



1 argument before the Supreme Court of the United States  
2 at 11:10 a.m.

3 APPEARANCES:

4 ROBERT C. OWEN, ESQ., Austin, Tex.; on behalf of the  
5 Petitioners.

6 EDWARD L. MARSHALL, ESQ., Assistant Attorney General,  
7 Austin, Tex.; on behalf of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ROBERT C. OWEN, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF	
6	EDWARD L. MARSHALL, ESQ.	
7	On behalf of the Respondent	21
8	REBUTTAL ARGUMENT OF	
9	ROBERT C. OWEN, ESQ.	
10	On behalf of the Petitioners	44
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in 05-11284, Abdul-Kabir vs. Quarterman, and  
5 05-11287, Brewer versus Quarterman.

6 Mr. Owen.

7 ORAL ARGUMENT OF ROBERT C. OWEN

8 ON BEHALF OF PETITIONERS

9 MR. OWEN: Mr. Chief Justice, and may it  
10 please the Court:

11 When this Court granted review in mid  
12 October in these consolidated cases, the cases  
13 exemplified the Fifth Circuit's settled approach to  
14 reviewing claims of error under this Court's 1989  
15 decision in Penry v. Lynaugh. In both cases the court  
16 below failed to take seriously the requirement that  
17 capital jurors have a meaningful basis for giving effect  
18 to the relevant mitigating qualities of a defendant's  
19 evidence, and in both cases the court below found as a  
20 factual matter, both against common sense and this  
21 Court's holdings, that reasonable jurors would regard  
22 evidence that a defendant had experienced significant  
23 mistreatment or abuse as a child or had mental  
24 impairments as an adult as reasons to find him less  
25 dangerous rather than more dangerous.

1           But those opinions, however incorrect, no  
2   longer represent the Fifth Circuit's view of Penry. In  
3   mid December the Fifth Circuit decided in its en banc  
4   decision in Nelson vs. Quarterman to take a sharp turn  
5   away from its prior treatment of Penry claims and to  
6   follow instead this Court's guidance in Tennard and  
7   Smith. Under such circumstances, where the assumption  
8   that we imagine underlay this Court's decision to grant  
9   review in this case has been so profoundly changed by an  
10  intervening decision of the court below, we respectfully  
11  suggested by motion that the Court return these cases,  
12  vacate the judgments, return them to the Fifth Circuit  
13  for further consideration in light of the new opinion in  
14  Nelson.

15           JUSTICE GINSBURG: Why, when we are told  
16  that, that the State will surely challenge Nelson in  
17  this Court, and we already have the issue before us, so  
18  all that you would achieve is delay, just substituting  
19  the Nelson case for this one?

20           MR. OWEN: I don't believe, Your Honor,  
21  that, that all that would be accomplished by that would  
22  be certainly not just delay. I think that if the Court  
23  chooses to wait for the State's cert petition in Nelson,  
24  the Court could certainly put our cases aside and hold  
25  them awaiting Nelson -- Nelson's cert petition should be

1 filed by mid March -- and then could make its judgment  
2 about whether to grant cert in Nelson or not.

3 If it granted cert in Nelson it could decide  
4 the three cases together; if it found Nelson raised no  
5 questions that were worthy of review, it could either  
6 proceed to decide these cases or send them back to the  
7 Fifth Circuit. I think that the State's decision,  
8 though, Your Honor, is based on a, a misreading of  
9 Nelson. I think that the State has suggested to the  
10 Court that Nelson is in the State's phrase a narrow  
11 fact-based decision and I think that's not, I think  
12 that's not a fair characterization of the Nelson --

13 JUSTICE KENNEDY: Well, why can't we just  
14 read Nelson and then say in these cases whether or not  
15 it's correct?

16 MR. OWEN: I think the main reason, Your  
17 Honor, is that these cases aren't Nelson, and that  
18 Nelson if it presents issues that are worthy of the  
19 Court's consideration, that would be the better vehicle,  
20 rather than trying to use in effect these cases to  
21 decide issues that are presented by a different set of  
22 facts.

23 JUSTICE STEVENS: If these cases aren't  
24 Nelson that's a reason why we should decide these cases;  
25 it seems to me.

1                   MR. OWEN: Well, Your Honor, I am, I am  
2   confident that if the Court chooses to proceed on the  
3   merits of this case that we will prevail on the merits,  
4   until it finds --

5                   JUSTICE STEVENS: Well, why don't you try to  
6   convince us of that?

7                   MR. OWEN: Then let me turn, let me turn to  
8   our, our merits, Your Honor.

9                   The issue before the Court in this case as  
10   we said is whether the jury instructions gave the jurors  
11   a meaningful basis for considering the relevant  
12   mitigating qualities of these two Defendants' mitigating  
13   evidence. In Mr. Brewer's case that included the fact  
14   that he was hospitalized for treatment for a major  
15   episode of depression about three months before the  
16   murder, and the fact that the evidence indicated he had  
17   suffered serious abuse, serious physical and emotional  
18   abuse from his father as a teenager. In Mr. Cole's case  
19   the evidence indicated that as a result of neglect and  
20   deprivation that he suffered as a child, he had himself  
21   emotional problems, fragmented personality, chronic  
22   depression, enormous need for nurturance, a lot of  
23   emotional turmoil and problems that continued into  
24   adulthood.

25                  And in addition to that, the expert who

1 testified at Mr. Cole's trial indicated that he had been  
2 given a set of generally accepted neuropsychological  
3 tests and that on those tests he had scored below normal  
4 and on some of them very far below normal, under the  
5 fifth percentile. And as a result that he probably  
6 suffers from some sort of central nervous dysfunction  
7 which limits his impulse control. We respectfully  
8 suggest that under this Court's decision in Penry, those  
9 are all the kinds of facts about these two Defendants  
10 that could reasonably support a juror in concluding that  
11 a life sentence rather than the death penalty was an  
12 appropriate sentence.

13 But because the jurors were never asked  
14 whether the mitigating evidence reduced the Defendant's  
15 culpability in such a way as to call for a life  
16 sentence, the resulting death sentences are unreliable.  
17 The jurors are asked only two questions as the Court  
18 well knows. But just to review, under the pre-1991  
19 Texas statute jurors were only asked two questions: Was  
20 the crime committed deliberately and is the Defendant  
21 likely to pose a continuing threat to society? And  
22 those instructions alone as has been mentioned earlier  
23 this morning, don't mention mitigating evidence; the  
24 verdict form doesn't mention mitigating evidence; and so  
25 this Court has held repeatedly that whether that two



1 question format satisfies the Eighth Amendment's  
2 individualized sentencing requirement is a matter of the  
3 evidence that's presented in a particular case, how it's  
4 argued to the jury, and what are the jurors told about  
5 the meaning of their instruction.

6           And we believe that in this case, throughout  
7 the trial -- in both of these cases, excuse me --  
8 throughout the trials the jurors were emphatically told  
9 that they were not entitled in deciding the future  
10 dangers test question to engage in any sort of broad  
11 inquiry into these Defendants' moral culpability.  
12 Instead, the prosecutors in both cases made very clear  
13 to the jurors during jury selection that in answering  
14 the future dangerousness question you must put to one  
15 side your opinion about whether the Defendant's  
16 background, for example, calls for a particular sentence  
17 and answer the question solely on, as the prosecutor put  
18 it, the basis of the facts. And we feel that the  
19 evidence in this case very strongly would have supported  
20 the inference that these, both of these Defendants were  
21 likely to be dangerous --

22           CHIEF JUSTICE ROBERTS: How would you  
23 compare that evidence with the evidence in Penry itself?

24           MR. OWEN: I think, Your Honor --

25           CHIEF JUSTICE ROBERTS: These are closer

1 cases than Penry, I think. You'd have to concede that,  
2 wouldn't you?

3 MR. OWEN: I think they are different cases,  
4 Your Honor, I'm not willing to concede that they are  
5 closer cases. I think that in, in the juror's mind, the  
6 only conclusion that could be drawn from the evidence in  
7 these cases is that the Defendants are likely to be  
8 dangerous in the future. That is exactly the same  
9 conclusion that would have been compelled by the  
10 evidence in Penry. I think that --

11 JUSTICE GINSBURG: How does that, if the  
12 evidence, suppose we think the evidence is weaker, it's  
13 still evidence of childhood abuse and mental disorder of  
14 some kind, and those are relevant mitigating factors.

15 MR. OWEN: Absolutely. Absolutely, Your  
16 Honor, .

17 JUSTICE GINSBURG: So you -- if your case is  
18 less strong than maybe the jury will decide it the other  
19 way. But it doesn't mean that those factors are not  
20 mitigating factors.

21 MR. OWEN: I couldn't agree more, Your  
22 Honor. I think it's very clearly settled by Tennard and  
23 other cases going back to 1976 that facts like a  
24 deprived or abused background or mental impairment are  
25 certainly mitigating. And with further response to your

1    --

2                   JUSTICE SCALIA:  Tennard, Tennard was  
3    decided after the State decision here, wasn't it?

4                   MR. OWEN:  This Court's decision in Tennard  
5    postdates the State court decisions in both of these  
6    cases.  Yes, Your Honor.

7                   JUSTICE SCALIA:  And where is -- this is an  
8    AEDPA case, isn't it?

9                   MR. OWEN:  Yes, Your Honor.

10                  JUSTICE SCALIA:  So we're, we're asking  
11    whether this State court made an unreasonable decision  
12    at the time, and at the time regardless of what the  
13    Fifth Circuit has now said, at the time under Johnson,  
14    and -- and there is another earlier case, we said that  
15    you didn't have to give full mitigating effects; as long  
16    as there was some manner in which mitigating effect  
17    could be given that was enough.

18                  MR. OWEN:  The Court has been consistent --

19                  JUSTICE SCALIA:  So I think Tennard is  
20    utterly irrelevant even if it is right.

21                  MR. OWEN:  I, I -- I don't agree.  And  
22    here's why, Your Honor.  Tennard was itself both a  
23    habeas case and a case governed by the antiterrorism  
24    act, like these two cases.  And so in Tennard the Court  
25    was called on to decide not squarely the question of

1 whether the State court decision in that case had been  
2 objectively unreasonable, but whether a reasonable  
3 jurist could have found it to be objectively  
4 unreasonable such that a certificate of appealability  
5 was warranted.

6 Mr. Tennard's case was decided by the State  
7 court in 1997, so I think it is immanent in this Court's  
8 ruling in Tennard that at least as of 1997, it was  
9 apparent that a, a low IQ score alone implicated the  
10 concerns of Penry.

11 JUSTICE SCALIA: Did Tennard purport to  
12 overrule Smith, even when it came down? It simply, it  
13 simply quoted language of the Justice O'Connor's  
14 concurrence in an earlier case. It certainly didn't  
15 purport to overrule Smith?

16 MR. OWEN: I, I see where Your Honor is --

17 JUSTICE SCALIA: I'm sorry, Johnson, not  
18 Smith.

19 MR. OWEN: Yes. And I, and I -- no, it  
20 didn't purport to overrule Johnson. And the reason why  
21 is this: I think the concept that ties this Court's  
22 cases together on Penry is this concept of meaningful  
23 consideration. Because Your Honor focused on one bit of  
24 language from Johnson: the jury has to be able to give  
25 some effect. Elsewhere in the Johnson opinion the Court

1 said there has to be a meaningful basis for giving  
2 effect to the relevant mitigating qualities of the  
3 evidence. And I think neither of those two phrases can  
4 be read out of the context of the other.

5 In other words, it can't just be some  
6 imaginable, conceivable, strained effect. It has to be  
7 some effect which speaks sensibly to the way that a  
8 juror would -- would understand the evidence to relate  
9 to future dangerousness. In the Johnson case, the  
10 defendant's evidence was his chronological youth, and I  
11 believe that it was, it is sensible for the Court to  
12 find that a reasonable juror could conclude that, that  
13 its relevance to culpability and its relevance to future  
14 dangerousness are essentially coextensive. This case is  
15 not like that.

16 CHIEF JUSTICE ROBERTS: In Brewer --

17 JUSTICE ALITO: Well, in Johnson wasn't  
18 there also --

19 CHIEF JUSTICE ROBERTS: Go ahead.

20 JUSTICE ALITO: Wasn't there also mitigating  
21 evidence about a troubled, about his troubled youth,  
22 which is analogous to what was involved at least -- well  
23 in both of these cases?

24 MR. OWEN: Very little such evidence, Your  
25 Honor, in Mr. Johnson's case. And in that case moreover

1 this Court's question presented, the question on which  
2 it granted review, was limited to the question of age,  
3 so this Court didn't reach or decide in Johnson the  
4 question of whether the other facts about Johnson's  
5 background that found their way before the jury might  
6 have been within the jurors' effective reach.

7           And I do think that the specific evidence in  
8 Johnson again was argued as a basis for a finding of  
9 nondangerousness, of rehabilitatability. That's utterly  
10 untrue of evidence in Mr. Brewer's case and Mr. Cole's  
11 case, where I think it's very clear that the evidence is  
12 being offered to provide some kind of explanation for  
13 the jurors about what caused these men to commit these  
14 terrible crimes, not that --

15           CHIEF JUSTICE ROBERTS: But in, in Brewer's  
16 case, it's, quoting the record, evidence of one  
17 hospitalization for a single episode of nonpsychotic  
18 major depression. So it was certainly opened for a jury  
19 to determine that as mitigating and not aggravating in  
20 assessing the likelihood that there was going to be  
21 further violent behavior.

22           MR. OWEN: I don't think, Your Honor --

23           CHIEF JUSTICE ROBERTS: Quite a bit  
24 different than Penry.

25           MR. OWEN: I don't think that you can

1 separate the diagnosis of depression, that, even that  
2 one single episode of hospitalization for depression,  
3 from what the jury knew about Mr. Brewer's upbringing,  
4 from the fact that they knew he had been hit by his  
5 father in the terms of, his mother said, numerous times.  
6 He was struck with the butt of a pistol, he was hit with  
7 a flashlight, he was hit with a stick of firewood. His  
8 father told him if you ever raise your hand to me you  
9 better kill me, because I'll kill you. He saw his  
10 father bloody his mother, and bruise her eyes, throw  
11 chairs at her.

12 CHIEF JUSTICE ROBERTS: And your submission  
13 -- your submission is that every juror is, or a  
14 reasonable juror is going to look at that, and the only  
15 conclusion that they are going to draw is that he is  
16 more likely to be violent in the future? As opposed to  
17 the conclusion that there is mitigating evidence because  
18 of this, that he should -- mercy should be shown to him  
19 in light of all of this? And I just don't see how you  
20 can speculate which way the jury is going to go.

21 MR. OWEN: I think that it's not simply  
22 speculation, Your Honor, I think this Court recognized  
23 in Tennard as it did in Penry, that when there is  
24 evidence of mental impairment before the jury, there is  
25 at least the probable inference of dangerousness. The

1 amici before the court, both the American Academy of  
2 Child and Adolescent Psychiatry, on the one hand, the  
3 Child Welfare League of America, on the other, their  
4 amicus briefs I think really -- really detailed the fact  
5 that this is a commonplace understanding in our society.

