theories and I think they're very very very tenuous indeed it's not even clear from my adversary's briefs that they believe. If I may, I'll reserve the balance of my time.

QUESTION: Very well Mr. Smith. Mr. Taylor we'll hear from you

ORAL ARGUMENT OF ANDY TAYLOR

ON BEHALF OF THE RESPONDENT

MR. TAYLOR: Mr. Chief Justice and may it please the Court. Unlike Penry One, where no instruction was given this case involves an instruction that was not only given but said in its express words that this jury could give effect to a moral determination of this man's personal culpability such that if they felt despite literal answers to the three questions that Texas submits that a life choice instead of death was the appropriate reasoned moral response, then answer one or more of those questions no.

QUESTION: Even though literally they should

answer yes. I mean that's such an odd posture in a sense it's very awkward to say the least.

MR. TAYLOR: We submit that it is not awkward because of the actual words contained in the instruction as Justice Scalia read out loud in that particular instruction that was given, and I might add, Justice Ginsburg, that instruction was attached to the three submission charge that went back in the jury room. It wasn't something that was said verbally and never seen again in writing but once that instruction was put together, it made clear that to give a vehicle to this jury to choose life instead of death it could answer no even if they felt that it would be a literally an answer of yes.

QUESTION: The last colloquy we just had with petitioner's counsel was to the effect that really evidence of child abuse and so forth doesn't relate to future dangerousness

MR. TAYLOR: I think that was the point of Penry One --

QUESTION: And that's our whole concern here.

MR. TAYLOR: I agree and what you taught us Your Honor in Sapple is that while we must channel and limit the discretion that a sentencing jury has in finding out if a defendant is eligible for the death penalty, it is

not unconstitutional to shape and to structure that jury's consideration of all of the evidence so that they can make a life choice.

QUESTION: Isn't the difficulty in this case that what you describe as the structure is in effect an instruction that says you may act irrationally and as against that possibility there were at least two avenues open to the court that would have allowed the jury to do just what Penry One required and to do it in a rational way? One way would have been to add a fourth question and say "even though you answer yes to one, two and three you also have a responsibility to consider mitigating evidence and if you do so, you may in fact answer this fourth question" however it might be structured "in a way that says don't impose the death penalty any way".

A second rational way to do it -- I don't how easy it would have been but I assume it could have been done, would have been with a definition of deliberately and the question the second question I guess, which instructed the jury that a person of some degree of retardation simply does not -- is not capable of the mental process that "deliberately" assumes or requires. So what it boils down to is the state had at least two ways in which Penry could rationally have been given consideration, and instead the court decided to do it in an irrational way saying even if

all the evidence leads to a yes answer, you can say no any way, and that's to me the nub of the problem here because if as we have repeatedly said the jury is supposed to engage in some kind of a reasoned moral process, this was not a reasoned moral process; it was an irrational process. What's your response to that?

MR. TAYLOR: Any of those three would be constitutional. This Court has never told the state of Texas that in structuring and shaping the jury's consideration of all of the relevant consideration of evidence including mitigating evidence, it must choose a particular way to --

QUESTION: No, but it has -- this is the point of my question, it has repeatedly told everybody that the process of arriving at a determination or a choice between life and death is supposed to be a reasoned moral process and it seems to me by definition inconsistent with that standard to say that it suffices to tell the jury that you may behave in a totally irrational way.

MR. TAYLOR: We think that it was a reasonable choice and certainly a reasonable application under the Edpa standard for this trial judge to pick an instruction as opposed to a fourth question. First, Penry One tells us to use an instruction. It doesn't tell us to use a question. Second the submission that state law allowed at

that time asked for three questions, not four. There was no appellate decision in Texas suggesting that a fourth question was appropriate.

QUESTION: You don't concede, do you, that giving a negative response to any -- to all of the three questions on the basis of the mental incapacity of the defendant would have been irrational? That is to say even though a deliberateless -- deliberateness instruction was not given, you don't concede that it would have been irrational for the jury to find that since this defendant did not have adequate mental capacity, he did not act with the requisite deliberateness?

MR. TAYLOR: We do not concede that point, Justice Scalia.?

