SUPREME COURT OF THE UNITED STATES

In the Matter of:

DONALD GENE FRANKLIN,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

No.87-5546

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JAMES A. LYNAUGH, DIRECTOR, :

TEXAS DEPARTMENT OF CORRECTIONS, :

Respondents. :

Washington, D.C.

Tuesday, March 1, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:52 a.m.

APPEARANCES:

MARK STEVENS, ESQ., San Antonio, Texas, on behalf of the Petitioners.

WILLIAM C. ZAPALAC, ESQ. Assistant Attorney General of Texas, Austin, Texas, on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Stevens, you may proceed whenever you're ready.

ORAL ARGUMENT BY MARK STEVENS, ESQ.

ON BEHALF OF PETITIONER

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

The question presented in this case is whether the jury instructions given pursuant to Article 37071(b) of the Texas Code of Criminal Procedure deprive the jury of any procedure for considering and expressing the view that the mitigating evidence in this case called for the sentence of less than Death.

This is a case involving consideration of mitigating circumstances. This Court has held that mitigating circumstances must be rooted in the evidence; they must concern the character of the record and the circumstances of the offense.

I would like to talk a little bit about the circumstances of the offense and the character of the Defendant, because those relate to the mitigating circumstances in this case.

It is absolutely undisputed that Mr. Moran was killed; robbed; kidnapped. There were no eyewitnesses to the crime itself, however. A circumstantial evidence case, the

circumstantial evidence pointed to Donald Franklin. Primarily it linked him to the car in which he was unquestionably abducted in; there was evidence linking her as well to his house and to the outside of the house.

So it was circumstantial evidence that pointed to Mr. Franklin. Still, there was no physical evidence unequivocally tying Mr. Franklin as her killer. There was no confession; there was no inculpatory statement; there were two eyewitnesses who identified him at the scene of the abduction; but they were vigorously cross-examined at trial: cross-examined on their opportunity to observe the prior misidentification of one of the witnesses; their motive for testifying; and the lighting conditions.

All in all we don't complain of the sufficiency of the evidence; but we concur that it was sufficient to prove his guilt; of intentional murder beyond a reasonable doubt.

But we do contend just as clearly that there was some residual doubt; that the facts of this case were not so strong; not so compelling; to remove all doubt whatsoever; and the best evidence of that is the fact that the jury deliberated for four hours and forty-five minutes before reaching its decision.

The primary residual doubt concerned identification; that is, was Mr. Franklin in fact the one seen driving the car away from the scene?

He was found guilty and the court then went into the

punishment phase of the trial. At the punishment phase, they presented four reputation witnesses who testified that Mr. Franklin had a bad reputation as a peaceful and law-abiding citizen; they proved that he had twice previously committed the crime of rate; and in addition there was a stipulation that, in seven years of imprisonment he had had a good disciplinary record.

At this point, the jury was retired to deliberate. They had to choose between life and death for Mr. Franklin, and they looked to instructions from the court.

What they got was two questions, as is typical under the Texas Capital Punishment Submission Scheme. The question asked whether the crime was committed deliberately and with the reasonable expectation that death would occur.

The second question asks whether there was a probability that Mr. Franklin would commit acts of criminal violence constitution a continuing threat to society? There was nothing at all in these questions that provided for consideration of the mitigating circumstance we just talked about.

QUESTION: Were there four questions?

MR. STEVENS: Two questions, Your Honor. Two. The Texas scheme permits the submission of three questions in some cases, but two were submitted.

QUESTION: As I recall, we require only relevant

mitigating circumstances to be considered. Is that a relevant mitigating circumstance? Have we ever said that it is?

MR. STEVENS: Your Honor, what the Court said in Lockett was it is required that the circumstances be relevant. But it's relevant if it goes to the defendant's character, record, or circumstance of the offense. I think there can be no more compelling circumstance of the offense than a question about whether the Defendant is the one who did it? So I do think it is relevant.

QUESTION: That's not a circumstance of the offense. That's a circumstance of the trial, it seems to me. The offense is what it is. Whether there is doubt on the part of the jury whether he did it doesn't seem to me to go to the offense.

MR. STEVENS: It goes to whether or not he did it, though, Your Honor. It seems to be like a circumstance of the offense. The Court has never defined circumstance of the offense; but it just seems like, especially in a capital murder case, where the decision, where the jury has to make that decision of life and death, there can be no more important circumstance of whether he's the one that did it; whether they've got the right man?

This Court has recognized in addition to recognizing the right to present evidence of the circumstance of the offense, this Court in Lockhart v. McCree recognized that

residual doubt can be of benefit to a defendant. That seems to me to be just another way of saying, if it can be of benefit to him, then it can also can be something that is proffered as the basis of the sentence less than Death.

QUESTION: Wasn't that put in terms of an assumption for the sake of argument in Lockhart?

MR. STEVENS: Possibly, Your Honor. That's the argument the state made; took the majority opinion to adopt that argument, to at least say, and the Court said, that it does not wholly vitiate the claimed interest.

And I took the Court to say that there is some interest in residual doubt that accrues to the Defendant in a unitary jury system. That is a recognition by the Court that it can be beneficial; it's just another way of saying it can be a mitigating circumstance -- an irrelevant mitigating circumstance.