6 And the reason that we know that, Your  
7 Honor, is what the prosecutor said in his closing  
8 argument, where he said to the jury if you take a puppy  
9 and you beat that puppy, then he is going to bite and he  
10 is going to bite as long as he lives. There is nothing  
11 you can do to change that. I think that where you  
12 have --

13 CHIEF JUSTICE ROBERTS: So that was in, in  
14 Brewer. Now --

15 MR. OWEN: Yes.

16 CHIEF JUSTICE ROBERTS: -- there was no  
17 reliance or no similar statement by the prosecutor in  
18 Abdul-Kabir or Mr. Cole's case.

19 MR. OWEN: There was no similar --

20 CHIEF JUSTICE ROBERTS: So do we have  
21 different results in these two consolidated cases?

22 MR. OWEN: No, Your Honor. I think that  
23 this Court's case in -- decision in Tennard, when it's  
24 talking about the inference of probable future  
25 dangerousness, this Court says: The jurors might well



1 have believed that Mr. Tennard would be dangerous in the  
2 future, both as an inference to be drawn from the  
3 evidence and because the prosecutor expressly told them  
4 that's how they ought to regard the evidence.

5 And in this case we have the prosecutor, in  
6 Mr. Brewer's case we have the prosecutor expressly  
7 telling the jury, just as the prosecutor did in Mr.  
8 Tennard's case, what is mitigating about the guy's  
9 background --

10 CHIEF JUSTICE ROBERTS: So the, so the --  
11 but my point is the absence of a similar prosecutorial  
12 statement in the Cole case cuts against you.

13 MR. OWEN: It simply doesn't cut as far in  
14 favor of us, Your Honor. The fact that in Tennard this  
15 Court said that from mental impairment, a probable  
16 inference of dangerousness may be drawn, cuts squarely  
17 in our favor. And you don't even have to go to the  
18 level of inference. In Mr. Cole's case his expert  
19 witnesses said that the background experiences that this  
20 young man had make him dangerous. And they, they could  
21 not forecast exactly how long it might be before he  
22 would conceivably age out of that. But they said is it  
23 10 years? It could be 15 years, it could be 20 years.

24 I mean, there is just -- that doesn't give a  
25 reasonable juror, as -- if all you ask the juror is,

1 after they have heard that evidence is, is there a  
2 probability that this guy is going to be dangerous in  
3 the future? I think they would be compelled to say yes,  
4 even though they might say, if they were broadly  
5 instructed --

6 CHIEF JUSTICE ROBERTS: Where is evidence of  
7 abatement in that case that was before the jury? So  
8 that if you ask them, was it this person's fault in some  
9 moral sense, that might affect whether they wish to show  
10 mercy? And if you ask them whether he is going to grow  
11 out of it, they may well say, it was not his fault  
12 because of this brain disorder and he is going to grow  
13 out of it and that was the evidence, and so we are not  
14 going to sentence him to death.

15 MR. OWEN: I think that it's not  
16 unconceivable that a juror could have reasoned in that  
17 fashion. But I think it's not reasonably possible. I  
18 think that this Court's decisions in Penry and Tennard  
19 suggest that a juror's commonsensical response to  
20 evidence that a defendant has, presently poses a grave  
21 danger as a result of his life experiences and the  
22 enduring impacts that they have left upon him, the  
23 reasonable response of a juror shown such evidence is to  
24 find future dangerousness, and that that is precisely  
25 the problem with the pre-1991 Texas sentencing statute.

1           If we had a broad mitigating evidence  
2   issue like the one that's presently given to Texas  
3   juries then we could all be confident that the jury had  
4   engaged in precisely the reasoning that the Court --  
5   that the Court is hypothesizing. That they looked at  
6   the evidence and said yes, he's dangerous, but he's also  
7   deserving of something less than death so we will  
8   accomplish that by answering this issue in a certain  
9   way.

10           CHIEF JUSTICE ROBERTS: But in Penry we  
11   didn't establish a per se rule. We said it depends upon  
12   the evidence. It depends upon the instructions. It  
13   depends upon what the prosecutors say. It seems to me  
14   that you're arguing for an absolute rule.

15           MR. OWEN: I don't -- no, Your Honor, and  
16   don't let me, please don't let me be misunderstood. I  
17   do not believe that this is a per se rule. I think  
18   Johnson stands with our case. I think that Graham  
19   stands with our case. I think there's no -- there's no  
20   need for the Court to -- to change anything other than  
21   to -- and it doesn't have to change anything about its  
22   existing approach to Penry for our clients to prevail.  
23   Because I think that if the Court looks at this evidence  
24   and concludes that a reasonable juror approaching this,  
25   there's no reasonable probability that they would have

1     felt constrained to find him to be a future danger, then  
2     we lose. But I don't think you can look at this record  
3     and see that.

4                 CHIEF JUSTICE ROBERTS: But it's not no  
5     reasonable probability, that's not the standard. The  
6     standard under Smith is whether the juries can consider  
7     this mitigating evidence in some manner.

8                 MR. OWEN: I think, Your Honor, that again,  
9     removing that language from Smith, from the language in  
10    -- if you're talking about Johnson, I know you're  
11    referring to Johnson, that the language in Johnson about  
12    some effect can't be separated from the language about  
13    meaningful effect.

14                JUSTICE SCALIA: It's absolutely one step  
15    removed from that.

16                MR. OWEN: I'm sorry, Your Honor?

17                JUSTICE SCALIA: I say the actual question  
18    is even one step removed. It's whether it is  
19    unreasonable to conclude otherwise than what you  
20    conclude, which is wrong.

21                MR. OWEN: That's correct. And I think --

22                JUSTICE SCALIA: But unreasonable.

23                MR. OWEN: That's correct, and I think that  
24    it is unreasonable. I think the State court in this  
25    case had essentially two lines of authority, that it was

1     trying to decide which one controlled this case. It had  
2     Penry which involved evidence of mental impairment and  
3     child abuse, and it had Johnson and Graham which  
4     involved evidence of youth and other background. And I  
5     think that the facts of these cases, given the facts of  
6     these two cases, it is objectively unreasonable to say  
7     they fit over here with Johnson and Graham rather than  
8     they fit over here with Penry. And that's why I think  
9     the decisions by the State courts are not just wrong,  
10    but objectively unreasonable.

11                 If the court has no further questions, I  
12    will reserve the remainder of my time.

13                 CHIEF JUSTICE ROBERTS: Thank you, Mr. Owen.  
14    Mr. Marshall.

15                 ORAL ARGUMENT OF EDWARD L. MARSHALL

16                 ON BEHALF OF THE RESPONDENT

17                 MR. MARSHALL: Mr. Chief Justice and may it  
18    please the Court:

19                 When the State court considered these Penry  
20    claims in 1994, 1999 and January 2001, this Court's  
21    decisions in Graham and Johnson made it clear that the  
22    Eighth Amendment requires only that a jury be only able  
23    to consider mitigating evidence in some manner, not in  
24    every conceivable manner. This is because virtually any  
25    mitigating evidence may be viewed as relevant to moral

1 culpability apart from its relevance to these Texas  
2 special issues.

3 Cole and Brewer with sizzling bright IQ  
4 scores of 121 and 115, dysfunctional childhoods and  
5 depression, are much more like the troubled childhood  
6 and youth evidence in Graham and Johnson than the mental  
7 retardation, brain damage and severe child abuse  
8 evidence in Penry. Equating these facts to Penry --

9 JUSTICE GINSBURG: It's the same kind of  
10 evidence. It may be weaker. In other words, it's not  
11 evidence of good deeds in the community. It's two  
12 specific kinds of evidence, the very kinds of evidence  
13 that were involved in Penry. You can argue about  
14 whether this was weaker, but it's certainly different  
15 from youth and reputation for good character.

16 MR. MARSHALL: Well, I disagree, Your Honor.  
17 In Graham in particular, the Court was not just  
18 considering youth, the Court was considering a troubled  
19 childhood, a difficult childhood in which Graham's  
20 mother had been hospitalized with a mental illness, his  
21 custody shifted from relative to relative. That's  
22 exactly the same kind of evidence we have in Cole.

23 JUSTICE GINSBURG: But the evidence was that  
24 he didn't react hostilely, he didn't do bad deeds. On  
25 the contrary, he was gentle, kind, God fearing, and

1 that's why the jury should regard the murder as  
2 aberrational. That was the Graham picture, whereas here  
3 we're dealing with people who are dangerous.

4 MR. MARSHALL: Well, Your Honor, that's not  
5 the way counsel argued it to the jury in either case.  
6 In both of these cases defense counsel presented his  
7 case to the jury during -- through his evidence and his  
8 argument, that this was youthful indiscretion or it was  
9 an aberration, and it wouldn't happen again, which is  
10 exactly what Graham --

11 JUSTICE GINSBURG: What other choice does  
12 defense counsel have, given that the jury is going to  
13 get a question, is this man likely to be a danger in the  
14 future? What else could counsel argue?

15 MR. MARSHALL: Well, Justice Ginsburg,  
16 that's not the question before the Court. The question  
17 before the Court is whether the Eighth Amendment was  
18 violated and whether the jury had a reasonable  
19 opportunity, and in --

20 JUSTICE GINSBURG: Yes. Well, maybe sending  
21 counsel into those two questions, what violates the  
22 Eighth Amendment instead of doing what Texas now does  
23 and say jury mitigating evidence is for you to judge.  
24 We're not going to bottle it up inside of two special  
25 questions.

1 MR. MARSHALL: Respectfully, Justice  
2 Ginsburg, that's not the question before the Court,  
3 though. We're trying to determine in this case whether  
4 the State courts unreasonably determined that these  
5 juries had a fair opportunity to consider that evidence.  
6 And I think looking at argument, when we're determining  
7 the reasonableness of that decision, looking at  
8 counsel's argument is all we have to go on in  
9 determining whether the jury had a fair shot. Now I  
10 think if you look back at the '90s --

11 JUSTICE GINSBURG: But realistically, a  
12 defense counsel who knows that the jury is going to have  
13 those two questions, he's got to fit his argument to the  
14 jury into those questions.

15 MR. MARSHALL: Your Honor, that was a  
16 strategic choice, though. This is not a Sixth Amendment  
17 claim. We're looking at the Eighth Amendment now. And  
18 so what counsel chose to do is not the question. We're  
19 looking at what he did, and we've got this record to  
20 work with.

21 JUSTICE GINSBURG: You're looking at what  
22 Texas law forced him to do.

23 MR. MARSHALL: I don't think that's the  
24 issue before the Court, Your Honor. I think what we're  
25 looking at is whether he -- the jury had a fair



1 opportunity here, regardless of what counsel chose not  
2 to do or what the statute forced him to do. The fact is  
3 when the State courts looked at these claims in 1994 and  
4 1999, this evidence was much more like Graham than it  
5 was like Penry, and it was reasonable for them to decide  
6 that there was no Penry error in these cases because of  
7 that fact. And I think it's worth mentioning that if  
8 that's not the case, then I think we've arrived at the  
9 point where Penry has swallowed the rule announced in  
10 Jurek 31 years ago and it -- to which it was only  
11 supposed to be an exception.

12 JUSTICE GINSBURG: Jurek was a facial  
13 challenge, and the Court said no, on its face we can see  
14 that there are things that would fit into it. Good  
15 character would fit into it. But Jurek said as applied,  
16 we're not certainly not ruling on that. All we're  
17 saying is it doesn't fall on its face, and then as cases  
18 come up the law is filled out. But Jurek doesn't say --  
19 Jurek didn't say across the board, it's enough that  
20 there are these two special factors, that everything can  
21 be squeezed into them, all mitigating evidence one way  
22 or another can be squeezed into them.

23 MR. MARSHALL: That is correct, Your Honor.  
24 Jurek was a facial challenge. But in Johnson and Graham  
25 the Court made it pretty clear, I think, that as long as

1 the evidence is relevant in some way within those  
2 special issues, some mitigating way --

3 JUSTICE GINSBURG: I thought in Johnson the  
4 only question presented was age.

5 MR. MARSHALL: In Johnson, Your Honor?

6 JUSTICE GINSBURG: Yes.

7 MR. MARSHALL: Youth was the central point  
8 of Johnson, but Graham involved youth and a distinctly  
9 troubled childhood, much like we have in these cases.  
10 And so if that evidence was relevant within future  
11 dangerousness and did not amount to Eighth Amendment  
12 error, then this evidence has to be just as relevant.  
13 And in fact we have another layer of analysis on top of  
14 this because we are looking at the State court's  
15 decision under AEDPA.

16 JUSTICE GINSBURG: I don't see how this fits  
17 in the Graham package. The Graham is, this child came  
18 from a deprived background but managed to survive it,  
19 and he fits right into the category, he's not dangerous.  
20 Look at all the bad things that were done to him. He  
21 turns out not to be dangerous. Apart from this one  
22 murder, he's been a good boy. That's not the picture in  
23 either of these cases.

24 MR. MARSHALL: That's essentially the  
25 picture, Justice Ginsburg, in Brewer. That's exactly

1 the way counsel presented it to the jury. But not only  
2 did counsel argue that he wasn't going to be dangerous  
3 despite his childhood shortcomings, there was a  
4 deliberateness definition submitted in the Brewer case,  
5 which is what this Court suggested in Penry in 1989  
6 might remedy this problem. And so the court submitted a  
7 definition of deliberateness and counsel argued it to  
8 the jury, that -- the definition was read to the jury,  
9 counsel argued --

10 JUSTICE GINSBURG: Where is that charge?

11 MR. MARSHALL: It appears at page 90 of the  
12 joint appendix, Your Honor, and that's the Brewer joint  
13 appendix. Now counsel read that definition to the jury,  
14 and the definition reads as follows: "A manner of doing  
15 an act characterized by or resulting from careful and  
16 thorough consideration characterized by awareness of the  
17 consequences, willful, slow, unhurried and steady, as  
18 though allowing time for a decision." Now counsel read  
19 that definition to the jury during his closing argument.  
20 He argued that Brewer's crime reflected poor planning  
21 and execution, that he was led into it by other actors,  
22 by his girlfriend Christy Nystrom, and that his  
23 commitment to a mental hospital and his mental illness,  
24 depression in this case, were argued specifically as  
25 cause for those faults. And so counsel related the

1 evidence within that deliberateness instruction to the  
2 jury, and that provided them with a significant vehicle  
3 to give effect to this evidence.

4 JUSTICE GINSBURG: Is that what the Penry  
5 Court was talking about, something like what you just  
6 read?

7 MR. MARSHALL: I think so, Your Honor, and  
8 the Penry Court was not specific about what that  
9 definition should say, but this is certainly helpful to  
10 the jury in this case and in taking account some of this  
11 evidence that was before it.