QUESTION: You don't think that's irrational?

MR. TAYLOR: We do not.

QUESTION: What we said in Penry One was that that is not necessarily clear to the jury, but we didn't say that it was irrational.

MR. TAYLOR: That is correct, Your Honor, and I might add - -

QUESTION: We did say in Penry One that it was an inadequate alternative, didn't we? That's why the case went back.

MR. TAYLOR: In Penry One although it was not

clearly established under the Edpa standard that confronts this Court, the Court did say that there was no instruction on mitigating or rather on deliberateness so the Court --

QUESTION: In other words in the absence of a deliberateness instruction different from the one given in Penry One, the Penry instructions were not adequate. That's what Penry held, didn't it?

MR. TAYLOR: We respectfully disagree.

QUESTION: You don't think it held that?

MR. TAYLOR: We do not. What Penry One taught us is that --

QUESTION: Then the irrationality apparently started with this Court.

MR. TAYLOR: What Penry One taught us --

QUESTION: Why did we reverse the case?

MR. TAYLOR: It's not been reversed but Sapple and Buchanan and other cases teach us that there must be an instruction. Once you get an instruction then we go through a Boyd analysis of whether or not the instruction got the job done. The instruction that you referenced on deliberateness that defense counsel requested is in your joint appendix volume three page 669, and in that instruction there is not one reference made to mitigating evidence. That couldn't have got the job done. It was a

reasonable decision on the part of the Texas courts.

QUESTION: I think counsel said this was one of various ones he had been -- you're not holding him simply to this instruction.

MR. TAYLOR: No, we are not, Your Honor, but the point is --

QUESTION: His point is this just shows how hard it is to do.

MR. TAYLOR: Well the point that we're making is that in order for an instruction on deliberateness to work under Penry One and the cases thereafter, it would have to direct the jury's attention to the mitigating evidence. That instruction doesn't get it done. What instruction was given specifically tells them that they have the power to answer no instead of yes and I might add under Boyd that case taught us that in determining if the instruction was erroneous or ambiguous that we look at the totality of the circumstances. We don't parse and make --

QUESTION: Mr. Taylor, can I just ask you one question. It seems to me that one things that cuts across all the instructions are the special issues that were given to the jury at the very end and with respect to each of the three special issues, the jury was said in order to say no to that, we the jury because at least ten jurors have a reasonable doubt as to the matter inquired into in

this special issue find and determine that the answer -- issue is no. Now how could any -- how could the foreperson sign a negative answer to a special issue unless there were several jurors who said I don't think the facts support it?

MR. TAYLOR: Because the instruction told them to. The instruction specifically says if you determine when giving mitigating effect to the mitigating evidence if any that a life sentence as reflected by a negative finding as to the issue under consideration rather than a death sentence - -

QUESTION: That's flatly inconsistent with the command in the special issue that because at least ten jurors have a reasonable doubt we must answer no.

MR. TAYLOR: We submit that it is not flatly inconsistent. In fact it is entirely consistent because what you taught us in Boyd is that you must look at all of the charge, not only a certain section to answer the question --

QUESTION: Mr. Taylor, you said before that the instruction, the so-called fourth instruction, accompanied the jury into the jury room together with the three special issues. Physically what did the jury have? They had on a piece of paper the three questions and then where did the fourth issue show up?

MR. TAYLOR: The charge and the accompanying instructions is found in volume three of the joint appendix beginning at page 672, Justice Ginsburg, and that charge does a couple of things. It not only tells the jury to take into consideration all of the evidence but it goes further and it tells them that they should look at all of the mitigating circumstances and including in that look at the defendant's character, record, circumstances of the crime, and then they have to look at a broader principle and that is what is this defendant's personal culpability not limiting it to only the question of deliberateness or future dangerousness or provocation --

QUESTION: Was all this presented so that each jury would understand from what the juror took into the jury room that these were to work together? Did they have this special issues on one page? You said something in the beginning about --

MR. TAYLOR: It's stapled together, Your Honor. This is an actual copy of what went back to the jury room and it's stapled on the front. They would have to had read it and of course it was read aloud to them during the trial. This was a six week voir dire.