QUESTION: Well, or it can affect the jury whether you tell it to affect them or not. I mean, it could be just an expression of the realities, as opposed to the legal niceties.

MR. STEVENS: It couldn't affect the jury if they're honestly obeying their oath in this case. The jury in this case took two oaths: one to surrender a true verdict according to a law and the evidence.

The law was submitted to the jury in the form of the special issues. The special issues do not logically comprehend

an inquiry into residual doubt. It is true the jury could have nullified their verdict; could have been dishonest; and could have answered that "no" based on residual doubt.

However, it certainly approaches "arbitrary and capriciousness" for a defendant to have to rely on jury nullification in order to save his life and get the verdict he ought to be entitled to if the jury were considering the evidence.

QUESTION: I am just referring to what our comment could have been referring to when we said it may be of use to the Defendant. That's the only point I was making.

MR. STEVENS: I think it's unquestionably of use to the Defendant. It's of use to the Defendant and it couldn't be comprehended in this case. And it's reasonable to believe that the punishment phase of the trial, that reasonable jurors, when they were deciding the guilt that they had, they deliberated almost five hours, that they still have some of this residual doubt; and it might be such that it could have affected them in this case; and yet there was no way for the jury to take that into consideration under the narrow, special issues.

And even if they had considered it for some reason or other, there was no vehicle for them to express that view that that was mitigating evidence substantial enough, to have them vote for a life sentence. Because all they could do honestly under the special issues is answer the questions yes or no.

CHIEF JUSTICE REHNQUIST: Mr. Stevens, we'll resume there at 1:00 p.m.

(Lunch recess.)

AFTERNOON SESSION

CHIEF JUSTICE REHNQUIST: Mr. Stevens, you may resume where you were, if you remember. Let me ask you a question, perhaps, to get you started this afternoon.

The state's brief here on page 17 says the jury was instructed to consider all the evidence introduced at both phases of the trial and answering the special issues.

Now I gather even if that is so it doesn't satisfy your requests here.

MR. STEVENS: That is correct, Your Honor, and I don't believe -- I do disagree with the state. The state wasn't explicitly instructed to consider all the evidence in deciding the special issues.

That instruction is typically given in Texas, but it was not here. The closest the state came to that was in the special issues, where the jury was told, "Do you find from the evidence beyond a reasonable doubt?"

So we think that the instruction was a little bit less explicit than the state would have it. And it would not satisfy us either, because even if it did, even if that did direct the jury's consideration, there's still that second aspect of the problem with the way the statute was applied in this case.

It doesn't give the jury a vehicle for answering the question honestly, "no."

QUESTION: I think the only charge on punishment was in the appendix on page 13?

MR. STEVENS: That is correct, Your Honor.

QUESTION: But the record doesn't indicate -- the record, not just the appendix, but the record, apparently, does not incorporate the charges on the guilt phase?

MR. STEVENS: I do believe that the jury was instructed to consider all the evidence -- excuse me, to consider the instructions for the previous part of the trial.

QUESTION: Yes.

MR. STEVENS: And I would like to emphasize that we rely on lockett as our principal authority, but Lockett was a statutory case. It invalidated a statute on its face.

We're not seeking to invalidate the Texas statute on its face.

QUESTION: But Lockett, of course, didn't deal with instructions; it just dealt with the admissibility of evidence, as I read the opinion.

MR. STEVENS: I don't know just the admissibility of evidence, Your Honor. I think what the statute -- what the case, said was the statute was so narrow that it didn't allow the jury -- the sentencing judge to consider and to give independent mitigating weight to the relevant mitigating evidence.

So I think it's very close to our case. It didn't

allow consideration; it didn't allow the jury to give independent mitigating weight to the evidence.

But it's not identical to our case because we're not attacking the statute on its face. Ours is a jury instruction.

QUESTION: You're not contending that any evidence that you offered should have been admitted, and wasn't admitted in violation of Lockett, are you?

MR. STEVENS: No. But we did request punishment instructions, and what those instructions would have done would have permitted the jury to consider all circumstances of the offense and to answer "no" if a circumstance such as residual doubt mitigated against the punishment of Death. That's our complaint with this Texas statute. It's too narrow; our requested instructions would have broadened the Texas statute; and would have broadened it just like the Texas Court of Criminal Appeals told this Court when it decided Jurek in 1976, this Court's decision in Jurek was based on a promise by the Texas Court of Criminal Appeals.

QUESTION: Instruction on the punishment phase just repeated what the Court said at the guilt stage -- or you wouldn't be here, I take it? Consider all the evidence?

MR. STEVENS: We would be here, Your Honor, because again, our problem is that, even if the jury could have considered all the evidence, there was no procedural vehicle for that jury to give effect to its consideration. In other

words, the jury was still bound by its oath to answer the questions truthfully based on the evidence; so if all the judge had done was instruct the jury that it must consider all the evidence, it still would have had no way to answer the questions "no."

Assuming it found the answers should be "yes." Yes, deliberately; yes, probability but still found a mitigating factor, it would have no way to give independent weight to that mitigating factor; and no way to answer the question, "no," outside the narrow special issues.

QUESTION: Now, did you ask for a broader instruction than you got?

MR. STEVENS: We did, Your Honor.