12 JUSTICE KENNEDY: But you see, in Johnson  
13 the Court was confronted with the special issues and it  
14 makes the assumption based on the State's representation  
15 there, that the special issues had enough latitude for a  
16 jury to fully consider this. What has happened in these  
17 cases is that the prosecutors tell the jury, they keep  
18 reminding the jury you just must answer special issues  
19 one and two as given. And in the Cole case they say,  
20 even though you felt maybe he had had a rough time as a  
21 kid, you still must put that out of the mind, of your  
22 mind, and just go by the special issues. And that's the  
23 concern in these cases.

24 MR. MARSHALL: That may be a concern,  
25 Justice Kennedy, but the Cole case provides a particular

1 example of how defense counsel countered that argument.  
2 75 percent of his argument, which is between pages 141  
3 and 144 of the Cole joint appendix, 75 percent of that  
4 argument is that Cole will burn out as he grows older,  
5 and that's based on the testimony of his experts. And  
6 he says that burnout, that likeliness that he will not  
7 be dangerous is a reasonable one.

8 JUSTICE KENNEDY: But that's because the  
9 issues confined him to that.

10 MR. MARSHALL: That's correct, Your Honor,  
11 but that's a legitimate argument on the evidence here,  
12 and I think that it would be, it's difficult in my mind  
13 anyway to determine that the State court in reading  
14 Graham and Johnson could unreasonably determine that  
15 that wasn't a good vehicle for the jury when he said,  
16 you have a reasonable doubt about this man's  
17 dangerousness because of the testimony that we presented  
18 to you from his experts that said he wouldn't be  
19 dangerous in the future.

20 JUSTICE GINSBURG: He's 30 years old, and  
21 the testimony is 40, 50. It says, jury, for 10 years  
22 this man is going to be walking in prison corridors and  
23 he's going to be a danger for at least 10 years. And  
24 that's an effective --

25 MR. MARSHALL: Justice Ginsburg, that's

1 easily as effective as the -- as youth was in Graham and  
2 Johnson. Youth is evidence that -- I mean, we don't  
3 know how long it takes people to grow out of youth, but  
4 certainly 10 years wouldn't be unreasonable under the  
5 circumstances in that case. And so I don't see any  
6 difference between youth and burnout in this context.  
7 We are talking about a finite amount of time, we don't  
8 know exactly what that amount of time is, but it's  
9 certainly reasonable for a jury to give mitigating  
10 effect to it under that question.

11 JUSTICE GINSBURG: Mr. Marshall, I heard  
12 what you read from this charge, and I don't have the  
13 exact words of what the Court was talking about in  
14 Penry, but it did say a special instruction that would  
15 enable the jury who believed Penry committed the crime  
16 deliberately, that he committed it deliberately, not  
17 slowly, whatever you just read, but also believed that  
18 his background and diminished mental capacity diminished  
19 his moral culpability, making the imposition of the  
20 death sentence unwarranted.

21 So what Penry said very clearly is yes, it's  
22 deliberate, but you give them a charge that tells them  
23 even though it was deliberate, because of his abuse,  
24 because of his retardation, he is not morally culpable  
25 to the same extent as someone who doesn't have those

1     impairments. That's the instruction that Penry said  
2     could be given and that would be okay under the  
3     deliberateness. Quite different from the instruction  
4     you read.

5                     MR. MARSHALL: It's different, Your Honor,  
6     but I don't think it's that much different, and the  
7     reason is that this makes the crime a function of  
8     awareness of the consequences of slow unhurried  
9     consideration of those consequences. And then counsel  
10    argues to the jury that Brewer is incapable of engaging  
11    in that sort of premeditation because of his mental  
12    problems, and so that's what reduces his culpability  
13    under the circumstances. And I think if you combine the  
14    argument and the definition, which we were bound to do  
15    under *Boyde versus California*, we're supposed to look at  
16    the entire context of the trial here, that that meets  
17    that suggestion in Penry for it. It's not exactly what  
18    the Court suggested.

19                    JUSTICE GINSBURG: Wasn't there something  
20    about moral culpability in what you read?

21                    MR. MARSHALL: No, Your Honor. It's not  
22    mentioned in this definition.

23                    JUSTICE GINSBURG: That's what Penry makes  
24    clear, makes the distinction, between these are factors  
25    that don't say he is that dangerous, don't say he didn't

1 act deliberately, but they reduce or the jury may decide  
2 that they reduce his moral culpability. And that's not  
3 what this charge was?

4 MR. MARSHALL: This charge is different and  
5 you're correct in that, Justice Ginsburg. However,  
6 future dangerousness also provides that vehicle in this  
7 case, just the same as it did in Graham, and so -- and  
8 in Johnson. The Court said that this kind of evidence,  
9 the evidence of a troubled childhood, could find effect  
10 within future dangerousness in some manner. And granted  
11 we can conceive of other ways it might be relevant to  
12 culpability, but the Court explained -- and this was  
13 what the State court was working with at the time it  
14 considered this claim -- this Court explained that just  
15 because we can imagine other ways in which it might be  
16 relevant doesn't mean that we have got Eighth Amendment  
17 error. It's just important that the jury had some way  
18 of getting to it. And I don't see how this is markedly  
19 different than the evidence that the Court said fit  
20 within future dangerousness in Graham.

21 Now, in -- I think another thing that I need  
22 to mention about Cole is, is that my colleague noted the  
23 expert testimony that Cole lacked impulse control. Now,  
24 I think the, the mitigating nature of that testimony in  
25 this case becomes especially apparent when you realize



1     that, that Cole planned this crime 2 days in advance.  
2     He planned to strangle this 66-year-old blind man 2 days  
3     before he did it. And so I don't think that an impulse  
4     control problem mitigates his culpability for this crime  
5     in any way and I don't think any reasonable juror would  
6     ever see that. So I think that the mitigating  
7     significance of that evidence in this case is severely  
8     diminished as opposed to the testimony that the jury  
9     heard in Penry, for example, which is that he'll never  
10    learn from his mistakes, he had previously committed a  
11    rape, he didn't learn from it; this time he committed a  
12    murder and a rape. And so the mitigating relevance of  
13    that evidence was only aggravating within future  
14    dangerousness.

15               CHIEF JUSTICE ROBERTS: How do we, how does  
16    that factor in on the issues that are before us, the  
17    weakness of the mitigating evidence? In what way are we  
18    supposed to assess it? We don't have a harmless error  
19    question in these cases.

20               MR. MARSHALL: There is no harmless error  
21    question, correct, Mr. Chief Justice. However, I think  
22    when we're looking at the Boyde standard, which is --  
23    and in Johnson -- a reasonable likelihood that the jury  
24    was precluded from giving effect to the evidence, the  
25    reasonableness of that likelihood, the reasonableness of

1    that possibility, depends upon the way the juror, the  
2    jury, heard the evidence and the relative strength of  
3    that evidence.

4                   And so evidence of intoxication, for  
5    example, while it does mitigate culpability in some  
6    manner, would not create the reasonable possibility of  
7    Eighth Amendment error in that sense.

8                   CHIEF JUSTICE ROBERTS:  So your argument is  
9    that the mitigating evidence was not precluded by,  
10   reasonable consideration was not precluded by the  
11   instruction; it was precluded by the fact that there  
12   wasn't much mitigating evidence to begin with?

13                  MR. MARSHALL:  That's correct, Your Honor.  
14   But in addition to all of that, the State court was  
15   looking at Penry and Graham when they decided this case  
16   and there was no Penry II yet.  There was no Tennard or  
17   Smith.  And so it was reasonable for them to compare the  
18   evidence, the weight of that evidence, the strength of  
19   that evidence, to those cases and decide that it fell on  
20   the Graham and Johnson side of the line rather than the  
21   Penry side of the line.  That's the only thing they  
22   could do at the time.

23                  JUSTICE STEVENS:  Well, do you think the  
24   case should have been decided differently should it have  
25   been decided after those decisions?

1                   MR. MARSHALL: Well, Justice Stevens, if we  
2 take into account the full effect language that gets  
3 quoted in Penry II, we might well have a different  
4 result. But that wasn't the standard at the time and  
5 under AEDPA --

6                   JUSTICE STEVENS: But those decisions didn't  
7 purport to change the law.

8                   MR. MARSHALL: Well, under Teague they did  
9 not purport to change the law. But I think AEDPA is a  
10 different inquiry here. We're looking at what clearly  
11 established law was at the time the State courts made  
12 their decisions and not necessarily what, you know, what  
13 the Teague inquiry would be. And so at that point I  
14 think it's pretty clear under Graham and Johnson we're  
15 looking at some effect. Whatever "full effect" means  
16 now, it doesn't apply to these cases.

17                   And I think that gets to the main point  
18 here. We're looking at an exceedingly ordinary fact  
19 pattern in a capital murder case in both of these cases:  
20 Dysfunctional childhoods, a small amount of abuse in  
21 Brewer, undescribed --

22                   JUSTICE STEVENS: Am I correct, your  
23 position essentially is that, while it may well be true  
24 that these instructions did not permit the jury to give  
25 full effect to this mitigating evidence, that was not

1 clearly established law at the time of these decisions?

2 MR. MARSHALL: That's correct, Justice  
3 Stevens.

4 JUSTICE STEVENS: That's your view.

5 JUSTICE KENNEDY: Were these decisions  
6 post-Johnson.

7 MR. MARSHALL: Yes, Your Honor. In fact,  
8 the Brewer case was decided the year after Johnson and  
9 the, the Cole case was decided in 1999. So the Court  
10 had not held forth on what Penry meant in a long time at  
11 that point. Graham and Johnson were the last clear  
12 statements the Court had made.

13 Now, I want to correct one misstatement by  
14 my opposing counsel in Brewer. Brewer was -- there are  
15 three distinct episodes of abuse that appear in the  
16 record in that case: That he was struck with a pistol  
17 by his father, he was struck with his fist, and struck  
18 with a flashlight. He was never struck with a stick of  
19 firewood, and that's on page 65 of the joint appendix.  
20 That's pretty clear. This isolated abuse that occurred  
21 late in life -- we don't know the exact time frame, but  
22 it could be as late as age 18 or 19 -- surely has  
23 different characteristics in a jury's eyes than the  
24 evidence in Penry which, in which the defendant was beat  
25 and beat severely from a very young age, from his

1    infancy, and that beating, that abuse, caused brain  
2    damage or mental retardation. The ordinary nature of  
3    this evidence in comparison to the exceptional --

4               JUSTICE GINSBURG: Are you suggesting that  
5    some kind of a psychological expert would say that abuse  
6    as an adolescent is not as damaging as abuse as a young  
7    child?

8               MR. MARSHALL: I'm not suggesting that, Your  
9    Honor. I'm just suggesting that this is a smaller  
10   amount of abuse than what was in Penry.

11              JUSTICE SCALIA: I guess striking a big  
12   person is not quite as bad as striking a little person.

13              MR. MARSHALL: That may be true, Your Honor.

14              JUSTICE BREYER: If the question is one of  
15   the evidence was weak, why isn't that a harmless error  
16   question rather than a question of whether the jury can  
17   give it effect?

18              MR. MARSHALL: Well, there is, there is that  
19   reasonable likelihood standard built in under Boyde.

20              JUSTICE BREYER: The likelihood of?

21              MR. MARSHALL: Of constitutional error.

22              JUSTICE BREYER: Well, constitutional error  
23   is --

24              MR. MARSHALL: Is the reasonable likelihood  
25   --

1 JUSTICE BREYER: Yes.

2 MR. MARSHALL: Reasonable likelihood that  
3 the juror was precluded from considering the relevant  
4 mitigating evidence.

5 JUSTICE BREYER: All right. So if the  
6 evidence is very weak and if the instructions prevent  
7 you from considering it, then it's precluded. But if  
8 the evidence is very weak it didn't matter.

9 MR. MARSHALL: Well, I think it's a  
10 reasonable reading of Graham and Johnson, though, Your  
11 Honor, that weak evidence does fit within these special  
12 issues. That's what those cases held. They said the  
13 jury could consider the evidence in some manner and  
14 therefore there was no reasonable likelihood that they  
15 were precluded from doing so.

16 JUSTICE BREYER: So imagine you're a juror  
17 and you think to yourself, I see all this stuff about  
18 the childhood, frankly it doesn't move me so far as his  
19 dangerousness, I think he's dangerous, and I also think  
20 he did it deliberately. And then you think to yourself,  
21 well, could I consider it because it shows a bad  
22 childhood and that is deserving of a life term? I'm not  
23 sure it shows me that, but can I consider it for that  
24 purpose at all? What's my answer under Texas law?

25 MR. MARSHALL: Well, Your Honor, the State

1 court considering this case was looking at Graham, in  
2 which the Court Stated that that evidence fit within  
3 future dangerousness.

4 JUSTICE BREYER: No, no. I have gotten --  
5 I've finished considering it for future dangerousness.  
6 No, it doesn't move me; he's dangerous. Now I say to  
7 myself, can I consider it for the purpose of showing a  
8 bad childhood deserving of mercy, if you like? Can I  
9 consider it for that purpose? What's the answer under  
10 State law?

11 MR. MARSHALL: Yes.

12 JUSTICE BREYER: The answer is no.

13 MR. MARSHALL: Yes, Justice Breyer, the  
14 answer is yes.

15 JUSTICE BREYER: The answer is yes?

16 MR. MARSHALL: The answer is yes because  
17 this Court said it was yes. This Court said that in  
18 Graham the jury was free to accept counsel's suggestion  
19 that Graham's conduct was merely an aberration and that,  
20 and that he wouldn't do it again. That's exactly the  
21 way the case was argued to the jury by these two defense  
22 lawyers.

23 JUSTICE BREYER: I'm not talking about  
24 future dangerousness. I'm talking about -- I would be  
25 repeating myself. You've taken that, I'm not talking

1 about future dangerousness. The jury's decided that  
2 matter in your favor. I'm saying does Texas law allow  
3 -- you understood what I said, didn't you?

4 MR. MARSHALL: Yes, yes.

5 JUSTICE BREYER: All right, and the answer  
6 is yes, you can take it in to show mercy?

7 MR. MARSHALL: Yes, Your Honor.

8 JUSTICE KENNEDY: And what's the Texas case  
9 that says that?

10 MR. MARSHALL: Your Honor, it's not a Texas  
11 case. It's this court in Graham and Johnson. This  
12 Court said that evidence of a troubled childhood, of the  
13 particular dysfunction that comes with youth, can be  
14 taken as an aberration, that the person will not repeat  
15 --

16 JUSTICE KENNEDY: Well, did we say that in  
17 the case of all childhood, in cases, in every case of  
18 childhood abuse and so forth?

19 MR. MARSHALL: The question is --

20 JUSTICE KENNEDY: Or was it really applied  
21 just in the context of the Graham evidence?

22 MR. MARSHALL: Well, Your Honor, in these  
23 cases it's relevant for the same reasons it was in  
24 Graham. This evidence is not enough like Penry to  
25 warrant relief.