QUESTION: Suppose I thought just going back to your instruction which as you read it properly "if you determine when giving effect to the mitigating evidence,

if any, that a life sentence as reflected by a negative finding to the issue under consideration is appropriate", so what should I do as a juror if I thought that a life sentence is appropriate because of the abused childhood and the mental retardation, but I didn't think a life sentence as reflected by a negative answer to these questions was appropriate, what am I supposed to do?

MR. TAYLOR: You must follow your oath. The oath includes the instruction and under that circumstance morally if you believe life instead of death is the right answer, you answer no.

QUESTION: No, I didn't ask it clearly. Suppose I believe a life sentence is appropriate but I don't believe a life sentence as reflected by a negative answer to a finding to the issue under consideration; I don't believe it is appropriate as reflected by deliberation; I don't believe it is appropriate as reflected by lack of dangerousness. I believe it is appropriate for a totally different reason that is nowhere reflected in the issue under consideration then what am I supposed to do? It seems to me that this instruction is silent as to that matter.

MR. TAYLOR: You were told under those circumstances to answer no. Not only does the instruction say that. The trial court during voir dire said that and

I quote. This is from the record and it's volume 27. The trial court is telling one of the members of the voir dire panel that was eventually chosen question okay, "and do you see from reading this instruction that if based on all the evidence you heard in this trial if you felt that these questions should be answered yes beyond a reasonable doubt" --

QUESTION: Suppose I accept that I know that I think we know that particular statement - -

QUESTION: Can I hear the rest of it?

MR. TAYLOR: "But you still felt that there was mitigating evidence that had been presented to you that was sufficient for you to feel that in this case the death sentence was not appropriate and a life sentence was more appropriate, then you could answer one or more of the questions no to effect a life sentence. Do you understand that?" The answer was yes. On pages 18 and 19 of our brief, the red brief, we cite voir dire references for every single one of those jurors that made it in the case. It was a six week voir dire on average over two hours was spent going over one thing and that was this instruction. This instruction was in writing and showed to the panel during voir dire. And what we learned --

QUESTION: You say a statement similar to that was made to each one of the jurors during the voir dire?

MR. TAYLOR: Statements by the prosecutor were made in each and every instance. Statements by the court were made in some instances. Statements by defense counsel were made in each instance and so --

QUESTION: When you say this instruction, you mean the instruction that is set forth as well on page 5 of the blue brief: "if you find there any mitigating circumstances in this case" or was it just the three special issues?

MR. TAYLOR: It was the instruction, the actual instruction --

QUESTION: The instruction that's set forth on page 5 was read to them in voir dire?

MR. TAYLOR: I don't have the blue brief handy.

QUESTION: Well, it's the one we're focusing on. "If you find there any mitigating circumstances in this case" et cetera.

MR. TAYLOR: Yes. The only difference, Your Honor, between the instruction during voir dire and the instruction that went back with the jury is that the instruction in voir dire said that special issue and what our opponent described as a slight improvement to the charge ultimately it said "one or more of the special issues". That's the only nuance that's different.

QUESTION: Now the Texas court of criminal

appeals found that the supplemental instruction was a nullification instruction. Are we bound by that determination?

MR. TAYLOR: We think not. Nullification to the extent that we're talking about Roberts versus Louisiana is a situation where a juror is tempted and invited by the charge to breach their oath. Here the juror was not tempted to breach their oath was admonished to follow their oath. Now it's true that the lower courts and the high court in Texas referred to it as a nullification charge but there's that key distinction because they're following their oath and doing exactly what you told us in the opinion you authored for this court in Penry One. As to the --

QUESTION: Is that a matter of Texas law? Did they look at it from that perspective and say as a matter of Texas law it was a nullification?

MR. TAYLOR: Well as a matter of Texas law they did use the word nullification but in a proper way. That's not a bad word under Texas law. That is a good word because if it's a nullification instruction, the high court in Texas, the Court of Criminal Appeals, has told us that complies rather than violates Roberts and complies and rather than violating Penry.

As my time draws near I'd like to focus on the

Estelle claim that was made in this case.