QUESTION: And in what respect was it broader?

MR. STEVENS: It was broader in respect that it tried to bring the statute as applied in this case into compliance with Lockett. There were two sorts of instructions: instructions three, four and five, told the jury that they could, that they may consider evidence concerning Defendant's character; record; or circumstance of the offense which, in their opinion mitigates against the punishment of Death; and if they find that it does mitigate against the punishment of Death, they can answer the questions "no."

The first requested instruction was a little bit different than that; what it told the jury was that it may

consider evidence of character; record; and circumstance of the offense and, if that evidence leads the jury to have a reasonable doubt about the true answer to the special issues, then it should answer that question, "no."

So what we tried to do with our requested instruction was basically ask the jury in every conceivable way the very questions that we think Lockett entitled us to.

QUESTION: Mr. Stevens, what besides the residual doubt, which you say couldn't have come to special issue No.2, what else couldn't have come into the special issue questions?

MR. STEVENS: Under the facts of this case, Your Honor, I'd like to frame the question a little bit differently if I could. Our second mitigating factor, however, was related to Mr. Franklin's seven years of good behavior in prison.

It's not true and we don't contend the jury was precluded from considering that altogether, because clearly his prior prison record was relevant to the second special issue; that is, whether he would probably commit acts of violence in the future.

But Lockett I think requires more than just consideration. It requires a certain sort of consideration; in other words, the jury must individually consider any aspect of character; record; or circumstance of the offense proffered as a basis of a sentence less than Death.

Individual consideration, and furthermore, it must be allowed by the instructions and by the statute, to give independent mitigating weight to that evidence.

So, although the jury considered it, we don't doubt that they did consider his prior prison record when answering special issue No.2, there was no vehicle for the jury to give independent mitigating weight to that evidence.

QUESTION: Surely the state is entitled to specify the purposes for which you have to consider it. Unless you know the purposes for which you can consider it, you really have no basis for knowing what is relevant, mitigating evidence; and what isn't relevant, mitigating evidence, can you?

MR. STEVENS: But the fact that the state may or may not be able to specify the purposes; but I certainly don't think they can specify the purposes to the extent that they preclude giving independent weight to relevant, mitigating factors.

QUESTION: Well, I'm perhaps with you on that, but you allow that everything except the residual doubt element could have come in on one of the special issues.

MR. STEVENS: It could have come in for limited consideration.

QUESTION: For limited consideration.

MR. STEVENS: Only for the purpose of probability.

What the state is doing; what the state is asking this Court effectively to say, that that's the only criteria necessary to decide whether a person lives or dies.

Undoubtedly this Court has previously held that that's one criterion, but that can't be the only one. That is the law of Texas, however.

If the jury -- whatever independent weight they want to give to the evidence, they can't do it under the Texas statute. They have to filter it all through special issue No.2.

QUESTION: Still, except for the residual doubt element, you must acknowledge what has happened here is at least within the language of our earlier cases; that the jury could, except for residual doubt, could have taken into account all of the mitigating elements you are concerned about with one exception?

MR. STEVENS: The cases are a little bit confusing to me. Because some cases say the jury could consider it; and other cases say the jury must consider it.

I believe that Eddings and Lockhart make clear that the jury must consider; the jury must listen. It doesn't say what weight the jury has to give to that evidence, but they must listen.

QUESTION: Okay, but that's still technically whether it's "must" or "may," it would still technically come within

that. The jury must consider it only within that language. The jury must consider it only -- they must consider it for this limited purpose in determining whether there ia a probability or not.

MR. STEVENS: It gets back to what I said earlier about consideration versus proper consideration.

QUESTION: I understand. You may be right about that, but there's nothing in the language of earlier cases that lays down that requirement, at least.

MR. STEVENS: I do think there is in Lockett. I think that Lockett told us how that consideration has to be; you have to consider any relevant aspect; mitigating aspect; and we have to give it independent mitigating weight.

So, just consideration, consideration as a conglomerate as Texas requires it, the conglomerate being probability, is not enough. The jury must be allowed to give that evidence independent mitigating weight.

QUESTION: I thought that meant just independent from all other mitigating factors, where you interpret it to mean what unrelated to any specific showing.

MR. STEVENS: I think it means independent of any factors mitigating or aggravating, and in this case, in Mr. Franklin's case, when it was shown that he had committed two prior rapes; when it was shown that he had a bad reputation; that was an aggravating factor as far as probability of future

dangerousness goes.

I think that it was unconstitutional in this case for a jury to have to consider that aggravating evidence in conjunction with this mitigating evidence in sort of lump sum, without considering them independently. I think that violates Lockett.

QUESTION: Well, is your premise, then, that Lockett undercuts Jurek?

MR. STEVENS: Not necessarily. We're not asking a court to overrule Jurek in this case. What Jurek said was the Texas statute properly narrows a category of persons eligible for the Death penalty. We have no quarrel with that.

It also says that, if we believe the Texas Court of Criminal Appeals, then it also provides for consideration of particularized mitigating circumstances.

In those cases in which the Texas statute allows for consideration in a particularized mitigating circumstance, we have no complaint. We're here because in our case, consideration of particularized mitigating circumstances, giving independent weight to those independent circumstances, was not allowed under the facts of the case, because of the narrow special issues.