1 JUSTICE KENNEDY: Right. But the answer to  
2 Justice Breyer it seems to me has to be that you can  
3 only consider it in the, in the context of  
4 deliberateness or future dangerousness.

5 MR. MARSHALL: That's correct, Your Honor.

6 CHIEF JUSTICE ROBERTS: And that depends on  
7 the nature of the evidence, I take it? I mean, if the  
8 evidence we were talking about was biological  
9 predisposition to violence, that's only going to point  
10 in one direction, right? I mean, if the evidence is  
11 isolated incident, incidents of depression, the idea is  
12 that, well, a juror might look at that and say, well,  
13 that's why he did it, and that since it was isolated  
14 it's not likely to come up again and therefore it can be  
15 regarded as mitigating as well as aggravating.

16 MR. MARSHALL: That's correct, Mr. Chief  
17 Justice.

18 CHIEF JUSTICE ROBERTS: And so when you get  
19 into this evidence of child abuse, I mean, how are we  
20 supposed to decide if the evidence is sufficient so that  
21 anyone looking at it is going to say, he's only going to  
22 do it again, or if someone who's looking at it is going  
23 to say, well, there's an excuse for it and he's going to  
24 outgrow it? Do we make that determination in every case  
25 based on the particular evidence and the particular

1 arguments that counsel made?

2 MR. MARSHALL: I don't think there's any  
3 other way to do it, Mr. Chief Justice. This Court has  
4 continually engaged in a case-specific analysis on a  
5 case-by-case basis in these types, when granting these  
6 types of claims.

7 If the Court has no further questions --

8 JUSTICE GINSBURG: Unless you take the view  
9 that Penry took, which is you have to let the jury  
10 distinguish between dangerousness and deliberate conduct  
11 on the one hand and mitigation for mercy purposes that  
12 don't tie in at all to dangerousness.

13 MR. MARSHALL: That's because, Justice  
14 Ginsburg, the Penry's evidence was relevant only in an  
15 aggravating way to those issues. It suggested nothing  
16 other than the fact that he would be a future danger,  
17 and when the evidence is not so aggravating, when the  
18 evidence suggests, suggests that there is a mitigating  
19 answer to the future dangerousness question, that the  
20 person won't be a future danger because they're going to  
21 burn out or because this is an isolated incident, we  
22 have a different situation.

23 JUSTICE KENNEDY: Can you tell me, if you  
24 know, how many cases in the Texas system, capital cases,  
25 are pending that were decided before the legislature

1 amended the instruction?

2 MR. MARSHALL: Justice Kennedy, there are 47  
3 inmates on Texas death row that were sentenced under  
4 this statute that remain there. There are nine cases  
5 which have litigated Penry claims all the way to  
6 conclusion in Federal court. There are 25 more that are  
7 somewhere in the pipeline either in State court or  
8 Federal court. I've actually looked at the cases and 17  
9 of those cases, 17 of the 34 that are still in the  
10 system, have evidence that's almost identical to these  
11 cases.

12 JUSTICE STEVENS: But that wasn't the  
13 question. Your question was how many were before or  
14 after the --

15 JUSTICE KENNEDY: But I take it your answer  
16 was that all these were tried before Texas amended the  
17 statute. Was it 1991 when it amended the statute?

18 MR. MARSHALL: Yes, Your Honor.

19 JUSTICE KENNEDY: And all the cases you  
20 mentioned were tried before 1991.

21 MR. MARSHALL: Yes. 47. 47 cases were  
22 sentenced under this pre-1991 statute.

23 If the Court has no further questions, I'd  
24 ask that they affirm the judgment of the court below.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Marshall.

2 You Mr. Owen, have you 12 minutes remaining.

3 REBUTTAL ARGUMENT OF ROBERT C. OWEN

4 ON BEHALF OF PETITIONERS

5 MR. OWEN: I'd like to make two points about  
6 Graham since it's been a subject of some discussion.  
7 First is to remind the Court that Graham was a Teague  
8 case. Graham was a case about whether the law in 1984,  
9 prior to Penry -- Mr. Graham's case became final on  
10 direct appeal -- dictated the result that he was asking  
11 for, which I think doesn't mean it has no persuasive  
12 impact on these cases, but I certainly think it limits  
13 its precedential value outside the scope of the question  
14 of youth that Johnson later settled squarely.

15 The second thing I want to say about Graham  
16 is this is the State's brief in Graham, 91-7580, and I  
17 want to just note that at page 26, squarely. This is  
18 the State's brief in Graham 917580 and I want to note at  
19 page 26, footnote 8 the State says the insubstantiality  
20 of Graham's evidence of a troubled childhood is readily  
21 apparent, which certainly suggests that there is a fair  
22 reading of the evidence in Graham of this background  
23 evidence as not being substantial, not being evidence  
24 about abuse or mistreatment. The fact that he was moved  
25 from one relative to another because of the

1 circumstances in his family, in that case was not shown  
2 to have any negative impact on him. Whereas I think in  
3 Mr. Cole's case certainly there is expert testimony that  
4 it had a very devastating negative impact on him. So  
5 Graham really does not even give the Court much guidance  
6 on the question of troubled background because there is  
7 no indication that Graham actually had a, a background  
8 of mistreatment.

9 By the same token with respect to the  
10 State's comment or my brother's comment that the, the  
11 record doesn't bear out that Mr. Brewer was struck by  
12 his father with a stick of firewood, that is correct.  
13 What the record actually says is, if I may quote from  
14 the Brewer JA at page 90 -- 95 -- 65, excuse me: "He  
15 tried to hit him with a stick of firewood. When he went  
16 outside to grab the firewood I --" -- that's  
17 Mr. Brewer's mother -- "slammed the front door and  
18 locked it, and he smashed the glass out of the front  
19 door with the firewood. That was the night I had him  
20 arrested."

21 CHIEF JUSTICE ROBERTS: How old was Brewer  
22 at that time?

23 MR. OWEN: I believe he was 15, Your Honor.  
24 But I also want to, I also want to emphasize that I  
25 think there, the fact is, the testimony is that

1 Mr. Brewer was hit numerous times. That's his mom's  
2 word. Hit with objects only twice, but hit numerous  
3 times. And I don't think the Court should also  
4 underestimate the significance of the evidence that  
5 Mr. Brewer saw his father brutalize his mother on many  
6 occasions, because that evidence too contributes. It's  
7 not just the difference between being hit and watching  
8 someone else being hit. I think everyone understands  
9 that there are enduring feelings of shame and guilt, and  
10 that the teenage son feels --

11 CHIEF JUSTICE ROBERTS: But the argument is  
12 that the jury hearing this evidence in light of all the  
13 instructions will only conclude that the evidence shows  
14 that he will be violent again. They will not feel that  
15 they can take it into account in any way to determine  
16 that it's a situation in which they should extend mercy,  
17 or that, I guess it was, I get the Cole and the Brewer  
18 records confused here, but that this, the cause for the  
19 violence will abate with, with age.

20 MR. OWEN: I think, Your Honor --

21 CHIEF JUSTICE ROBERTS: Or that in, I guess  
22 in Brewer's case in particular, that since the violence  
23 was caused by a particular bout of depression, that  
24 would not necessarily recur.

25 MR. OWEN: I, I don't think that's -- that's

1 not our argument, first, Your Honor, for this reason.

2 The court's question was, as I understand  
3 it, don't we have to show there is no way the jury could  
4 have understood this evidence except as aggravating? I  
5 don't think that's, I don't think that's the test. In  
6 Tennard this Court said if the jury might well have  
7 considered the evidence as aggravating, then --

8 CHIEF JUSTICE ROBERTS: -- that was after --  
9 I guess the question would be under Johnson, whether or  
10 not it could be considered in some manner.

11 MR. OWEN: In some manner that is reasonable  
12 and that gives effect to the relevant mitigating  
13 qualities of the evidence. Yes, Your Honor. And I do  
14 think that the, that the fact of Mr. Brewer's -- the  
15 fact that the jury knew that he had endured this  
16 mistreatment as a teenager could only have been given  
17 aggravating effect. I don't think there is any way to  
18 reason from the premise that he was mistreated  
19 physically and emotionally by his father when he was a  
20 teenager, to the conclusion that therefore he will be  
21 less dangerous in the future. That doesn't seem to me  
22 to be a reasonable connection.

23 And I think that what the Court was calling  
24 for in Johnson was that there be some sensible link  
25 between the proffered mitigating evidence and these

1 narrow questions, which as has been pointed out already  
2 were the only options for the jury in this case. There  
3 was no, there was no mercy option. There was no  
4 mitigation instruction. The jury was told solely these  
5 two -- these two special issues.

6           With respect to the Brewer argument that  
7 there was a deliberateness instruction, I think Justice  
8 Ginsburg has it exactly right in observing that in  
9 Penry, what the Court said was that to satisfy the, you  
10 know, to fix the deficit in the former Texas special  
11 issues, a definition of deliberateness would have to  
12 direct the jury's attention to the defendant's personal  
13 culpability. And I don't think this instruction does  
14 that. This instruction directs them to the sort of  
15 quantity of forethought, how much did he think about it,  
16 how long did he think about it, did he mull it over?  
17 But I don't think that that captures the moral  
18 culpability aspect that Penry says is required under the  
19 Eighth Amendment.

20           If the Court has further questions I'm happy  
21 to entertain them. Otherwise we would ask that the  
22 Court grant our motions. In the alternative we would  
23 ask that the Court reverse the judgments in both cases  
24 with directions to reinstate the District Court's  
25 favorable judgment in Mr. Brewer's case and to grant



1 habeas relief in Mr. Cole's case.

2 Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you Mr. Owen.

4 The case is submitted.

5 (Whereupon, at 12:00 p.m., the case in the  
6 above-entitled matters was submitted.)

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<b>A</b>	<b>affect</b> 18:9	<b>antiterrorism</b> 11:23	<b>asking</b> 11:10 44:10	30:15,17
<b>abate</b> 46:19	<b>affirm</b> 43:24	<b>anyway</b> 29:13	<b>aspect</b> 48:18	<b>better</b> 6:19 15:9
<b>abatement</b> 18:7	<b>age</b> 14:2 17:22 26:4 36:22,25 46:19	<b>apart</b> 22:1 26:21	<b>assess</b> 33:18	<b>big</b> 37:11
<b>Abdul-Kabir</b> 1:3 4:4 16:18	<b>aggravating</b> 14:19 33:13 41:15 42:15,17 47:4,7,17	<b>apparent</b> 12:9 32:25 44:21	<b>assessing</b> 14:20	<b>biological</b> 41:8
<b>aberration</b> 23:9 39:19 40:14	<b>ago</b> 25:10	<b>appeal</b> 44:10	<b>Assistant</b> 2:6	<b>bit</b> 12:23 14:23
<b>aberrational</b> 23:2	<b>agree</b> 10:21 11:21	<b>appealability</b> 12:4	<b>assumption</b> 5:7 28:14	<b>bite</b> 16:9,10
<b>able</b> 12:24 21:22	<b>ahead</b> 13:19	<b>appear</b> 36:15	<b>attention</b> 48:12	<b>blind</b> 33:2
<b>above-entitled</b> 1:25 49:6	<b>ALITO</b> 13:17 13:20	<b>APPEARAN...</b> 2:3	<b>Attorney</b> 2:6	<b>bloody</b> 15:10
<b>absence</b> 17:11	<b>allow</b> 40:2	<b>appears</b> 27:11	<b>Austin</b> 2:4,7	<b>board</b> 25:19
<b>absolute</b> 19:14	<b>allowing</b> 27:18	<b>appendix</b> 27:12 27:13 29:3 36:19	<b>authority</b> 20:25	<b>bottle</b> 23:24
<b>absolutely</b> 10:15 10:15 20:14	<b>alternative</b> 48:22	<b>applied</b> 25:15 40:20	<b>awaiting</b> 5:25	<b>bound</b> 31:14
<b>abuse</b> 4:23 7:17 7:18 10:13 21:3 22:7 30:23 35:20 36:15,20 37:1 37:5,6,10 40:18 41:19 44:24	<b>amended</b> 43:1 43:16,17	<b>apply</b> 35:16	<b>awareness</b> 27:16 31:8	<b>bout</b> 46:23
<b>abused</b> 10:24	<b>Amendment</b> 21:22 23:17,22 24:16,17 26:11 32:16 34:7 48:19	<b>approach</b> 4:13 19:22	<b>a.m</b> 2:2 4:2	<b>boy</b> 26:22
<b>Academy</b> 16:1	<b>Amendment's</b> 9:1	<b>approaching</b> 19:24	<b>B</b>	<b>Boyde</b> 31:15 33:22 37:19
<b>accept</b> 39:18	<b>America</b> 16:3	<b>appropriate</b> 8:12	<b>back</b> 6:6 10:23 24:10	<b>brain</b> 18:12 22:7 37:1
<b>accepted</b> 8:2	<b>American</b> 16:1	<b>argue</b> 22:13 23:14 27:2	<b>background</b> 9:16 10:24 14:5 17:9,19 21:4 26:18 30:18 44:22 45:6,7	<b>BRENT</b> 1:13
<b>accomplish</b> 19:8	<b>amici</b> 16:1	<b>argued</b> 9:4 14:8 23:5 27:7,9,20 27:24 39:21	<b>bad</b> 22:24 26:20 37:12 38:21 39:8	<b>Brewer</b> 1:13 4:5 13:16 16:14 22:3 26:25 27:4,12 31:10 35:21 36:8,14 36:14 45:11,14 45:21 46:1,5 46:17 48:6
<b>accomplished</b> 5:21	<b>amicus</b> 16:4	<b>argues</b> 31:10	<b>banc</b> 5:3	<b>Brewer's</b> 7:13 14:10,15 15:3 17:6 27:20 45:17 46:22 47:14 48:25
<b>account</b> 28:10 35:2 46:15	<b>amount</b> 26:11 30:7,8 35:20 37:10	<b>arguing</b> 19:14	<b>based</b> 6:8 28:14 29:5 41:25	<b>Breyer</b> 37:14,20 37:22 38:1,5 38:16 39:4,12 39:13,15,23 40:5 41:2
<b>achieve</b> 5:18	<b>analogous</b> 13:22	<b>argument</b> 2:1 3:2,5,8 4:3,7 16:8 21:15 23:8 24:6,8,13 27:19 29:1,2,4 29:11 31:14 34:8 44:3 46:11 47:1 48:6	<b>basis</b> 4:17 7:11 9:18 13:1 14:8 42:5	<b>brief</b> 44:16,18
<b>act</b> 11:24 27:15 32:1	<b>analysis</b> 26:13 42:4	<b>arguments</b> 42:1	<b>bear</b> 45:11	<b>briefs</b> 16:4
<b>actors</b> 27:21	<b>announced</b> 25:9	<b>arrested</b> 45:20	<b>beat</b> 16:9 36:24 36:25	<b>bright</b> 22:3
<b>actual</b> 20:17	<b>answer</b> 9:17 28:18 38:24 39:9,12,14,15 39:16 40:5 41:1 42:19 43:15	<b>arrived</b> 25:8	<b>beating</b> 37:1	<b>broad</b> 9:10 19:1
<b>addition</b> 7:25 34:14	<b>answering</b> 9:13 19:8	<b>aside</b> 5:24	<b>behalf</b> 2:4,7 3:4 3:7,10 4:8 21:16 44:4	<b>broadly</b> 18:4
<b>adolescent</b> 16:2 37:6		<b>asked</b> 8:13,17 8:19	<b>behavior</b> 14:21	<b>brother's</b> 45:10
<b>adult</b> 4:24			<b>believe</b> 5:20 9:6 13:11 19:17 45:23	<b>bruise</b> 15:10
<b>adulthood</b> 7:24			<b>believed</b> 17:1	<b>brutalize</b> 46:5
<b>advance</b> 33:1				<b>built</b> 37:19
<b>AEDPA</b> 11:8 26:15 35:5,9				<b>burn</b> 29:4 42:21
				<b>burnout</b> 29:6