QUESTION: Counsel, Your time is far off still.

MR. TAYLOR: Under the Estelle claim what was clearly established and remembering of course that we're on federal habeas review, Edpa standard applies, what was clearly demonstrated in Estelle, two things, first that request for an examination of the defendant was not made by the defendant or his counsel but rather was ordered by the Court. Second, in Estelle we learned that there was no attempt at all to introduce the mind-set or the psychiatric evidence in that case, and so it was a reasonable application of Estelle for the Court of Criminal Appeals in Texas to rule that Estelle was distinguishable and not clearly applicable to this case.

In this case not only are we dealing with a request by defense counsel, we're also dealing with offensive use of psychiatric evidence by defense counsel. You'll note in the record when Dr. Price, their expert witness on mental retardation and child abuse and its effects, he testified that he relied on the Doctor Peebles report. That's a choice the defense made, not a choice that the prosecution made.

QUESTION: Mr. Taylor, what I don't understand about this is I don't understand what evidence that Penry submitted that statement by Doctor Peebles rebutted.

MR. TAYLOR: Of course, we contend that Estelle is not applicable but if you believe that Buchanan applies and the only way that we can win is to argue that it's solely and exclusively rebuttal, the answer to that question that demonstrates why we still prevail and why the court below was correct is that in the Peebles Report there is a statement made that the reason that this gentleman doesn't learn from his mistakes is not because of mental retardation, not because of child abuse but rather because he is a psychotic individual.

He has an anti-social personality disorder. He's a psychopath and so therefore it's very important in determining personal culpability and whether he should get death instead of life to be able to demonstrate from the prosecution's point of view this man is not any less culpable because his violent behavior, his future dangerousness is not the result of mental retardation. It's the result of the fact that he's a psychopath and therefore he is not any less culpable than any one else absent such evidence of mitigating circumstances. And Justice Ginsburg, it is for that reason that we still prevail even if you believe that under Buchanan and its rebuttal exception that is all that we have here.

QUESTION: This part of your argument it seems to me contradicts your first. You're saying the jury

can't really consider mitigating circumstances because we're talking about dangerousness. That's exactly the opposite of what you're saying in the first part of your argument.

MR. TAYLOR: Well the first part of our argument we're saying is Estelle doesn't apply on its facts, that as to the Buchanan exception, we're suggesting and the question I believe was what part of the report would be rebuttal to what they were saying in the punishment phase, what Dr. Price was saying is that I'm not focusing on the future dangerousness part but what Dr. Price was saying is we don't think he's culpable and the reason we don't think he's culpable is because he can't control himself, he can't learn from his mistakes, but that --

QUESTION: Thank you, Mr. Taylor.

Mr. Schaerr we'll hear from you

ORAL ARGUMENT OF GENE C. SCHAERR

ON BEHALF OF ALABAMA, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

MR. SCHAERR: Mr. Chief Justice, and may it please the Court, despite the lip service that the petitioner pays to Edpa, the fundamental flaw in both of his claims is that they ignore the statute's threshold requirement and that is that the principal of federal law on which he relies be clearly established in this Court's

decisions and not just arguably established.

Let's take first his challenge to the jury instruction, the first question to ask of course is what principle did this court's Penry jurisprudence clearly establish as opposed to arguably establish when the state courts made their decisions below. I submit that what Penry clearly established is summarized at page 328 of the Penry opinion in which the court said that a defendant is entitled to instructions informing the jury that it can consider and give effect to the mitigating evidence by declining to impose the death penalty.

This is how the Penry One holding was characterized in subsequent opinions of this Court including Graham and Sapple and others, and it's true that Penry One discussed some of the ways that Texas might comply with this principle but it did not clearly establish that these additional instructions either had to include a separate special issue or had to expressly tell the jury that it could answer no to a special issue even if the literal answer was yes or that it had to expressly define deliberately. The Court I submit did not attempt to micro manage Texas procedure in any of those ways and in fact as later opinions pointed out it could not have done so without creating a new rule under Teague.

Indeed the term after Penry One both Boyd and Sapple

made crystal clear that Penry One had left intact the state's freedom to structure and shape the jury's consideration of mitigating evidence.