QUESTION: Well, Jurek was a facial attack on it, though. Wasn't our pronouncement much more facial in Jurek? Didn't we say this Texas statute is okay?

MR. STEVENS: It did, Your Honor. But decided the same day was Proffitt v. Florida, and Gregg v. Georgia. Since then, the Court has re-examined both those state statutes as applied.

Proffitt and the Hitchcock case is a good example of a recent case out of this Court. When the Court decided Hitchcock, it didn't overrule Proffitt. It just said that as we looked at the case it is clear to us that the jury was precluded from considering mitigating circumstances. So we hold that the statute was applied unconstitutionally in that case.

That's exactly what we're asking in this case. We have demonstrated, we believe in our brief, that the jury was precluded from considering mitigating circumstances in this case; and as applied, the statute worked unconstitutionally.

QUESTION: Well, there is this difference. Hitchcock said, as applied, it didn't work out right because of something apart from what the statute itself says.

Where here, you're arguing that the reason this didn't work as applied was because the language of the statute doesn't let it work as applied. I thought we had resolved that in Jurek?

Now, maybe you're telling us Jurek is wrong, and it may well be. I'm darned if I don't think we decided it in Jurek, anyway. The same question you're presenting to us.

MR. STEVENS: I don't think this question was presented as I read the briefs in Jurek or the decision in Jurek. Again, if particularized mitigating circumstances could have been considered under the facts of our case, we wouldn't be here.

So Jurek is still good law as far as it goes.

Jurek, though, is important to remember that Jurek was based on a promise by the Texas Court of Criminal Appeals. The court recognized that the statute was facially narrow. In order to uphold the constitutionality of the statute on its face, the Court looked to advice and guidance from the Texas Court of Appeals in Jurek v. State, the Texas case; and was assured by that case that the Court would consider all mitigating circumstances.

Maybe it looked to the Court like Texas would keep its promise at that time.

However, it is now clear, based on this case, that Texas has not kept that promise.

QUESTION: It depends in the way of what you mean by "consider." Certainly if evidence is brought in before a jury, and the jury is told to consider all the evidence, many people would say Texas is permitting, in fact, instructing the Jury, to consider all the evidence.

MR. STEVENS: Even if that's true, Texas is still not providing a procedural mechanism.

QUESTION: But then you're going beyond -- they you're cutting into Jurek. Because it's perfectly clear in Jurek that Texas wasn't providing any procedural mechanism.

I had understood the opinion of the Texas court in that case to say "We're going to let in a lot of stuff here, okay, that maybe you would think wouldn't ordinarily be let in under this statute.

But no one suggested we're going to add some more special circumstances.

MR. STEVENS: No one suggested either that you couldn't add that, Your Honor, and I think that when you --

QUESTION: But that would make it an amendment of the statute.

MR. STEVENS: I don't think it does. I think when you talk about broad construction, and that's what the Court did in Jurek, it talked about the statute really being more broadly construed than it is on its face. There are a number of different ways --

QUESTION: Well, here's what Jurek said on that point: 'In the present case, the Court of Appeals indicated that it will interpret the second question so as to allow the Defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show."

Now that dictum -- that holding, was complied with in this case, was it not?

MR. STEVENS: I don't know that it was complied with. In spirit at least, Your Honor. In Lockett, the Court talked about Jurek. And they certainly didn't overrule Jurek in Lockett. But they noted that the statute was facially narrow and had been broadly construed by the Texas court.

I think that one way to -- it's a reasonable interpretation that a broad construction would be one that properly allowed the jury to consider all mitigating circumstances.

Our instructions would have done that -- the instructions given in this case under our facts did ont allow it. That's our complaint. That's one of our complaints.

QUESTION: But you want an instruction to the jury that said, wholly aside from any of these questions you have to answer, if you feel like -- if you think the mitigating circumstances indicate the Death penalty is not appropriate, you may answer any of these questions that you want to know.

MR. STEVENS: We asked for two sorts of instructions and that was one of them.

QUESTION: Yes well, and the others had the same effect.

MR. STEVENS: The other one, basically, I think request No.1 asked the jury to consider mitigating evidence, and if that evidence requires an answer "no" to special issue No.1 or No.2, then you can answer it "no."

QUESTION: I thought you really said if the mitigating evidence indicated the Death penalty were inappropriate, you may answer question No.1 "no."

MR. STEVENS: That's what we did, Your Honor. There were two sets of instructions. One of them is geared to the special issues themselves; the other one is really independent of the special issues.

QUESTION: Yes, but they have -- it has the same effect either way.

MR. STEVENS: It does, and we think the effect is one of making the statute as applied constitutional. It brings it into compliance with what the Court held in Lockett.

QUESTION: But Lockett didn't purport to disturb Jurek did it?

MR. STEVENS: Absolutely not. It did note that the Texas statute as applied at the time did note clearly preclude consideration of mitigating circumstances. We think that, as we have shown in our case, there's going to be a case in which the statute as applied does preclude consideration of mitigating circumstances and does prevent the jury from giving independent weight to those mitigating circumstances and does prevent the jury from giving independent weight to those mitigating circumstances.