30:6 <b>butt</b> 15:6	21:5,6 23:6 25:6,17 26:9 26:23 28:17,23 33:19 34:19 35:16,19 38:12 40:17,23 42:24 42:24 43:4,8,9 43:11,19,21 44:12 48:23	<b>Chief</b> 4:3,9 9:22 9:25 13:16,19 14:15,23 15:12 16:13,16,20 17:10 18:6 19:10 20:4 21:13,17 33:15 33:21 34:8 41:6,16,18 42:3 43:25 45:21 46:11,21 47:8 49:3	36:11,20 <b>clearly</b> 10:22 30:21 35:10 36:1 <b>clients</b> 19:22 <b>closer</b> 9:25 10:5 <b>closing</b> 16:7 27:19 <b>coextensive</b> 13:14 <b>Cole</b> 1:4 17:12 22:3,22 28:19 28:25 29:3,4 32:22,23 33:1 36:9 46:17 <b>Cole's</b> 7:18 8:1 14:10 16:18 17:18 45:3 49:1 <b>colleague</b> 32:22 <b>combine</b> 31:13 <b>come</b> 25:18 41:14 <b>comes</b> 40:13 <b>comment</b> 45:10 45:10 <b>commit</b> 14:13 <b>commitment</b> 27:23 <b>committed</b> 8:20 30:15,16 33:10 33:11 <b>common</b> 4:20 <b>commonplace</b> 16:5 <b>commonsensi...</b> 18:19 <b>community</b> 22:11 <b>compare</b> 9:23 34:17 <b>comparison</b> 37:3 <b>compelled</b> 10:9 18:3 <b>concede</b> 10:1,4 <b>conceivable</b>	13:6 21:24 <b>conceivably</b> 17:22 <b>conceive</b> 32:11 <b>concept</b> 12:21 12:22 <b>concern</b> 28:23 28:24 <b>concerns</b> 12:10 <b>conclude</b> 13:12 20:19,20 46:13 <b>concludes</b> 19:24 <b>concluding</b> 8:10 <b>conclusion</b> 10:6 10:9 15:15,17 43:6 47:20 <b>concurrence</b> 12:14 <b>conduct</b> 39:19 42:10 <b>confident</b> 7:2 19:3 <b>confined</b> 29:9 <b>confronted</b> 28:13 <b>confused</b> 46:18 <b>connection</b> 47:22 <b>consequences</b> 27:17 31:8,9 <b>consider</b> 20:6 21:23 24:5 28:16 38:13,21 38:23 39:7,9 41:3 <b>consideration</b> 5:13 6:19 12:23 27:16 31:9 34:10 <b>considered</b> 21:19 32:14 47:7,10 <b>considering</b> 7:11 22:18,18 38:3,7 39:1,5 <b>consistent</b> 11:18 <b>consolidated</b>
<b>C</b> <b>C</b> 2:4 3:1,3,9 4:1 4:7 44:3 <b>California</b> 31:15 <b>call</b> 8:15 <b>called</b> 11:25 <b>calling</b> 47:23 <b>calls</b> 9:16 <b>CALVIN</b> 1:4 <b>capacity</b> 30:18 <b>capital</b> 4:17 35:19 42:24 <b>captures</b> 48:17 <b>careful</b> 27:15 <b>case</b> 5:9,19 7:3,9 7:13,18 9:3,6 9:19 10:17 11:8,14,23,23 12:1,6,14 13:9 13:14,25,25 14:10,11,16 16:18,23 17:5 17:6,8,12,18 18:7 19:18,19 20:25 21:1 23:5,7 24:3 25:8 27:4,24 28:10,19,25 30:5 32:7,25 33:7 34:15,24 35:19 36:8,9 36:16 39:1,21 40:8,11,17,17 41:24 44:8,8,9 45:1,3 46:22 48:2,25 49:1,4 49:5 <b>cases</b> 4:12,12,15 4:19 5:11,24 6:4,6,14,17,20 6:23,24 9:7,12 10:1,3,5,7,23 11:6,24 12:22 13:23 16:21	<b>case-by-case</b> 42:5 <b>case-specific</b> 42:4 <b>category</b> 26:19 <b>cause</b> 27:25 46:18 <b>caused</b> 14:13 37:1 46:23 <b>central</b> 8:6 26:7 <b>cert</b> 5:23,25 6:2 6:3 <b>certain</b> 19:8 <b>certainly</b> 5:22 5:24 10:25 12:14 14:18 22:14 25:16 28:9 30:4,9 44:12,21 45:3 <b>certificate</b> 12:4 <b>chairs</b> 15:11 <b>challenge</b> 5:16 25:13,24 <b>change</b> 16:11 19:20,21 35:7 35:9 <b>changed</b> 5:9 <b>character</b> 22:15 25:15 <b>characteristics</b> 36:23 <b>characterizati...</b> 6:12 <b>characterized</b> 27:15,16 <b>charge</b> 27:10 30:12,22 32:3 32:4	<b>child</b> 4:23 7:20 16:2,3 21:3 22:7 26:17 37:7 41:19 <b>childhood</b> 10:13 22:5,19,19 26:9 27:3 32:9 38:18,22 39:8 40:12,17,18 44:20 <b>childhoods</b> 22:4 35:20 <b>choice</b> 23:11 24:16 <b>chooses</b> 5:23 7:2 <b>chose</b> 24:18 25:1 <b>Christy</b> 27:22 <b>chronic</b> 7:21 <b>chronological</b> 13:10 <b>Circuit</b> 5:3,12 6:7 11:13 <b>Circuit's</b> 4:13 5:2 <b>circumstances</b> 5:7 30:5 31:13 45:1 <b>claim</b> 24:17 32:14 <b>claims</b> 4:14 5:5 21:20 25:3 42:6 43:5 <b>clear</b> 9:12 14:11 21:21 25:25 31:24 35:14	<b>clearly</b> 10:22 30:21 35:10 36:1 <b>clients</b> 19:22 <b>closer</b> 9:25 10:5 <b>closing</b> 16:7 27:19 <b>coextensive</b> 13:14 <b>Cole</b> 1:4 17:12 22:3,22 28:19 28:25 29:3,4 32:22,23 33:1 36:9 46:17 <b>Cole's</b> 7:18 8:1 14:10 16:18 17:18 45:3 49:1 <b>colleague</b> 32:22 <b>combine</b> 31:13 <b>come</b> 25:18 41:14 <b>comes</b> 40:13 <b>comment</b> 45:10 45:10 <b>commit</b> 14:13 <b>commitment</b> 27:23 <b>committed</b> 8:20 30:15,16 33:10 33:11 <b>common</b> 4:20 <b>commonplace</b> 16:5 <b>commonsensi...</b> 18:19 <b>community</b> 22:11 <b>compare</b> 9:23 34:17 <b>comparison</b> 37:3 <b>compelled</b> 10:9 18:3 <b>concede</b> 10:1,4 <b>conceivable</b>	13:6 21:24 <b>conceivably</b> 17:22 <b>conceive</b> 32:11 <b>concept</b> 12:21 12:22 <b>concern</b> 28:23 28:24 <b>concerns</b> 12:10 <b>conclude</b> 13:12 20:19,20 46:13 <b>concludes</b> 19:24 <b>concluding</b> 8:10 <b>conclusion</b> 10:6 10:9 15:15,17 43:6 47:20 <b>concurrence</b> 12:14 <b>conduct</b> 39:19 42:10 <b>confident</b> 7:2 19:3 <b>confined</b> 29:9 <b>confronted</b> 28:13 <b>confused</b> 46:18 <b>connection</b> 47:22 <b>consequences</b> 27:17 31:8,9 <b>consider</b> 20:6 21:23 24:5 28:16 38:13,21 38:23 39:7,9 41:3 <b>consideration</b> 5:13 6:19 12:23 27:16 31:9 34:10 <b>considered</b> 21:19 32:14 47:7,10 <b>considering</b> 7:11 22:18,18 38:3,7 39:1,5 <b>consistent</b> 11:18 <b>consolidated</b>

4:12 16:21 <b>constitutional</b> 37:21,22 <b>constrained</b> 20:1 <b>context</b> 13:4 30:6 31:16 40:21 41:3 <b>continually</b> 42:4 <b>continued</b> 7:23 <b>continuing</b> 8:21 <b>contrary</b> 22:25 <b>contributes</b> 46:6 <b>control</b> 8:7 32:23 33:4 <b>controlled</b> 21:1 <b>convince</b> 7:6 <b>correct</b> 6:15 20:21,23 25:23 29:10 32:5 33:21 34:13 35:22 36:2,13 41:5,16 45:12 <b>CORRECTI...</b> 1:10,19 <b>corridors</b> 29:22 <b>counsel</b> 23:5,6 23:12,14,21 24:12,18 25:1 27:1,2,7,9,13 27:18,25 29:1 31:9 36:14 42:1 <b>counsel's</b> 24:8 39:18 <b>countered</b> 29:1 <b>court</b> 1:1 2:1 4:10,11,15,19 5:10,11,17,22 5:24 6:10 7:2,9 8:17,25 11:5 11:11,18,24 12:1,7,25 13:11 14:3 15:22 16:1,25 17:15 19:4,5 19:20,23 20:24	21:11,18,19 22:17,18 23:16 23:17 24:2,24 25:13,25 27:5 27:6 28:5,8,13 29:13 30:13 31:18 32:8,12 32:13,14,19 34:14 36:9,12 39:1,2,17,17 40:11,12 42:3 42:7 43:6,7,8 43:23,24 44:7 45:5 46:3 47:6 47:23 48:9,20 48:22,23 <b>courts</b> 21:9 24:4 25:3 35:11 <b>court's</b> 4:14,21 5:6,8 6:19 8:8 11:4 12:7,21 14:1 16:23 18:18 21:20 26:14 47:2 48:24 <b>create</b> 34:6 <b>crime</b> 8:20 27:20 30:15 31:7 33:1,4 <b>crimes</b> 14:14 <b>CRIMINAL</b> 1:9 1:18 <b>culpability</b> 8:15 9:11 13:13 22:1 30:19 31:12,20 32:2 32:12 33:4 34:5 48:13,18 <b>culpable</b> 30:24 <b>custody</b> 22:21 <b>cut</b> 17:13 <b>cuts</b> 17:12,16  <hr/> <b>D</b> <hr/> <b>D</b> 4:1 <b>damage</b> 22:7 37:2	<b>damaging</b> 37:6 <b>danger</b> 18:21 20:1 23:13 29:23 42:16,20 <b>dangerous</b> 4:25 4:25 9:21 10:8 17:1,20 18:2 19:6 23:3 26:19,21 27:2 29:7,19 31:25 38:19 39:6 47:21 <b>dangerousness</b> 9:14 13:9,14 15:25 16:25 17:16 18:24 26:11 29:17 32:6,10,20 33:14 38:19 39:3,5,24 40:1 41:4 42:10,12 42:19 <b>dangers</b> 9:10 <b>days</b> 33:1,2 <b>dealing</b> 23:3 <b>death</b> 8:11,16 18:14 19:7 30:20 43:3 <b>December</b> 5:3 <b>decide</b> 6:3,6,21 6:24 10:18 11:25 14:3 21:1 25:5 32:1 34:19 41:20 <b>decided</b> 5:3 11:3 12:6 34:15,24 34:25 36:8,9 40:1 42:25 <b>deciding</b> 9:9 <b>decision</b> 4:15 5:4,8,10 6:7,11 8:8 11:3,4,11 12:1 16:23 24:7 26:15 27:18 <b>decisions</b> 11:5 18:18 21:9,21	34:25 35:6,12 36:1,5 <b>deeds</b> 22:11,24 <b>defendant</b> 4:22 8:20 18:20 36:24 <b>Defendants</b> 7:12 8:9 9:11,20 10:7 <b>defendant's</b> 4:18 8:14 9:15 13:10 48:12 <b>defense</b> 23:6,12 24:12 29:1 39:21 <b>deficit</b> 48:10 <b>definition</b> 27:4,7 27:8,13,14,19 28:9 31:14,22 48:11 <b>delay</b> 5:18,22 <b>deliberate</b> 30:22 30:23 42:10 <b>deliberately</b> 8:20 30:16,16 32:1 38:20 <b>deliberateness</b> 27:4,7 28:1 31:3 41:4 48:7 48:11 <b>DEPARTME...</b> 1:9,18 <b>depends</b> 19:11 19:12,13 34:1 41:6 <b>depression</b> 7:15 7:22 14:18 15:1,2 22:5 27:24 41:11 46:23 <b>deprivation</b> 7:20 <b>deprived</b> 10:24 26:18 <b>deserving</b> 19:7 38:22 39:8 <b>despite</b> 27:3	<b>detailed</b> 16:4 <b>determination</b> 41:24 <b>determine</b> 14:19 24:3 29:13,14 46:15 <b>determined</b> 24:4 <b>determining</b> 24:6,9 <b>devastating</b> 45:4 <b>diagnosis</b> 15:1 <b>dictated</b> 44:10 <b>difference</b> 30:6 46:7 <b>different</b> 6:21 10:3 14:24 16:21 22:14 31:3,5,6 32:4 32:19 35:3,10 36:23 42:22 <b>differently</b> 34:24 <b>difficult</b> 22:19 29:12 <b>diminished</b> 30:18,18 33:8 <b>direct</b> 44:10 48:12 <b>direction</b> 41:10 <b>directions</b> 48:24 <b>DIRECTOR</b> 1:8 1:17 <b>directs</b> 48:14 <b>disagree</b> 22:16 <b>discussion</b> 44:6 <b>disorder</b> 10:13 18:12 <b>distinct</b> 36:15 <b>distinction</b> 31:24 <b>distinctly</b> 26:8 <b>distinguish</b> 42:10 <b>District</b> 48:24 <b>DIVISION</b> 1:11 1:20 <b>doing</b> 23:22
--	--	--	---	--