QUESTION: You would agree I take it that we would -- we were not required in order to establish a clear standard we were not required in Penry One to say the instructions have got to call for a rational process, the instructions have got to call for a process that reasonable jurors could at least intellectually follow, -- that if we found a deficiency on such points as that that you would not feel that Edpa stood in the way of granting relief here.

MR. SCHAERR: Well the application of Penry One would have to not only be incorrect or less than perfect, it would have to be unreasonable under this Court's analysis in Williams versus Taylor, and let me address that question now if I might.

QUESTION: I want to make sure we're together at least on one point. When we say that instructions are inadequate and it has to go back for better instructions, I take it it's not your position that Edpa would require us to say something like and the instructions have got to be clear, they've got to be rational, they've got to be instructions that juries can follow. I take it you would agree that at least those requirements are implicit and

clearly implicit in what we hold when we say the first instructions are inadequate. Do you agree?

MR. SCHAERR: I think that's right and I think these instructions complied with those requirements at least to the extent that a reasonable jurist could conclude that they did comply. It seems to me the only real question under Edpa with regard to the jury instruction is whether that instruction was a reasonable application of this court's Penry jurisprudence.

QUESTION: If the answer is no, I wonder what happens to -- it seems to me your position has considerable implication for the authority of this Court in criminal cases. We issue mandates and you're saying that those mandates could be ignored by a state as long as the way in which the state ignores the mandate commends itself to some reasonable juror -- reasonable lawyer rather though most reasonable lawyers decide the contrary, is that what you're thinking?

MR. SCHAERR: Not at all, Justice Breyer. Obviously the state has to comply with the Court's mandate. The question is did they do so in a reasonable way, and I think --

QUESTION: What about that though? I mean I'm not asking it argumentively. I'm trying to follow through on the implication. We have a mandate, we issue it to a

state, now in your view they -- they do what two or three lawyers might think was reasonable but 97 wouldn't and so what are we supposed to do?

MR. SCHAERR: Certainly the Court held in Williams versus Taylor that it's not enough to have one jurist that might conclude that it was reasonable.

QUESTION: All right then however -- you see what I'm getting at. I'm worried about the implications there for the compliance by a state with a mandate of the Supreme Court and that's what I'd like you to think through for me.

MR. SCHAERR: Sure and I agree. They have to do it in a reasonable way but I can't -- I don't think it's possible to draw a line and say if 70 percent of --

QUESTION: I don't think we know either. We haven't stated a number seven, 18, 32 we don't know either.

QUESTION: Mr. Schaerr we did say in a case that came down rather recently in the Sapple case that South Carolina just didn't get it, it didn't pay attention to our decision in Simmons. This case has something of the same feel to it.

MR. SCHAERR: Well I -- with all respect Justice Ginsburg, I don't think that's true. In fact in this case to me the key distinguishing factor between this

case and Penry One is that here unlike Penry One, the trial court actually gave a very extended instruction on the subject of mitigating evidence as Mr. Taylor has discussed earlier. That was instruction number four and there was no corresponding instruction given in Penry One and so the only question -- so clearly this case is distinguishable from that and clearly the lower courts at least attempted to apply this Court's precedent in Penry One. Whether they did so reasonably is the real question of the day and I think on that point it's significant although not dispositive that of the ten state judges and the four federal judges who address this issue on the merits, not one of them concluded that the instruction was an unreasonable application of Penry One.

There was one judge in the Fifth Circuit who concluded that it was incorrect but again under Williams versus Taylor it's not enough that the application be incorrect and especially not less than perfect. And so even if it would have been better to add a fourth special issue, that doesn't make the Texas decision unreasonable especially in light of Boyd and Sapple which say that the states retain their right to structure and shape the jury's consideration of mitigating evidence.

QUESTION: Didn't those judges look at the instruction in isolation without reading it against the

special issues?

MR. SCHAERR: Well I think they -- I don't think they looked at it in isolation. I think --

QUESTION: Did they refer to the special issues in their comment on the instructions?

MR. SCHAERR: I believe they did and certainly that was the entire issue throughout the --

QUESTION: The language about what they have to do to answer no, that at least ten jurors have to have a reasonable doubt as to the facts?