In effect, what the state is saying in their brief, and their position is that the cause of the mitigating evidence

as far as the probability of his prison record because that did not negate the probability of future violence, it should be disregarded entirely. And that is inconsistent with Lockett's mandate that it be considered independently.

The state says that good behavior has no relevance apart from this probability of future misconduct. That's not supported by the caselaw. Skipper v. South Carolina, for one thing, says that a good adjustment in jail is potentially mitigating regarding Petitioner's character and his probable future conduct.

So Skipper basically gives us two explicit mitigating aspects of this sort of evidence. It goes to his character and his probable future conduct.

We could only rely on one of them under the narrow special issues here. Here the jury -- Mr. Franklin had the right to have his jury decide whether the strength of his character, as shown by his seven years of good behavior in prison, whether that factor alone, whatever it showed about his probability of future violence, whether that factor alone was strong enough to mitigate in favor of a life sentence?

Had our instructions been granted, that could have been done. It could have been done under the instructions actually given.

I would like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stevens. We will hear next to Mr. Zapalac.

ORAL ARGUMENT BY WILLIAM C. ZAPALAC, ESQ.

ON BEHALF OF RESPONDENT

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

In this case Franklin contends that the Texas capital sentencing statute fails to allow for individualized sentencing because it does not provide for instructions to the jury on how to consider mitigating evidence in their deliberations during the punishment phase of the trial.

He relies heavily on the fact that during his particular trial the jury was precluded from considering any residual doubt that it might have had as to Franklin's guild in answering the special issues.

First of all, as the Court has already expressed, there has never been any constitutional requirement that the jury take into account residual doubt in determining the punishment that is to be meted out to a capital defendant.

Secondly, this is not one of the factors that the jury is to be taking into consideration in making its punishment decision. This Court has explicitly said that the relevant mitigating factors that are to be taken into account during the punishment phase concern the circumstance of the offense and the character and record of the individual

defendant before the Court.

The Court has further said that the jury is to be concerned with the personal culpability of the individual Defendant, and of the aspects of his character which show whether he can be rehabilitated or whether he is going to continue to be a threat to society.

We would contend that residual doubt is simply any residual doubt that the jury might entertain is simply not a circumstance of the offense; is not relevant mitigating evidence; that the jury is required to consider in its punishment deliberations.

But even if it were required to take into account this type of evidence, we would contend that both of the first two Texas special issues which are submitted in every capital murder case, do allow for the consideration of the residual doubt that the jury might entertain.

The jury is first of all asked to determine whether the conduct of the defendant, in committing the offense, was committed deliberately and with a reasonable expectation that the death of the deceased or another would result.

Second, the jury is required to determine whether there is a probability that the defendant will commit future acts of violence that will constitute a continuing threat to society.

This Court recognized in Adams v. Texas that jurors

faced with the possibility of imposing the Death penalty are going to be -- may well be affected by that very awesome burden; and that they may approach their deliberations with a great deal of care and thought.

And what this means is they may give greater weight to the evidence that's put before them; and that they may raise their standards as to what constitutes reasonable doubt, so that any doubt that they might have as to the defendant's culpability can be taken into account in the punishment deliberations.

QUESTION: May I ask you a question about the second statutory question --

MR. ZAPALAC: Yes, Your Honor.

QUESTION: -- that asks if he would commit criminal acts that would constitute a continuing threat to society. If what, if he's not put to death, or if he were loose in society? Has the Texas court ever answered that question?

MR. ZAPALAC: The question simply asks, if he is allowed to live --

QUESTION: It's if he's allowed to live, not if -- the words "continuing threat to society" made me wonder if it was intended to mean if he were turned loose in society?

MR. ZAPALAC: The court, to my knowledge, has never restricted society to free society as opposed to, for example, being confined in prison.

QUESTION: So that the predicate is, "if not put to death," he would do those things?

MR. ZAPALAC: That is correct, Your Honor.

QUESTION: Okay.

MR. ZAPALAC: The state's position is, then, that any juror who has any residual doubts about the actual guilt of the defendant is not sufficient to rise to the level of a reasonable doubt as to his guilt, still can find expression for those concerns in the Texas special issues to determine that, by giving additional weight to the evidence of deliberateness, as was brought out in Franklin's case, the jury would be able to return a "no" answer on that special issue.

Franklin's case is a good example of this: if any juror had any doubt about the actual guilt of the defendant, the evidence that was presented, and the argument that was made with respect to the first special issue, the deliberateness issue, could have given the juror -- that juror, a means of expressing his residual doubt; and the ability to answer the question, "no."

Franklin argued that the facts of this offense demonstrated that he had not given careful thought, had not engaged in the kind of reflection when he committed the crime, but it was, in his words, a "crime of passion," simply an instinctive reaction to the fact that his victim was beginning to show opposition to his attempt to kidnap and rob.

QUESTION: Well counsel, suppose that the instruction here were, "Ladies and gentlemen of the jury, you can consider the mitigating evidence only with reference to question Nos.1 and 2."

MR. ZAPALAC: If those were the --

QUESTION: Valid?

MR. ZAPALAC: -- those were the only issues presented, and those were the concerns that the jury is to be taking into account in its sentencing decision.

QUESTION: Can the Court give that instruction in every case?

MR. ZAPALAC: The instructions that the courts typically give are that you are to consider all of the evidence in answering the special issues.