<b>door</b> 45:17,19	46:9	33:7,13,17,24	<b>extent</b> 30:25	<b>fifth</b> 4:13 5:2,3
<b>doubt</b> 29:16	<b>engage</b> 9:10	34:2,3,4,9,12	<b>eyes</b> 15:10 36:23	5:12 6:7 8:5
<b>draw</b> 15:15	<b>engaged</b> 19:4	34:18,18,19		11:13
<b>drawn</b> 10:6 17:2	42:4	35:25 36:24	<b>F</b>	<b>filed</b> 6:1
17:16	<b>engaging</b> 31:10	37:3,15 38:4,6	<b>face</b> 25:13,17	<b>filled</b> 25:18
<b>dysfunction</b> 8:6	<b>enormous</b> 7:22	38:8,11,13	<b>facial</b> 25:12,24	<b>final</b> 44:9
40:13	<b>entertain</b> 48:21	39:2 40:12,21	<b>fact</b> 7:13,16 15:4	<b>find</b> 4:24 13:12
<b>dysfunctional</b>	<b>entire</b> 31:16	40:24 41:7,8	16:4 17:14	18:24 20:1
22:4 35:20	<b>entitled</b> 9:9	41:10,19,20,25	25:2,7 26:13	32:9
<b>D.C</b> 1:22	<b>episode</b> 7:15	42:14,17,18	34:11 35:18	<b>finding</b> 14:8
	14:17 15:2	43:10 44:20,22	36:7 42:16	<b>finds</b> 7:4
<b>E</b>	<b>episodes</b> 36:15	44:23,23 46:4	44:24 45:25	<b>finished</b> 39:5
<b>E</b> 3:1 4:1,1	<b>Equating</b> 22:8	46:6,12,13	47:14,15	<b>finite</b> 30:7
<b>earlier</b> 8:22	<b>error</b> 4:14 25:6	47:4,7,13,25	<b>factor</b> 33:16	<b>firewood</b> 15:7
11:14 12:14	26:12 32:17	<b>exact</b> 30:13	<b>factors</b> 10:14,19	36:19 45:12,15
<b>easily</b> 30:1	33:18,20 34:7	36:21	10:20 25:20	45:16,19
<b>EDWARD</b> 2:6	37:15,21,22	<b>exactly</b> 10:8	31:24	<b>first</b> 44:7 47:1
3:6 21:15	<b>especially</b> 32:25	17:21 22:22	<b>facts</b> 6:22 8:9	<b>fist</b> 36:17
<b>effect</b> 4:17 6:20	<b>ESQ</b> 2:4,6 3:3,6	23:10 26:25	9:18 10:23	<b>fit</b> 21:7,8 24:13
11:16 12:25	3:9	30:8 31:17	14:4 21:5,5	25:14,15 32:19
13:2,6,7 20:12	<b>essentially</b> 13:14	39:20 48:8	22:8	38:11 39:2
20:13 28:3	20:25 26:24	<b>example</b> 9:16	<b>factual</b> 4:20	<b>fits</b> 26:16,19
30:10 32:9	35:23	29:1 33:9 34:5	<b>fact-based</b> 6:11	<b>fix</b> 48:10
33:24 35:2,15	<b>establish</b> 19:11	<b>exceedingly</b>	<b>failed</b> 4:16	<b>FKA</b> 1:3
35:15,25 37:17	<b>established</b>	35:18	<b>fair</b> 6:12 24:5,9	<b>flashlight</b> 15:7
47:12,17	35:11 36:1	<b>exception</b> 25:11	24:25 44:21	36:18
<b>effective</b> 14:6	<b>evidence</b> 4:19,22	<b>exceptional</b> 37:3	<b>fall</b> 25:17	<b>focused</b> 12:23
29:24 30:1	7:13,16,19	<b>excuse</b> 9:7 41:23	<b>family</b> 45:1	<b>follow</b> 5:6
<b>effects</b> 11:15	8:14,23,24 9:3	45:14	<b>far</b> 8:4 17:13	<b>follows</b> 27:14
<b>Eighth</b> 9:1 21:22	9:19,23,23	<b>execution</b> 27:21	38:18	<b>footnote</b> 44:19
23:17,22 24:17	10:6,10,12,12	<b>exemplified</b>	<b>fashion</b> 18:17	<b>forced</b> 24:22
26:11 32:16	10:13 13:3,8	4:13	<b>father</b> 7:18 15:5	25:2
34:7 48:19	13:10,21,24	<b>existing</b> 19:22	15:8,10 36:17	<b>forecast</b> 17:21
<b>either</b> 6:5 23:5	14:7,10,11,16	<b>experienced</b>	45:12 46:5	<b>forethought</b>
26:23 43:7	15:17,24 17:3	4:22	47:19	48:15
<b>emotional</b> 7:17	17:4 18:1,6,13	<b>experiences</b>	<b>fault</b> 18:8,11	<b>form</b> 8:24
7:21,23	18:20,23 19:1	17:19 18:21	<b>faults</b> 27:25	<b>format</b> 9:1
<b>emotionally</b>	19:6,12,23	<b>expert</b> 7:25	<b>favor</b> 17:14,17	<b>former</b> 48:10
47:19	20:7 21:2,4,23	17:18 32:23	40:2	<b>forth</b> 36:10
<b>emphasize</b>	21:25 22:6,8	37:5 45:3	<b>favorable</b> 48:25	40:18
45:24	22:10,11,12,12	<b>experts</b> 29:5,18	<b>fearing</b> 22:25	<b>found</b> 4:19 6:4
<b>emphatically</b>	22:22,23 23:7	<b>explained</b> 32:12	<b>Federal</b> 43:6,8	12:3 14:5
9:8	23:23 24:5	32:14	<b>feel</b> 9:18 46:14	<b>fragmented</b>
<b>en</b> 5:3	25:4,21 26:1	<b>explanation</b>	<b>feelings</b> 46:9	7:21
<b>enable</b> 30:15	26:10,12 28:1	14:12	<b>feels</b> 46:10	<b>frame</b> 36:21
<b>endured</b> 47:15	28:3,11 29:11	<b>expressly</b> 17:3,6	<b>fell</b> 34:19	<b>frankly</b> 38:18
<b>enduring</b> 18:22	30:2 32:8,9,19	<b>extend</b> 46:16	<b>felt</b> 20:1 28:20	<b>free</b> 39:18

<b>front</b> 45:17,18	<b>gives</b> 47:12	46:17,21 47:9	43:18 45:23	9:2
<b>full</b> 11:15 35:2	<b>giving</b> 4:17 13:1	<b>guidance</b> 5:6	46:20 47:1,13	<b>infancy</b> 37:1
35:15,25	33:24	45:5	49:2	<b>inference</b> 9:20
<b>fully</b> 28:16	<b>glass</b> 45:18	<b>guilt</b> 46:9	<b>hospital</b> 27:23	15:25 16:24
<b>function</b> 31:7	<b>go</b> 13:19 15:20	<b>guy</b> 18:2	<b>hospitalization</b>	17:2,16,18
<b>further</b> 5:13	17:17 24:8	<b>guy's</b> 17:8	14:17 15:2	<b>inmates</b> 43:3
10:25 14:21	28:22		<b>hospitalized</b>	<b>inquiry</b> 9:11
21:11 42:7	<b>God</b> 22:25	<b>H</b>	7:14 22:20	35:10,13
43:23 48:20	<b>going</b> 10:23	<b>habeas</b> 11:23	<b>hostilely</b> 22:24	<b>inside</b> 23:24
<b>future</b> 9:9,14	14:20 15:14,15	49:1	<b>hypothesizing</b>	<b>INSTITUTIO...</b>
10:8 13:9,13	15:20 16:9,10	<b>hand</b> 15:8 16:2	19:5	1:11,20
15:16 16:24	18:2,10,12,14	42:11	<b>I</b>	<b>instructed</b> 18:5
17:2 18:3,24	23:12,24 24:12	<b>happen</b> 23:9	<b>idea</b> 41:11	<b>instruction</b> 9:5
20:1 23:14	27:2 29:22,23	<b>happened</b> 28:16	<b>identical</b> 43:10	28:1 30:14
26:10 29:19	41:9,21,21,22	<b>happy</b> 48:20	<b>II</b> 34:16 35:3	31:1,3 34:11
32:6,10,20	41:23 42:20	<b>harmless</b> 33:18	<b>illness</b> 22:20	43:1 48:4,7,13
33:13 39:3,5	<b>good</b> 22:11,15	33:20 37:15	27:23	48:14
39:24 40:1	25:14 26:22	<b>hear</b> 4:3	<b>imaginable</b> 13:6	<b>instructions</b>
41:4 42:16,19	29:15	<b>heard</b> 18:1	<b>imagine</b> 5:8	7:10 8:22
42:20 47:21	<b>gotten</b> 39:4	30:11 33:9	32:15 38:16	19:12 35:24
<b>G</b>	<b>governed</b> 11:23	34:2	<b>immanent</b> 12:7	38:6 46:13
<b>G</b> 4:1	<b>grab</b> 45:16	<b>hearing</b> 46:12	<b>impartial</b> 12:7	<b>insubstantiality</b>
<b>General</b> 2:6	<b>Graham</b> 19:18	<b>held</b> 8:25 36:10	<b>impact</b> 44:12	44:19
<b>generally</b> 8:2	21:3,7,21 22:6	38:12	45:2,4	<b>intervening</b> 5:10
<b>gentle</b> 22:25	22:17 23:2,10	<b>helpful</b> 28:9	<b>impacts</b> 18:22	<b>intoxication</b>
<b>getting</b> 32:18	25:4,24 26:8	<b>he'll</b> 33:9	<b>impairment</b>	34:4
<b>Ginsburg</b> 5:15	26:17,17 29:14	<b>hit</b> 15:4,6,7	10:24 15:24	<b>involved</b> 13:22
10:11,17 22:9	30:1 32:7,20	45:15 46:1,2,2	17:15 21:2	21:2,4 22:13
22:23 23:11,15	34:15,20 35:14	46:7,8	<b>impairments</b>	26:8
23:20 24:2,11	36:11 38:10	<b>hold</b> 5:24	4:24 31:1	<b>IQ</b> 12:9 22:3
24:21 25:12	39:1,18 40:11	<b>holdings</b> 4:21	<b>implicated</b> 12:9	<b>irrelevant</b> 11:20
26:3,6,16,25	40:21,24 44:6	<b>Honor</b> 5:20 6:8	<b>important</b> 32:17	<b>isolated</b> 36:20
27:10 28:4	44:7,8,15,16	6:17 7:1,8 9:24	<b>imposition</b>	41:11,13 42:21
29:20,25 30:11	44:18,22 45:5	10:4,16,22	30:19	<b>issue</b> 5:17 7:9
31:19,23 32:5	45:7	11:6,9,22	<b>impulse</b> 8:7	19:2,8 24:24
37:4 42:8,14	<b>Graham's</b> 22:19	12:16,23 13:25	32:23 33:3	<b>issues</b> 6:18,21
48:8	39:19 44:9,20	14:22 15:22	<b>incident</b> 41:11	22:2 26:2
<b>girlfriend</b> 27:22	<b>grant</b> 5:8 6:2	16:7,22 17:14	42:21	28:13,15,18,22
<b>give</b> 11:15 12:24	48:22,25	19:15 20:8,16	<b>incidents</b> 41:11	29:9 33:16
17:24 28:3	<b>granted</b> 4:11 6:3	22:16 23:4	<b>included</b> 7:13	38:12 42:15
30:9,22 35:24	14:2 32:10	24:15,24 25:23	<b>incorrect</b> 5:1	48:5,11
37:17 45:5	<b>granting</b> 42:5	26:5 27:12	<b>indicated</b> 7:16	
<b>given</b> 8:2 11:17	<b>grave</b> 18:20	28:7 29:10	7:19 8:1	<b>J</b>
19:2 21:5	<b>grow</b> 18:10,12	31:5,21 34:13	<b>indication</b> 45:7	<b>JA</b> 45:14
23:12 28:19	30:3	36:7 37:9,13	<b>indiscretion</b>	<b>JALIL</b> 1:3
31:2 47:16	<b>grows</b> 29:4	38:11,25 40:7	23:8	<b>January</b> 1:23
	<b>guess</b> 37:11	40:10,22 41:5	<b>individualized</b>	21:20