MR. SCHAERR: I don't recall if they focused on that specific language.

QUESTION: Isn't that fairly relevant?

MR. SCHAERR: Well it is relevant but as Boyd says this Court and the lower courts as well they look to the entire context of the trial. It's under Boyd it is clearly fair gave to look at voir dire and closing arguments and all of that, and so even if it might have been better under -- even if it might have been better to tell the jury more clearly that it could answer a special interrogatory no when it thought the answer was yes, that also doesn't make the instruction unreasonable and as we've discussed especially in light of the other circumstances of the trial.

I also think that there's no arguable problem in this

case under Roberts because the problem in Roberts of course which was a plurality opinion was that there was no instruction at all that even authorized the jury to find a lesser included offense if it wanted to give a life sentence instead of a death sentence.

QUESTION: What do you think about that? The other thing more philosophically, as a prosecutor, someone on that side, if this court were to say nullification instructions are okay, might that come back to haunt you some day in other cases, indeed to bite you if you see what I'm driving at? I want to get your reaction to that as a prosecutor.

MR. SCHAERR: I think the way the word nullification was used by the Texas Court of Criminal Appeals, it was simply that the jury could in essence nullify what it might otherwise consider to be the correct answer to one of those three special interrogatories. I don't think they were saying that nullification instructions as a general matter are proper or anything like that but as used here that's what nullification means. I don't think there's any magic.

QUESTION: The word nullification instruction is almost an oxymoron, isn't it, because you think of nullification jury as refusing to follow an instruction rather than following one.

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MR. SCHAERR: Right and that was the situation in Roberts, but that's not the situation here. At the end of the day the instruction at issue here was reasonable in my view, if for no other reason that it gave the jury at least one clear path to a life sentence based on the petitioner's mitigating evidence and that is all that this court's decisions clearly required.

Now finally I think it's important to remember as the Court considers the statute here that Edpa was designed to curb what Congress saw as an enormous and undue federal burden on the state's criminal justice system.

Thank you.

QUESTION: Thank you Mr. Schaerr.

Mr. Smith you have four minutes remaining.

REBUTTAL ARGUMENT OF ROBERT S. SMITH

ON BEHALF OF THE PETITIONER

MR. SMITH: Thank you.

Let me -- I'm going to try to use that time just to try to convey some information on some points that may be of interest. On the question of what a Texas court could have done my Texas colleague advises me that there was a case called McPherson in which a Texas court before the statute was amended did give a fourth special issue and that that was ultimately upheld by the Texas Court of Criminal Appeals. That had not occurred at the time of

our trial but the Texas Court of Criminal Appeals did approve it. There was an escape hatch available and it was used. I do not have the citation to the McPherson case here; if there's an appropriate way to provide it we'll certainly do that.

Secondly on the question of -- I learned to say voir dire when I was in Texas and I'm trying to unlearn it, but it's one or the other voir dire or voir dire. I suggest that it is perilous to rely on voir dire of all things to undo or to cure a problem with an instruction. Mr. Taylor is quite right, that this process in Texas goes on for weeks and weeks and a lot of things get said. If you'll look at volume 22 page 1792 of the record, you will see one of the jurors, one of the jurors who actually sat being instructed by the prosecutors, you should not automatically answer these questions a certain way to achieve a punishment, you should not answer one of them no because I want him to get a life sentence. Possibly technically correct but surely in the context of what these jurors were supposed to do, likely to confuse, my point simply a lot of things get said in voir dire over a long time and it would be a mistake to say that that cured what I think is a hopelessly confusing instruction.

On the Peebles Report where Mr. Taylor made the argument that what they were really trying to show was

that Penry was a psychopath, I have a very short response. The Peebles Report doesn't say that. There's nothing in the Peebles Report that says he's a psychopath. Sure they said it; everybody else said it. Peebles said pretty much what our expert said, he said he has mental retardation and anti-social conduct, but anti-social personality disorder, you won't find that in the Peebles Report. Unless there are further questions I'll submit.

QUESTION: Thank you, Mr. Smith the case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

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