QUESTION: Well, but I'm asking if you could give the instruction that I proposed?

MR. ZAPALAC: That the --

QUESTION: And may consider all of the mitigating circumstances; all of the evidence that's been presented to you; but only in order to answer question Nos.1 and 2, and for no other purpose.

MR. ZAPALAC: That would be permissible, because our position is that all relevant mitigating evidence; all the evidence that goes to determine the individual culpability of this particular Defendant, and the evidence that goes to

determine whether he can be rehabilitated, whether he's going to continue to be a threat to society, or whether there is a possibility of treating him or at least restraining him in such a way that he does not continue to be a threat, is covered in these two special issues, so that any relevant mitigating evidence that would be presented by the defendant, can be considered within the two special issues, and the jury could properly be limited to consideration of the evidence within those special issues.

QUESTION: May I follow up on that? Suppose the mitigating circumstance was different than the one relied on here, and instead the Defendant's counsel argued that he was only 16 or 17 years old at the time of the offense and for that reason he should not be put to death; that that is a mitigating circumstance that should be given independent consideration; and the prosecutor argued, "You can only consider it in answering question No.2 as to the probability of future harm, and if you are convinced that he is -- that there is a risk of future violence or future criminal threat to society, you must nevertheless answer the question in that way, and the judge so-instructed.

That would be proper, I gather, under the Texas system?

MR. ZAPALAC: I'm not sure that it would be proper to say that the evidence can be limited only to the second special

issue.

QUESTION: Or the first or the second.

MR. ZAPALAC: Be limited to the first or the second special issue. In that case, if the only evidence that the defendant produces is that he is 16 or 17 -- under Texas law he'd have to be at least 17 years old at the time of the offense --

QUESTION: Or say he was 18, and he said a man of 18 shouldn't be -- he wanted to argue that?

MR. ZAPALAC: If the only thing that the defendant does is introduce the fact that his age at the time of his offense, certainly that can be considered in mitigation in the jury.

QUESTION: But how could it if the judge gave the instruction that Justice Kennedy proposed: the fact that he's 18 is only relevant to the question whether he would constitute a continuing threat to society -- you may not weigh it for any other purpose?

MR. ZAPALAC: Or that he did not have the maturity to act with the kind of deliberateness --

QUESTION: Correct.

MR. ZAPALAC: -- that we would ascribe to people that we think deserve the Death penalty. Again, if the defendant simply introduces the fact of his age, I think that jurors are aware that young people, as this Court has pointed out, for

example, in Eddings, younger people do not have the same maturity in adults and are not held necessarily to the same standard.

And the jury can be aware of this; the jury can look at that evidence and determine whether this particular defendant acted deliberately; acted with the kind of culpability that would justify the imposition of the Death penalty; or whether this Defendant has the capacity has the capacity to be rehabilitated.

But the defendant also bears the responsibility, if he wants the jury to give additional weight to all this evidence, then it's incumbent upon him to come in and explain to the jury, as Franklin did not in this case about the evidence about his adjustment to prison life; explain to the jury why this evidence is relevant to the considerations that the jury would engage in; why this evidence is particularly relevant to these special issues?

The point is that there could be that there is medical evidence or psychiatric testimony that could be developed that shows that this particular individual did not have the maturity, the capability, of committing the act with the kind of deliberateness that's necessary for the imposition of capital punishment.

QUESTION: But the assertion here is that you may come up with, and the assertion is that there was in this case

an element of mitigation that was mitigating not because it went to one of these two factors but for some other reason, such as in particular the fact that he had been well-behaved the last time he was in prison, which could go to whether he would be dangerous in the future (issue No.2) or it could also go to the question whether he was basically a pretty good person; a person of good character. That's the assertion in any event.

Now, why can't a jury just consider that as mitigating because it showed he wasn't such a bad person?

MR. ZAPALAC: Because this is an aspect of his character that is a relevant consideration that the jury needs to take into account. I would point out first that Franklin did not argue this part of his character as a mitigating factor. He limited his argument simply to the fact that if he was in prison for the rest of his life, he's not going to be a danger to anyone; he's demonstrated in the past that he's not going to be a danger.

But beyond that, it is incumbent upon the defendant to show how this is relevant to one of the special issues.

QUESTION: I know it is. I'm asking why it should be. You're not addressing the argument that he's made, which is that the two special factors unduly limit the jury's ability to take account of the special factors. It says you can only take account of them for this purpose, not for any other

purpose. Maybe, I think a person of good, basically good character, even if he is going to be just as dangerous, is someone not basically of good character, shouldn't be executed. And I can't do that under these two charges.

MR. ZAPALAC: This Court has said that the relevant concerns that the jury must take into account and must be looking at are the individual culpability of the defendant what comes before it; and the aspects of that defendant's character that demonstrate, for example, whether he is going to be capable of being rehabilitated.

And we would say that if that evidence of the individual's character shows that he can be rehabilitated, or at least show that he's not going to be a danger as long as he's confined in prison, that that is certainly relevant mitigating evidence, and that the Texas statute allows for consideration of that evidence.

QUESTION: In this case --

QUESTION: I think that you also suggested the jury said that the only consideration that the Texas statute, even in its limited considerations, those three questions, is constitutional. And that Texas need not add any independent considerations?