<b>Johnson</b> 11:13 12:17,20,24,25 13:9,17 14:3,8 19:18 20:10,11 20:11 21:3,7 21:21 22:6 25:24 26:3,5,8 28:12 29:14 30:2 32:8 33:23 34:20 35:14 36:8,11 38:10 40:11 44:14 47:9,24	27:1,8,8,13,19 28:2,10,16,17 28:18 29:15,21 30:9,15 31:10 32:1,17 33:8 33:23 34:2 35:24 37:16 38:13 39:18,21 42:9 46:12 47:3,6,15 48:2 48:4	<b>K</b> <b>keep</b> 28:17 <b>Kennedy</b> 6:13 28:12,25 29:8 36:5 40:8,16 40:20 41:1 42:23 43:2,15 43:19 <b>kid</b> 28:21 <b>kill</b> 15:9,9 <b>kind</b> 10:14 14:12 22:9,22 22:25 32:8 37:5 <b>kinds</b> 8:9 22:12 22:12 <b>knew</b> 15:3,4 47:15 <b>know</b> 16:6 20:10 30:3,8 35:12 36:21 42:24 48:10 <b>knows</b> 8:18 24:12	<b>life</b> 8:11,15 18:21 36:21 38:22 <b>light</b> 5:13 15:19 46:12 <b>likelihood</b> 14:20 33:23,25 37:19 37:20,24 38:2 38:14 <b>likeliness</b> 29:6 <b>limited</b> 14:2 <b>limits</b> 8:7 44:12 <b>line</b> 34:20,21 <b>lines</b> 20:25 <b>link</b> 47:24 <b>litigated</b> 43:5 <b>little</b> 13:24 37:12 <b>lives</b> 16:10 <b>locked</b> 45:18 <b>long</b> 11:15 16:10 17:21 25:25 30:3 36:10 48:16 <b>longer</b> 5:2 <b>look</b> 15:14 20:2 24:10 26:20 31:15 41:12 <b>looked</b> 19:5 25:3 43:8 <b>looking</b> 24:6,7 24:17,19,21,25 26:14 33:22 34:15 35:10,15 35:18 39:1 41:21,22 <b>looks</b> 19:23 <b>lose</b> 20:2 <b>lot</b> 7:22 <b>low</b> 12:9 <b>Lynaugh</b> 4:15	<b>man</b> 17:20 23:13 29:22 33:2 <b>managed</b> 26:18 <b>manner</b> 11:16 20:7 21:23,24 27:14 32:10 34:6 38:13 47:10,11 <b>man's</b> 29:16 <b>March</b> 6:1 <b>markedly</b> 32:18 <b>Marshall</b> 2:6 3:6 21:14,15,17 22:16 23:4,15 24:1,15,23 25:23 26:5,7 26:24 27:11 28:7,24 29:10 29:25 30:11 31:5,21 32:4 33:20 34:13 35:1,8 36:2,7 37:8,13,18,21 37:24 38:2,9 38:25 39:11,13 39:16 40:4,7 40:10,19,22 41:5,16 42:2 42:13 43:2,18 43:21 44:1 <b>matter</b> 1:25 4:20 9:2 38:8 40:2 <b>matters</b> 49:6 <b>mean</b> 10:19 17:24 30:2 32:16 41:7,10 41:19 44:11 <b>meaning</b> 9:5 <b>meaningful</b> 4:17 7:11 12:22 13:1 20:13 <b>means</b> 35:15 <b>meant</b> 36:10 <b>meets</b> 31:16 <b>men</b> 14:13 <b>mental</b> 4:23 10:13,24 15:24
<b>Johnson's</b> 13:25 14:4 <b>joint</b> 27:12,12 29:3 36:19 <b>judge</b> 23:23 <b>judgment</b> 6:1 43:24 48:25 <b>judgments</b> 5:12 48:23 <b>Jurek</b> 25:10,12 25:15,18,19,24 <b>juries</b> 19:3 20:6 24:5 <b>jurist</b> 12:3 <b>juror</b> 8:10 13:8 13:12 15:13,14 17:25,25 18:16 18:23 19:24 33:5 34:1 38:3 38:16 41:12 <b>jurors</b> 4:17,21 7:10 8:13,17 8:19 9:4,8,13 14:6,13 16:25 <b>juror's</b> 10:5 18:19 <b>jury</b> 7:10 9:4,13 10:18 12:24 14:5,18 15:3 15:20,24 16:8 17:7 18:7 19:3 21:22 23:1,5,7 23:12,18,23 24:9,12,14,25	<b>Justice</b> 1:10,19 4:3,9 5:15 6:13 6:23 7:5 9:22 9:25 10:11,17 11:2,7,10,19 12:11,13,17 13:16,17,19,20 14:15,23 15:12 16:13,16,20 17:10 18:6 19:10 20:4,14 20:17,22 21:13 21:17 22:9,23 23:11,15,20 24:1,11,21 25:12 26:3,6 26:16,25 27:10 28:4,12,25 29:8,20,25 30:11 31:19,23 32:5 33:15,21 34:8,23 35:1,6 35:22 36:2,4,5 37:4,11,14,20 37:22 38:1,5 38:16 39:4,12 39:13,15,23 40:5,8,16,20 41:1,2,6,17,18 42:3,8,13,23 43:2,12,15,19 43:25 45:21 46:11,21 47:8 48:7 49:3	<b>L</b> <b>L</b> 2:6 3:6 21:15 <b>lacked</b> 32:23 <b>language</b> 12:13 12:24 20:9,9 20:11,12 35:2 <b>late</b> 36:21,22 <b>latitude</b> 28:15 <b>law</b> 24:22 25:18 35:7,9,11 36:1 38:24 39:10 40:2 44:8 <b>lawyers</b> 39:22 <b>layer</b> 26:13 <b>League</b> 16:3 <b>learn</b> 33:10,11 <b>led</b> 27:21 <b>left</b> 18:22 <b>legislature</b> 42:25 <b>legitimate</b> 29:11 <b>level</b> 17:18	<b>M</b> <b>main</b> 6:16 35:17 <b>major</b> 7:14 14:18 <b>making</b> 30:19	

<p>17:15 21:2 22:6,20 27:23 27:23 30:18 31:11 37:2 <b>mention</b> 8:23,24 32:22 <b>mentioned</b> 8:22 31:22 43:20 <b>mentioning</b> 25:7 <b>mercy</b> 15:18 18:10 39:8 40:6 42:11 46:16 48:3 <b>merely</b> 39:19 <b>merits</b> 7:3,3,8 <b>mid</b> 4:11 5:3 6:1 <b>mind</b> 10:5 28:21 28:22 29:12 <b>minutes</b> 44:2 <b>misreading</b> 6:8 <b>misstatement</b> 36:13 <b>mistakes</b> 33:10 <b>mistreated</b> 47:18 <b>mistreatment</b> 4:23 44:24 45:8 47:16 <b>misunderstood</b> 19:16 <b>mitigate</b> 34:5 <b>mitigates</b> 33:4 <b>mitigating</b> 4:18 7:12,12 8:14 8:23,24 10:14 10:20,25 11:15 11:16 13:2,20 14:19 15:17 17:8 19:1 20:7 21:23,25 23:23 25:21 26:2 30:9 32:24 33:6,12,17 34:9,12 35:25 38:4 41:15 42:18 47:12,25 <b>mitigation</b> 42:11</p>	<p>48:4 <b>mom's</b> 46:1 <b>months</b> 7:15 <b>moral</b> 9:11 18:9 21:25 30:19 31:20 32:2 48:17 <b>morally</b> 30:24 <b>morning</b> 8:23 <b>mother</b> 15:5,10 22:20 45:17 46:5 <b>motion</b> 5:11 <b>motions</b> 48:22 <b>move</b> 38:18 39:6 <b>moved</b> 44:24 <b>mull</b> 48:16 <b>murder</b> 7:16 23:1 26:22 33:12 35:19</p> <hr/> <p><b>N</b></p> <hr/> <p><b>N</b> 3:1,1 4:1 <b>narrow</b> 6:10 48:1 <b>NATHANIEL</b> 1:7,16 <b>nature</b> 32:24 37:2 41:7 <b>necessarily</b> 35:12 46:24 <b>need</b> 7:22 19:20 32:21 <b>negative</b> 45:2,4 <b>neglect</b> 7:19 <b>neither</b> 13:3 <b>Nelson</b> 5:4,14,16 5:19,23,25 6:2 6:3,4,9,10,12 6:14,17,18,24 <b>Nelson's</b> 5:25 <b>nervous</b> 8:6 <b>neuropsychol...</b> 8:2 <b>never</b> 8:13 33:9 36:18 <b>new</b> 5:13</p>	<p><b>night</b> 45:19 <b>nine</b> 43:4 <b>nondangerous...</b> 14:9 <b>nonpsychotic</b> 14:17 <b>normal</b> 8:3,4 <b>note</b> 44:17,18 <b>noted</b> 32:22 <b>numerous</b> 15:5 46:1,2 <b>nurturance</b> 7:22 <b>Nystrom</b> 27:22</p> <hr/> <p><b>O</b></p> <hr/> <p><b>O</b> 3:1 4:1 <b>objectively</b> 12:2 12:3 21:6,10 <b>objects</b> 46:2 <b>observing</b> 48:8 <b>occasions</b> 46:6 <b>occurred</b> 36:20 <b>October</b> 4:12 <b>offered</b> 14:12 <b>okay</b> 31:2 <b>old</b> 29:20 45:21 <b>older</b> 29:4 <b>opened</b> 14:18 <b>opinion</b> 5:13 9:15 12:25 <b>opinions</b> 5:1 <b>opportunity</b> 23:19 24:5 25:1 <b>opposed</b> 15:16 33:8 <b>opposing</b> 36:14 <b>option</b> 48:3 <b>options</b> 48:2 <b>oral</b> 1:25 3:2,5 4:7 21:15 <b>ordinary</b> 35:18 37:2 <b>ought</b> 17:4 <b>outgrow</b> 41:24 <b>outside</b> 44:13 45:16</p>	<p><b>overrule</b> 12:12 12:15,20 <b>Owen</b> 2:4 3:3,9 4:6,7,9 5:20 6:16 7:1,7 9:24 10:3,15,21 11:4,9,18,21 12:16,19 13:24 14:22,25 15:21 16:15,19,22 17:13 18:15 19:15 20:8,16 20:21,23 21:13 44:2,3,5 45:23 46:20,25 47:11 49:3 <b>O'Connor's</b> 12:13</p> <hr/> <p><b>P</b></p> <hr/> <p><b>P</b> 4:1 <b>package</b> 26:17 <b>page</b> 3:2 27:11 36:19 44:17,19 45:14 <b>pages</b> 29:2 <b>particular</b> 9:3 9:16 22:17 28:25 40:13 41:25,25 46:22 46:23 <b>pattern</b> 35:19 <b>penalty</b> 8:11 <b>pending</b> 42:25 <b>Penry</b> 4:15 5:2,5 8:8 9:23 10:1 10:10 12:10,22 14:24 15:23 18:18 19:10,22 21:2,8,19 22:8 22:8,13 25:5,6 25:9 27:5 28:4 28:8 30:14,15 30:21 31:1,17 31:23 33:9 34:15,16,21 35:3 36:10,24</p>	<p>37:10 40:24 42:9 43:5 44:9 48:9,18 <b>Penry's</b> 42:14 <b>people</b> 23:3 30:3 <b>percent</b> 29:2,3 <b>percentile</b> 8:5 <b>permit</b> 35:24 <b>person</b> 37:12,12 40:14 42:20 <b>personal</b> 48:12 <b>personality</b> 7:21 <b>person's</b> 18:8 <b>persuasive</b> 44:11 <b>petition</b> 5:23,25 <b>Petitioner</b> 1:5 1:14 <b>Petitioners</b> 2:5 3:4,10 4:8 44:4 <b>phrase</b> 6:10 <b>phrases</b> 13:3 <b>physical</b> 7:17 <b>physically</b> 47:19 <b>picture</b> 23:2 26:22,25 <b>pipeline</b> 43:7 <b>pistol</b> 15:6 36:16 <b>planned</b> 33:1,2 <b>planning</b> 27:20 <b>please</b> 4:10 19:16 21:18 <b>point</b> 17:11 25:9 26:7 35:13,17 36:11 41:9 <b>pointed</b> 48:1 <b>points</b> 44:5 <b>poor</b> 27:20 <b>pose</b> 8:21 <b>poses</b> 18:20 <b>position</b> 35:23 <b>possibility</b> 34:1 34:6 <b>possible</b> 18:17 <b>postdates</b> 11:5 <b>post-Johnson</b> 36:6</p>
---	--	---	--	--



<b>precedential</b> 44:13	<b>prosecutors</b> 9:12 19:13 28:17	<b>quoted</b> 12:13 35:3	<b>REBUTTAL</b> 3:8 44:3	<b>removed</b> 20:15 20:18
<b>precisely</b> 18:24 19:4	<b>provide</b> 14:12	<b>quoting</b> 14:16	<b>recognized</b> 15:22	<b>removing</b> 20:9
<b>precluded</b> 33:24 34:9,10,11 38:3,7,15	<b>provided</b> 28:2	<b>R</b>	<b>record</b> 14:16 20:2 24:19 36:16 45:11,13	<b>repeat</b> 40:14
<b>predisposition</b> 41:9	<b>provides</b> 28:25 32:6	<b>R 4:1</b>	<b>records</b> 46:18	<b>repeatedly</b> 8:25
<b>premeditation</b> 31:11	<b>Psychiatry</b> 16:2	<b>raise</b> 15:8	<b>recur</b> 46:24	<b>repeating</b> 39:25
<b>premise</b> 47:18	<b>psychological</b> 37:5	<b>raised</b> 6:4	<b>reduce</b> 32:1,2	<b>represent</b> 5:2
<b>presented</b> 6:21 9:3 14:1 23:6 26:4 27:1 29:17	<b>puppy</b> 16:8,9	<b>rape</b> 33:11,12	<b>reduced</b> 8:14	<b>representation</b> 28:14
<b>presently</b> 18:20 19:2	<b>purport</b> 12:11 12:15,20 35:7 35:9	<b>RAY</b> 1:13	<b>reduces</b> 31:12	<b>reputation</b> 22:15
<b>presents</b> 6:18	<b>purpose</b> 38:24 39:7,9	<b>reach</b> 14:3,6	<b>referring</b> 20:11	<b>required</b> 48:18
<b>pretty</b> 25:25 35:14 36:20	<b>purposes</b> 42:11	<b>react</b> 22:24	<b>reflected</b> 27:20	<b>requirement</b> 4:16 9:2
<b>prevail</b> 7:3 19:22	<b>put</b> 5:24 9:14,17 28:21	<b>read</b> 6:14 13:4 27:8,13,18 28:6 30:12,17 31:4,20	<b>regard</b> 4:21 17:4 23:1	<b>requires</b> 21:22
<b>prevent</b> 38:6	<b>purposes</b> 42:11	<b>readily</b> 44:20	<b>regarded</b> 41:15	<b>reserve</b> 21:12
<b>previously</b> 33:10	<b>put</b> 5:24 9:14,17 28:21	<b>reading</b> 29:13 38:10 44:22	<b>regardless</b> 11:12 25:1	<b>respect</b> 45:9 48:6
<b>pre-1991</b> 8:18 18:25 43:22	<b>p.m</b> 49:5	<b>reads</b> 27:14	<b>rehabilitabil...</b> 14:9	<b>respectfully</b> 5:10 8:7 24:1
<b>prior</b> 5:5 44:9	<b>Q</b>	<b>realistically</b> 24:11	<b>reinstate</b> 48:24	<b>Respondent</b> 2:7 3:7 21:16
<b>prison</b> 29:22	<b>qualities</b> 4:18 7:12 13:2 47:13	<b>realize</b> 32:25	<b>relate</b> 13:8	<b>response</b> 10:25 18:19,23
<b>probability</b> 18:2 19:25 20:5	<b>quantity</b> 48:15	<b>really</b> 16:4,4 40:20 45:5	<b>related</b> 27:25	<b>result</b> 7:19 8:5 18:21 35:4 44:10
<b>probable</b> 15:25 16:24 17:15	<b>Quartermen</b> 1:7 1:16 4:4,5 5:4	<b>reason</b> 6:16,24 12:20 16:6 31:7 47:1,18	<b>relative</b> 22:21 22:21 34:2 44:25	<b>resulting</b> 8:16 27:15
<b>probably</b> 8:5	<b>question</b> 9:1,10 9:14,17 11:25 14:1,1,2,4 20:17 23:13,16 23:16 24:2,18 26:4 30:10 33:19,21 37:14 37:16,16 40:19 42:19 43:13,13 44:13 45:6 47:2,9	<b>reasonable</b> 4:21 12:2 13:12 15:14 17:25 18:23 19:24,25 20:5 23:18 25:5 29:7,16 30:9 33:5,23 34:6,10,17 37:19,24 38:2 38:10,14 47:11 47:22	<b>relevance</b> 13:13 13:13 22:1 33:12	<b>results</b> 16:21
<b>problem</b> 18:25 27:6 33:4	<b>questions</b> 6:5 8:17,19 21:11 23:21,25 24:13 24:14 42:7 43:23 48:1,20	<b>reasonableness</b> 24:7 33:25,25	<b>relevant</b> 4:18 7:11 10:14 13:2 21:25 26:1,10,12 32:11,16 38:3 40:23 42:14 47:12	<b>retardation</b> 22:7 30:24 37:2
<b>problems</b> 7:21 7:23 31:12	<b>quite</b> 14:23 31:3 37:12	<b>reasonably</b> 8:10 18:17	<b>reliance</b> 16:17	<b>return</b> 5:11,12
<b>proceed</b> 6:6 7:2	<b>quote</b> 45:13	<b>reasoned</b> 18:16	<b>relief</b> 40:25 49:1	<b>reverse</b> 48:23
<b>proffered</b> 47:25		<b>reasoning</b> 19:4	<b>remain</b> 43:4	<b>review</b> 4:11 5:9 6:5 8:18 14:2
<b>profoundly</b> 5:9		<b>reasons</b> 4:24 40:23	<b>remainder</b> 21:12	<b>reviewing</b> 4:14
<b>prosecutor</b> 9:17 16:7,17 17:3,5 17:6,7			<b>remaining</b> 44:2	<b>right</b> 11:20 26:19 38:5 40:5 41:1,10 48:8
<b>prosecutorial</b> 17:11			<b>remedy</b> 27:6	<b>ROBERT</b> 2:4 3:3,9 4:7 44:3
			<b>remind</b> 44:7	<b>ROBERTS</b> 4:3 9:22,25 13:16 13:19 14:15,23 15:12 16:13,16
			<b>reminding</b> 28:18	

