

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
JOHNNY PAUL PENRY, :
Petitioner :
v. : No. 00-6677
GARY L. JOHNSON, DIRECTOR, :
TEXAS DEPARTMENT OF CRIMINAL :
JUSTICE, INSTITUTIONAL :
DIVISION. :
- - - - -X

Washington, D.C.
Tuesday, March 27, 2001

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

APPEARANCES:
ROBERT S. SMITH, ESQ., New York, New York; on behalf
of the Petitioner.
ANDY TAYLOR, ESQ., First Assistant Attorney General,
Austin, Texas; on behalf of the Respondent.
GENE C. SCHAERR, ESQ., Washington, D.C.; on behalf of
Alabama, as amicus curiae, supporting Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF ROBERT S. SMITH, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF ANDY TAYLOR, ESQ. On behalf of the Respondent	23
ORAL ARGUMENT OF GENE C. SCHAERR, ESQ. On behalf of Alabama, as amicus curiae, supporting the Respondent	38
REBUTTAL ARGUMENT OF ROBERT S. SMITH, ESQ. On behalf of the Petitioner	46

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

QUESTION: Mr. Smith?

ORAL ARGUMENT OF ROBERT S. SMITH

ON BEHALF OF THE PETITIONER

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

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

1 When you summarized in Grand v Collins the Penry
2 holding, you said and I'm quoting from page 474 of 506 US
3 Reports, you said that "in Penry it was impossible to give
4 mitigating effect to Penry's evidence by way of answering
5 the special issues. Grand says that without any
6 qualification. I would assume that one qualification is
7 appropriate because Penry does indicate that there is --
8 that the definition of deliberately was a possibility for
9 --

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

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

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

6 QUESTION: I thought you were imminently clear.

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

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

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

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

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

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

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

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

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

3 MR. SMITH: No, it wasn't.

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

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

11 QUESTION: That was pretty well done too I
12 thought.

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

1 To me the important fact was not the -- not defense
2 counsel's argument, but the jury one might expect would
3 pay somewhat more attention to the piece of paper that
4 they were handed to write their verdict on from the court
5 which was identical 100 percent verbatim identical with
6 the piece of paper they were handed in Penry One and which
7 said in it as part of the instructions as -- or actually
8 as part of the verdict form, there's nothing about
9 mitigating evidence on that piece of paper but there is
10 something that says if you want to answer no, it has to be
11 because there's a reasonable doubt as to I believe it's
12 the facts pertaining or the evidence pertaining to the
13 special issue. In other words they had to find that there
14 was reasonable doubt as to whether the state had proved
15 --

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

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

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

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

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

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

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

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

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

23 MR. SMITH: There was no fourth question.

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

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

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

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

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

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

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

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

5 QUESTION: Did you ask for that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. SMITH: Under the new statute, yes.

22 QUESTION: And is that okay? Is that
23 constitutional?

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

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

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

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

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

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

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

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

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

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

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

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

15
16
17
18
19
20
21
22
23
24
25

1 Let me try to talk briefly about my second task, if I
2 can,
3 which is to show that the -- this Peebles psychiatric
4 report was contrary to or an unreasonable application of
5 this Court's decision in Estelle v Smith. Based on the
6 briefs I think that issue is going to boil down to whether
7 the Peebles report was the sort of rebuttal that is
8 permitted under Buchanan against Kentucky. I think it is
9 quite clear that it is not. The Peebles report which is
10 at page 60 of the joint appendix served one function in
11 this case for the prosecution and that was to introduce
12 one sentence which says it is -- "it is my further
13 professional opinion that if Johnny Paul Penry were
14 released from custody that he would be dangerous to other
15 persons". That is the heart of that -- that statement is
16 summarizes perfectly what the state was trying to prove on
17 its affirmative case of future dangerousness. On that
18 issue the defendant produced no mental status evidence, no
19 psychiatric evidence and there was no occasion for
20 rebuttal. They didn't rebut anything we said.

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

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

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

3 QUESTION: Close case, on which issue?

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

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

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

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

20

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202) 289-2260
(800) FOR DEPO

1 culpability.

2 MR. SMITH: Yes.

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

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

18 QUESTION: But there was other evidence of
19 future dangerousness.

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

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

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

7 QUESTION: One sentence?

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

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

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

25 QUESTION: Maybe it wasn't an Estelle v Smith

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

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

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

13 ORAL ARGUMENT OF ANDY TAYLOR

14 ON BEHALF OF THE RESPONDENT

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

25 QUESTION: Even though literally they should

23

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202) 289-2260
(800) FOR DEPO

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

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

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

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

21 QUESTION: And that's our whole concern here.

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. TAYLOR: We do not.

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

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

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

25 MR. TAYLOR: In Penry One although it was not

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

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

9 MR. TAYLOR: We respectfully disagree.

10 QUESTION: You don't think it held that?

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

13 QUESTION: Then the irrationality apparently
14 started with this Court.

15 MR. TAYLOR: What Penry One taught us --

16 QUESTION: Why did we reverse the case?

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

1 reasonable decision on the part of the Texas courts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 QUESTION: Can I hear the rest of it?

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

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

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

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

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

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

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

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

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

25 QUESTION: Now the Texas court of criminal

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

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

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

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

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

1 Estelle claim that was made in this case.

2 QUESTION: Counsel, Your time is far off still.

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

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

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

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

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

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

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

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

15 QUESTION: Thank you, Mr. Taylor.

16 Mr. Schaerr we'll hear from you

17 ORAL ARGUMENT OF GENE C. SCHAERR

18 ON BEHALF OF ALABAMA, AS AMICUS CURIAE,

19 SUPPORTING THE RESPONDENT

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

1 decisions and not just arguably established.

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

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

25 Indeed the term after Penry One both Boyd and Sapple

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 special issues?

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

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

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

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

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

13 QUESTION: Isn't that fairly relevant?

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

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

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

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

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

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

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

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

12 Thank you.

13 QUESTION: Thank you Mr. Schaerr.

14 Mr. Smith you have four minutes remaining.

15 REBUTTAL ARGUMENT OF ROBERT S. SMITH

16 ON BEHALF OF THE PETITIONER

17 MR. SMITH: Thank you.

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

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

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

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

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

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

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

13
14
15
16
17
18
19
20
21
22
23
24
25