MR. ZAPALAC: That's correct, because as this Court pointed out, the relevant considerations, the concerns, that the jury is to be looking at is the individual culpability of

this defendant; this is the purpose of individualized sentencing; this is why we want to have the juries engage in individualized sentencing, because we want to look at the culpability of this particular Defendant to determine his, for example, his degree of participation in the offense; his degree of the culpability that he bears for the very type of crime that he committed; whether it was a particularly savage and brutal crime; whether there were perhaps mitigating aspects even in the circumstances of the offense, in the way that the crime was committed.

And also those aspects of the Defendant's character which demonstrate that he is a person who doesn't deserve the Death penalty; that he is a person who can be rehabilitated who is not going to pose a threat to society in the future.

And it's these concerns that the Texas special issues address; it's these concerns that the jury's attention is focused on during the punishment phase of the trial.

In his brief, Franklin argues that the concepts of "intentional" which is used to define the culpable mental state for capital murder; and "deliberate" is used in the first special issue, are virtually identical; and therefore, a jury who has convicted a defendant of capital murder is almost bound to return an affirmative answer to the first special issue.

In fact, this is not the case. The Court of Appeals has indicated in the past that the two terms are not linguistic

equivalents; that the term, "intentional" and the term, "deliberate" are not synonymous; do not mean the same thing; and that juries are able to comprehend this; and in fact, juries are able to comprehend this.

For example, in the Heckert v. State, the defendant went in with an accomplice into a residence with the purpose of burglarizing the place. The co-defendant handed Heckart a weapon; said, "Stand here; I'm going to go look for things to rob."

Heckert saw a movement out of the corner of his eye; recognized that it was not his accomplice, who had gone off in a different direction; turned, fired two shots and killed the victim.

The jury had no trouble determining -- deciding, that this was an intentional act that the defendant intended; that he killed the victim at the time he fired the shots; but returned a "no" answer on the first special issue, saying that there was no deliberation; there was no volition; no choosing to engage in this kind of conduct.

Jurors can perceive the difference between the two.

The issue is also particularly relevant in determining the actual culpability of the -- defendant in the case of the Law of Parties or Accomplices, where the degree of participation of the actual defendant may be less than having actually committed the murder. Although guilty of capital

murder as a party or as an accomplice, the degree of participation was not sufficient that the jury would find that his behavior was deliberate and culpable enough to warrant the Death penalty.

There are numerous cases reported in Texas where the Law of Parties has been at issue; the defendant has been convicted under the Law of Parties, but the jury has come back with a "no" answer to the first issue.

Finally, in Franklin's own case, the process of arguing that Franklin's actions were not deliberate began with the process of jury selection; and during voir dire, Franklin questioned the -- members extensively on their understanding of intentional and deliberate, and their ability to distinguish the two terms.

At least one potential juror was excluded because the two terms were indistinguishable in that persons's mind.

During the punishment phase of the trial, during his argument, counsel argued at length that all of the facts of the offense showed that this was not a careful, thoughtful, reflective action on the part of Franklin; that it was a result simply of a crime of passion; an instinctive reaction to the situation; and was not something that warranted the death penalty. It was not a deliberate act.

He went through again and read numerous definitions of the term, "deliberate" and reiterated that these actions did

not fall within the terms of deliberate conduct.

QUESTION: Was that juror excused for cause or not for cause, the one that couldn't see the difference between intentional and deliberate? Did he have to use a preemptory challenge to get rid of it?

MR. ZAPALAC: I don't recall, Your Honor. I think he may have been excused for cause, but I don't remember.

QUESTION: I would think, if the difference is as obvious as you say, and you have a juror who can't understand it, you shouldn't have to waste a preemptory challenge.

MR. ZAPALAC: I would think that it would have been for cause, but I don't recall exactly.

So his argument that the first special issue, in actuality, is a nullity and adds nothing to the jury's consideration certainly is not borne out by either the law or the facts of his own particular case.

Finally, with respect to the future danger issue, Franklin cannot deny and has not denied that he was able, under the Texas statute, under the procedures employed in this trial, to present all of the relevant mitigating evidence that he wanted to. He has not denied that he was limited in any way in arguing the relevance of that evidence to the special issues during his jury argument.

He cannot reasonably claim that the jury could not seek the relevance of his evidence to the second special issue.

The aspect of his character that he wants to give an independent weight was not borne out if the jury did not see this particular evidence; did not see the effects of this evidence on his case; the fault is with Franklin, and he has not shown that a jury instruction to, especially in the form that he has proposed, would have made any difference in the jury's decision; would have added anything to the jury's consideration; would have pinpointed the jury to those aspects of his character that he claims were exemplified by his behavior in prison.

QUESTION: Is it fair to say, counsellor, that with reference to Franklin's requested instructions, he did not seek to add any special issues, but simply to instruct the jury how the special issues were to be answered; and that was done? Is that your position?

MR. ZAPALAC: He certainly did not attempt to add any special issues. I don't think that his instructions, particularly added anything to the jury's understanding of how the jury was to proceed with their deliberations.