16:20 17:10 18:6 19:10 20:4 21:13 33:15 34:8 41:6,18 43:25 45:21 46:11,21 47:8 49:3 <b>rough</b> 28:20 <b>row</b> 43:3 <b>rule</b> 19:11,14,17 25:9 <b>ruling</b> 12:8 25:16	<b>sensibly</b> 13:7 <b>sentence</b> 8:11,12 8:16 9:16 18:14 30:20 <b>sentenced</b> 43:3 43:22 <b>sentences</b> 8:16 <b>sentencing</b> 9:2 18:25 <b>separate</b> 15:1 <b>separated</b> 20:12 <b>serious</b> 7:17,17 <b>seriously</b> 4:16 <b>set</b> 6:21 8:2 <b>settled</b> 4:13 10:22 44:14 <b>severe</b> 22:7 <b>severely</b> 33:7 36:25 <b>shame</b> 46:9 <b>sharp</b> 5:4 <b>shifted</b> 22:21 <b>shortcomings</b> 27:3 <b>shot</b> 24:9 <b>show</b> 18:9 40:6 47:3 <b>showing</b> 39:7 <b>shown</b> 15:18 18:23 45:1 <b>shows</b> 38:21,23 46:13 <b>side</b> 9:15 34:20 34:21 <b>significance</b> 33:7 46:4 <b>significant</b> 4:22 28:2 <b>similar</b> 16:17,19 17:11 <b>simply</b> 12:12,13 15:21 17:13 <b>single</b> 14:17 15:2 <b>situation</b> 42:22 46:16 <b>Sixth</b> 24:16	<b>sizzling</b> 22:3 <b>slammed</b> 45:17 <b>slow</b> 27:17 31:8 <b>slowly</b> 30:17 <b>small</b> 35:20 <b>smaller</b> 37:9 <b>smashed</b> 45:18 <b>Smith</b> 5:7 12:12 12:15,18 20:6 20:9 34:17 <b>society</b> 8:21 16:5 <b>solely</b> 9:17 48:4 <b>son</b> 46:10 <b>sorry</b> 12:17 20:16 <b>sort</b> 8:6 9:10 31:11 48:14 <b>speaks</b> 13:7 <b>special</b> 22:2 23:24 25:20 26:2 28:13,15 28:18,22 30:14 38:11 48:5,10 <b>specific</b> 14:7 22:12 28:8 <b>specifically</b> 27:24 <b>speculate</b> 15:20 <b>speculation</b> 15:22 <b>squarely</b> 11:25 17:16 44:14,17 <b>squeezed</b> 25:21 25:22 <b>standard</b> 20:5,6 33:22 35:4 37:19 <b>stands</b> 19:18,19 <b>State</b> 5:16 6:9 11:3,5,11 12:1 12:6 20:24 21:9,19 24:4 25:3 26:14 29:13 32:13 34:14 35:11 38:25 39:10 43:7 44:19	<b>Stated</b> 39:2 <b>statement</b> 16:17 17:12 <b>statements</b> 36:12 <b>States</b> 1:1 2:1 <b>State's</b> 5:23 6:7 6:10 28:14 44:16,18 45:10 <b>statute</b> 8:19 18:25 25:2 43:4,17,17,22 <b>steady</b> 27:17 <b>step</b> 20:14,18 <b>Stevens</b> 6:23 7:5 34:23 35:1,6 35:22 36:3,4 43:12 <b>stick</b> 15:7 36:18 45:12,15 <b>strained</b> 13:6 <b>strangle</b> 33:2 <b>strategic</b> 24:16 <b>strength</b> 34:2,18 <b>striking</b> 37:11 37:12 <b>strong</b> 10:18 <b>strongly</b> 9:19 <b>struck</b> 15:6 36:16,17,17,18 45:11 <b>stuff</b> 38:17 <b>subject</b> 44:6 <b>submission</b> 15:12,13 <b>submitted</b> 27:4 27:6 49:4,6 <b>substantial</b> 44:23 <b>substituting</b> 5:18 <b>suffered</b> 7:17,20 <b>suffers</b> 8:6 <b>sufficient</b> 41:20 <b>suggest</b> 8:8 18:19 <b>suggested</b> 5:11	6:9 27:5 31:18 42:15 <b>suggesting</b> 37:4 37:8,9 <b>suggestion</b> 31:17 39:18 <b>suggests</b> 42:18 42:18 44:21 <b>support</b> 8:10 <b>supported</b> 9:19 <b>suppose</b> 10:12 <b>supposed</b> 25:11 31:15 33:18 41:20 <b>Supreme</b> 1:1 2:1 <b>sure</b> 38:23 <b>surely</b> 5:16 36:22 <b>survive</b> 26:18 <b>swallowed</b> 25:9 <b>system</b> 42:24 43:10
<b>S</b> S 3:1 4:1 <b>satisfies</b> 9:1 <b>satisfy</b> 48:9 <b>saw</b> 15:9 46:5 <b>saying</b> 25:17 40:2 <b>says</b> 16:25 29:6 29:21 40:9 44:19 45:13 48:18 <b>SCALIA</b> 11:2,7 11:10,19 12:11 12:17 20:14,17 20:22 37:11 <b>scope</b> 44:13 <b>score</b> 12:9 <b>scored</b> 8:3 <b>scores</b> 22:4 <b>se</b> 19:11,17 <b>second</b> 44:15 <b>see</b> 12:16 15:19 20:3 25:13 26:16 28:12 30:5 32:18 33:6 38:17 <b>selection</b> 9:13 <b>send</b> 6:6 <b>sending</b> 23:20 <b>sense</b> 4:20 18:9 34:7 <b>sensible</b> 13:11 47:24				<b>T</b> T 3:1,1 <b>take</b> 4:16 5:4 16:8 35:2 40:6 41:7 42:8 43:15 46:15 <b>taken</b> 39:25 40:14 <b>takes</b> 30:3 <b>talking</b> 16:24 20:10 28:5 30:7,13 39:23 39:24,25 41:8 <b>Teague</b> 35:8,13 44:7 <b>teenage</b> 46:10 <b>teenager</b> 7:18 47:16,20 <b>tell</b> 28:17 42:23 <b>telling</b> 17:7 <b>tells</b> 30:22 <b>Tennard</b> 5:6 10:22 11:2,2,4 11:19,22,24

12:8,11 15:23 16:23 17:1,14 18:18 34:16 47:6 <b>Tennard's</b> 12:6 17:8 <b>term</b> 38:22 <b>terms</b> 15:5 <b>terrible</b> 14:14 <b>test</b> 9:10 47:5 <b>testified</b> 8:1 <b>testimony</b> 29:5 29:17,21 32:23 32:24 33:8 45:3,25 <b>tests</b> 8:3,3 <b>Tex</b> 2:4,7 <b>Texas</b> 1:8,17 8:19 18:25 19:2 22:1 23:22 24:22 38:24 40:2,8 40:10 42:24 43:3,16 48:10 <b>Thank</b> 21:13 43:25 49:2,3 <b>thing</b> 32:21 34:21 44:15 <b>things</b> 25:14 26:20 <b>think</b> 5:22 6:7,9 6:11,11,16 9:24 10:1,3,5 10:10,12,22 11:19 12:7,21 13:3 14:7,11 14:22,25 15:21 15:22 16:4,11 16:22 18:3,15 18:17,18 19:17 19:18,19,23 20:2,8,21,23 20:24 21:5,8 24:6,10,23,24 25:7,8,25 28:7 29:12 31:6,13 32:21,24 33:3	33:5,6,21 34:23 35:9,14 35:17 38:9,17 38:19,19,20 42:2 44:11,12 45:2,25 46:3,8 46:20,25 47:5 47:5,14,17,23 48:7,13,15,16 48:17 <b>thorough</b> 27:16 <b>thought</b> 26:3 <b>threat</b> 8:21 <b>three</b> 6:4 7:15 36:15 <b>throw</b> 15:10 <b>tie</b> 42:12 <b>ties</b> 12:21 <b>time</b> 11:12,12,13 21:12 27:18 28:20 30:7,8 32:13 33:11 34:22 35:4,11 36:1,10,21 45:22 <b>times</b> 15:5 46:1 46:3 <b>token</b> 45:9 <b>told</b> 5:15 9:4,8 15:8 17:3 48:4 <b>top</b> 26:13 <b>treatment</b> 5:5 7:14 <b>trial</b> 8:1 9:7 31:16 <b>trials</b> 9:8 <b>tried</b> 43:16,20 45:15 <b>troubled</b> 13:21 13:21 22:5,18 26:9 32:9 40:12 44:20 45:6 <b>true</b> 35:23 37:13 <b>try</b> 7:5 <b>trying</b> 6:20 21:1 24:3	<b>turmoil</b> 7:23 <b>turn</b> 5:4 7:7,7 <b>turns</b> 26:21 <b>twice</b> 46:2 <b>two</b> 7:12 8:9,17 8:19,25 11:24 13:3 16:21 20:25 21:6 22:11 23:21,24 24:13 25:20 28:19 39:21 44:5 48:5,5 <b>types</b> 42:5,6  <b>U</b> <b>uncapable</b> 31:10 <b>unconceivable</b> 18:16 <b>underestimate</b> 46:4 <b>underlay</b> 5:8 <b>understand</b> 13:8 47:2 <b>understanding</b> 16:5 <b>understands</b> 46:8 <b>understood</b> 40:3 47:4 <b>undescribed</b> 35:21 <b>unhurried</b> 27:17 31:8 <b>United</b> 1:1 2:1 <b>unreasonable</b> 11:11 12:2,4 20:19,22,24 21:6,10 30:4 <b>unreasonably</b> 24:4 29:14 <b>unreliable</b> 8:16 <b>untrue</b> 14:10 <b>unwarranted</b> 30:20 <b>upbringing</b> 15:3 <b>use</b> 6:20 <b>utterly</b> 11:20	14:9  <b>V</b> <b>v</b> 1:6,15 4:15 <b>vacate</b> 5:12 <b>value</b> 44:13 <b>vehicle</b> 6:19 28:2 29:15 32:6 <b>verdict</b> 8:24 <b>versus</b> 4:5 31:15 <b>view</b> 5:2 36:4 42:8 <b>viewed</b> 21:25 <b>violated</b> 23:18 <b>violates</b> 23:21 <b>violence</b> 41:9 46:19,22 <b>violent</b> 14:21 15:16 46:14 <b>virtually</b> 21:24 <b>vs</b> 4:4 5:4  <b>W</b> <b>wait</b> 5:23 <b>walking</b> 29:22 <b>want</b> 36:13 44:15,17,18 45:24,24 <b>warrant</b> 40:25 <b>warranted</b> 12:5 <b>Washington</b> 1:22 <b>wasn't</b> 11:3 13:17,20 27:2 29:15 31:19 34:12 35:4 43:12 <b>watching</b> 46:7 <b>way</b> 8:15 10:19 13:7 14:5 15:20 19:9 23:5 25:21 26:1,2 27:1 32:17 33:5,17 34:1 39:21 42:3,15 43:5 46:15 47:3,17	<b>ways</b> 32:11,15 <b>weak</b> 37:15 38:6 38:8,11 <b>weaker</b> 10:12 22:10,14 <b>weakness</b> 33:17 <b>Wednesday</b> 1:23 <b>weight</b> 34:18 <b>Welfare</b> 16:3 <b>went</b> 45:15 <b>We'll</b> 4:3 <b>we're</b> 11:10,10 23:3,24 24:3,6 24:17,18,24 25:16,16 31:15 33:22 35:10,14 35:18 <b>we've</b> 24:19 25:8 <b>willful</b> 27:17 <b>willing</b> 10:4 <b>wish</b> 18:9 <b>witnesses</b> 17:19 <b>word</b> 46:2 <b>words</b> 13:5 22:10 30:13 <b>work</b> 24:20 <b>working</b> 32:13 <b>worth</b> 25:7 <b>worthy</b> 6:5,18 <b>wouldn't</b> 10:2 23:9 29:18 30:4 39:20 <b>wrong</b> 20:20 21:9  <b>X</b> <b>x</b> 1:2,21  <b>Y</b> <b>year</b> 36:8 <b>years</b> 17:23,23 17:23 25:10 29:20,21,23 30:4 <b>young</b> 17:20 36:25 37:6 <b>youth</b> 13:10,21
--	--	--	--	--

21:4 22:6,15 22:18 26:7,8 30:1,2,3,6 40:13 44:14 <b>youthful</b> 23:8	<b>4</b> 4 3:4 40 29:21 44 3:10 47 43:2,21,21			
<b>0</b> 05-11284 1:6 4:4 05-11287 1:15 4:5	<b>5</b> 50 29:21			
<b>1</b> 10 17:23 29:21 29:23 30:4 11:10 2:2 4:2 115 22:4 12 44:2 12:00 49:5 121 22:4 141 29:2 144 29:3 15 17:23 45:23 17 1:23 43:8,9 18 36:22 19 36:22 1976 10:23 1984 44:8 1989 4:14 27:5 1991 43:17,20 1994 21:20 25:3 1997 12:7,8 1999 21:20 25:4 36:9	<b>6</b> 65 36:19 45:14 66-year-old 33:2			
	<b>7</b> 75 29:2,3			
	<b>8</b> 8 44:19			
	<b>9</b> 90 27:11 45:14 90s 24:10 91-7580 44:16 917580 44:18 95 45:14			
<b>2</b> 2 33:1,2 20 17:23 2001 21:20 2006 1:23 21 3:7 25 43:6 26 44:17,19				
<b>3</b> 30 29:20 31 25:10 34 43:9				