IN THE SUPREME COURT OF THE UNITED STATES

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JALIL ABDUL-KABIR, FKA :

CALVIN COLE, :

Petitioner :

v. : No. 05-11284

NATHANIEL QUARTERMAN, :

DIRECTOR, TEXAS :

DEPARTMENT OF CRIMINAL :

JUSTICE, CORRECTIONAL :

INSTITUTIONS DIVISION; :

and :

BRENT RAY BREWER, :

Petitioner :

v. : No. 05-11287

NATHANIEL QUARTERMAN, :

DIRECTOR, TEXAS :

DEPARTMENT OF CRIMINAL :

JUSTICE, CORRECTIONAL :

INSTITUTIONS DIVISION. :

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Washington, D.C.

Wednesday, January 17, 2006

The above-entitled matter came on for oral

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

APPEARANCES:

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

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

C O N T E N T S

P R O C E E D I N G S

(11:10 a.m.)

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

Mr. Owen.

ORAL ARGUMENT OF ROBERT C. OWEN

ON BEHALF OF PETITIONERS

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

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

But those opinions, however incorrect, no longer represent the Fifth Circuit's view of Penry.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

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

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

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

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

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

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

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

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

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

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

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

And in addition to that, the expert who

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

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

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

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

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

MR. OWEN: I think, Your Honor --

CHIEF JUSTICE ROBERTS: These are closer

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

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

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

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

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

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

--

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

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

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

MR. OWEN: Yes, Your Honor.

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

MR. OWEN: The Court has been consistent --

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: In Brewer --

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

CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Quite a bit different than Penry.

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

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

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

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

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

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

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

MR. OWEN: Yes.

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

MR. OWEN: There was no similar --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: But unreasonable.

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

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

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

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

ORAL ARGUMENT OF EDWARD L. MARSHALL

ON BEHALF OF THE RESPONDENT

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

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

culpability apart from its relevance to these Texas special issues.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARSHALL: In Johnson, Your Honor?

JUSTICE GINSBURG: Yes.

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

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

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

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

JUSTICE GINSBURG: Where is that charge?

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

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

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

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

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

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

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

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

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

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

MR. MARSHALL: Justice Ginsburg, that's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

clearly established law at the time of these decisions?

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

JUSTICE STEVENS: That's your view.

JUSTICE KENNEDY: Were these decisions post-Johnson.

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: The likelihood of?

MR. MARSHALL: Of constitutional error.

JUSTICE BREYER: Well, constitutional error is --

MR. MARSHALL: Is the reasonable likelihood --

JUSTICE BREYER: Yes.

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

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

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

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

MR. MARSHALL: Well, Your Honor, the State

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

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

MR. MARSHALL: Yes.

JUSTICE BREYER: The answer is no.

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

JUSTICE BREYER: The answer is yes?

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

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

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

MR. MARSHALL: Yes, yes.

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

MR. MARSHALL: Yes, Your Honor.

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

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

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

MR. MARSHALL: The question is --

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

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

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

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

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

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

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

arguments that counsel made?

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

If the Court has no further questions --

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

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

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

amended the instruction?

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

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

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

MR. MARSHALL: Yes, Your Honor.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Marshall.

You Mr. Owen, have you 12 minutes remaining.

REBUTTAL ARGUMENT OF ROBERT C. OWEN

ON BEHALF OF PETITIONERS

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

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

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

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

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

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

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

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

MR. OWEN: I think, Your Honor --

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

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

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

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

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

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

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

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

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

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

habeas relief in Mr. Cole's case.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you Mr. Owen. The case is submitted.

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