In fact, the jury, although in this case apparently not explicitly instructed to consider all the evidence during voir dire, during the jury argument at the punishment phase of the trial, the jury was told repeatedly that there would be a punishment phase of the trial; you will be able to consider the evidence from both phases of the trial at that time in

answering the special issues.

Both sides argued the facts of the offense from the guilt/innocence phase; as well as the evidence that came out at the punishment phase of the trial. The jury clearly was aware that they were to consider all of the evidence that had been presented at both phases of the trial.

The jury was also instructed that they were to find they were not to answer one of the specials -- either of the special issues in the affirmative, unless they were persuaded beyond a reasonable doubt that the answer should be "yes."

And they were also instructed that the only way that they could return a "yes" answer was that if the entire jury, all 12 members, unanimously agreed that the answer should be "yes." So it's very clear that Franklin had the protections of the jury system; had the protections of the reasonable doubt standard; and that the Texas special issues allow for the consideration of all the mitigating evidence that he presented.

QUESTION: Yes, but couldn't you make the same argument in Lockett, that all the evidence was received and could have been considered, but just for limited purposes, rather than with respect to the ultimate question?

MR. ZAPALAC: The statute in Ohio really did not allow the jury to consider the evidence that was not directly related to the three specially defined mitigating circumstances. In this case, Franklin has pointed to no

evidence that either he attempted to introduce or that he would have liked to have introduced; or that he could even think about from any source.

QUESTION: No. But the instruction would preclude, and Justice Scalia suggested, from thinking that the evidence of seven years of good behavior in prison may not really convince me that he will not engage in violence in the future; but yet if I also find that he went to church every day; or he prayed regularly and he really was contrite about what he did, I don't think the man should die. They couldn't make that determination.

MR. ZAPALAC: I think that that evidence, I really fail to see that that particular evidence has any kind of relevance to the jury's consideration, other than as it goes to the question whether this particular defendant is going to be a future danger. Again --

QUESTION: Well, they could believe, you know, he was sincerely repentant and all the rest of it, yet not have a strong enough character to avoid involvement in future criminal activity.

So it seems to me that it is at least logically possible for a jury to think that it must answer both questions in the affirmative; but nevertheless feel that this evidence is persuasive on the question whether he should be put to death?

MR. ZAPALAC: I think that that type of evidence

would also be in the way that you phrased it could also be relevant to the first special issue in whether this particular defendant is capable of actually engaging in the type of behavior that is so personally culpable that the jury would be justified in imposing the death penalty.

So I think that the Texas statute does take into account those considerations. Again, Franklin did not make the argument at the time of his trial, that the jury should look at these aspects of his character; presented no evidence whatsoever that the fact that he had been able to conform his behavior in prison; had been able to adapt his life, made any difference other than the fact that he indicated that he wouldn't be a future danger as long as he was confined to prison.

If the Court has no further questions, I think that the state's position is that the Court of Appeals decision should be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Zapalac.

Mr. Stevens, you have three minutes remaining.

ORAL ARGUMENT BY MARK STEVENS, ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MR. STEVENS: Thank you.

The state faults us for not arguing character had independent weight. That's the very point of the case. The basis, the framework, for an effective argument is on proper

jury instruction. You can't make --

QUESTION: But am I right, counsel, that the only thing you requested was that the jurors consider those factors with respect to special issue Nos.1 and 2? Or am I incorrect?

MR. STEVENS: Two types of instructions: one, consider the mitigating evidence when deciding the true answer of special issue Nos.1 and 2.

The second type of instruction asks the jury to answer yes or no based on whether or not they thought the evidence mitigated against the penalty of death.

QUESTION: Which instruction was that?

MR. STEVENS: Two -- well, three, four and five did it exclusively; and two was a mixed instruction.

QUESTION: But each one of those refers only to the jury's consideration of questions of special issue Nos.1 and 2.

MR. STEVENS: That is correct, Your Honor.

QUESTION: Your point is it sort of rewrites to -- I mean, it says you can answer No.2 "no' even though the answer is "yes?"

MR. STEVENS: Correct, Your Honor. The state wants to fault us for not making an argument that we didn't have -- if we didn't have the proper jury instructions, the argument could have been made effective.

QUESTION: You're talking about No.5 in particular, your instruction that you may answer special issue No.2 "no" if

you find any aspect of the Defendant's character or record or any of the circumstances as factors which mitigate against the imposition of the Death penalty; which means anything that you want to mitigate; and if you think it mitigates, then answer No.2 "no" even though its real answer is "yes." That's essentially what your instruction said?

MR. STEVENS: That's correct, Your Honor. So that's independent of the true answer of the special issues.

I don't understand the prosecutor to say that I requested instructions and misstated the law; or that they were erroneous in any way. The worst he can say about them is that they are merely redundant. They're clearly not redundant, as Justice O'Connor has noted in a concurring opinion, when there's any doubt about this, it's the duty of the Court to remove any ambiguity about whether the jury actually considered the mitigating evidence.

At the very best, the state can say there's an ambiguity here: the proper jury instruction; the one we requested would have removed that ambiguity. We think the Court of Appeals should be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stevens, the case is submitted.

(Whereupon, at 1:4 p.m., the case in the above-cited matter was submitted.)

REPORTERS' CERTIFICATE

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the UNITED STATES SUPREME COURT.

Date: 3/1/88

Margaret Daly
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