ORIGINAL

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOHNNY PAUL PENRY, Petitioner V. JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

CASE NO: 87-6177

PLACE: WASHINGTON, D.C.

DATE: January 11, 1989

PAGES: 1 - 46

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY,

Petitioner

v. : No. 87-6177

JAMES A. LYNAUGH, DIRECTOR,

TEXAS DEPARTMENT OF CORRECTIONS

Washington, D.C.

Wednesday, January 11, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:45 o'clock p.m.

APPEARANCES:

CURTIS C. MASON, ESQ., Hunstville, Texas; on behalf of the Petitioner.

CHARLES A. PALMER, ESQ., Assistant Attorney General of Texas; Austin, Texas; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

P R O C E E D I N G S

(1:45 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-6177, Johnny Paul Penry v. James Lynaugh.

We'll wait just a moment, Mr. Mason, until some of the people clear out.

Very well. You may proceed whenever you're ready, Mr. Mason.

ORAL ARGUMENT OF CURTIS C. MASON

ON BEHALF OF THE PETITIONER

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

In the Fifth Circuit, the State of Texas conceded that Johnny Penry had limited mental capacity and that psychological testing supports the U.S. District Court's finding that he has the mind of a six to seven-year old child.

In addition to this, the evidence in the record is that Johnny Penry was severely abused as a child, that he was in and out of state mentally retarded institutions, and that as a teenager he was victimized by older males.

This is the type of evidence, relevant mitigating evidence, that has a relevance beyond the three Texas special issues that were submitted to the jury that had

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

to be answered yes or no.

In Penry v. State, the Texas Court of Criminal Appeals rejected the argument that the terms and the three Texas special issues should have been defined so that the jury could have taken into consideration relevant mitigating evidence. After rejecting this argument and saying the terms are to be given their usual, common meaning without even trying to show how given their common meaning, these three special issues -- how, how Penry's mitigating evidence could be considered in these three special issues. And then they concluded that the three special issues were not unconstitutional because they did not provide a provision for the jury to say, considering the mitigating evidence, Penry does not deserve to die.

Under the interpretation of these special issues given by the Texas Court of Criminal Appeals, in the words of Circuit Judge Reavley, what is a jury going to be able to do if they decide that, based upon the evidence, the answer to these three special issues should be yes, but after considering all of the relevant mitigating evidence, a juror believes that Johnny Penry did not have the moral culpability required for him to be deserving of receiving the death penalty? What is that juror to do? How can he say no to any of those

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

questions and still uphold the oath he gave when he swore that he would answer those three special issues based upon the evidence?

In Roberts v. Louisiana, this Court held -- a plurality opinion -- this Court held that having to rely upon jury nullification was not an adequate method for a jury to take into consideration mitigating evidence.

The second question for which cert was granted in this Court can be briefly summarized -- the argument supporting it can be briefly summarized by this one sentence. If it is given that the severity of the punishment should bear a relationship to the culpability of the defendant, then how can somebody with the reasoning capacity of a seven-year old be determined to have the moral culpability to deserve a sentence of death?

The evidence -- in Penry's case, the relevant mitigating evidence is very similar to the relevant mitigating evidence that was in Eddings and in Hitchcock. And in both Eddings and Hitchcock, this Court reversed those decisions, the death penalty in those cases, because the sentencer had no -- did not take into consideration the mitigating evidence when deciding that Eddings or Hitchcock should be given the death penalty.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

In Lockett --

QUESTION: Well, now, may I ask what definition of the term "deliberately" would in your view have met the requirements that you urge here?

MR. MASON: Deliberate would have to be defined in such a way that his reduced capacity to conform his acts to the requirements of law could be taken into consideration.

QUESTION: Well, define it.

MR. MASON: So, it --

QUESTION: How would you do it?

MR. MASON: I would -- something like you're instructed that a person acts deliberately when his ability to conform his actions to the requirement of society is not significantly impaired due to mental defect or abused childhood or -- or (inaudible) by abused childhood, something -- or other factors beyond his control. I think that sort of definition of deliberate would encompass most of Penry's mitigating evidence.

QUESTION: You would kind of introduce the old Durham test from the District of Columbia Court of Appeals then in -- as a constitutional requirement to decide whether someone is deliberate?

MR. MASON: Well, okay. We're trying to make a

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

term have a meaning where a jury can take into consideration mitigating evidence like the Texas Court of Criminal Appeals when they decided Jurek v. State said these terms can encompass mitigating evidence. And so, I'm trying to figure out a way that these terms could actually be defined so that that could --

QUESTION: To be brought within one of the specifications?

MR. MASON: Right.

And actually the simplest way of making sure mitigating evidence could be taken into consideration in the Texas statutes would be if they would just simply let the jury in on the secret. That is, that what the Court of Criminal Appeals has said and what this Court has said, and that is if they would tell the jurors that in their deliberation they are to define the terms in those special issues in such a way that all relevant mitigating evidence could be taken into consideration and that if after considering all the relevant mitigating evidence, the jury is of the opinion that the defendant does not deserve to be executed, they are to vote no on these special issue or issues that contains the term or terms that the jury has defined in such a way as to take consideration.

QUESTION: Do you think the jury should be left to

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

define what's relevant mitigating evidence?

MR. MASON: No, not what's relevant mitigating evidence.

QUESTION: The Court would --

MR. MASON: This Court has essentially defined that.

QUESTION: Well, the Court hasn't tried to -- this Court hasn't tried to define it. Perhaps we should leave it to the jury.

MR. MASON: Well -- well, okay. However you're going to say that. Okay.

This Court has said it's evidence about the defendant's character or background or about the facts surrounding the commission of the crime which would make a juror want to consider a sentence less than death appropriate. I don't know if that's considered a definition of relevant mitigating evidence or not, but that's essentially what I believe the cases of this Court say is relevant mitigating evidence.

QUESTION: What do you think we mean by all relevant mitigating evidence? Suppose, for example, a particular defendant has had a childhood in which he was subject to child abuse. Would, would a jury have to consider that? Suppose a particular state says that's -- we don't consider that relevant mitigating evidence. We think it's only if it somehow impaired the

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

individual's mental capacity.

MR. MASON: Well --

QUESTION: What if a state said that? Would that comply with our decisions?

MR. MASON: No, because that was one of the types of evidence that was left out in Eddings, the fact that when he went to live with his father, he was severely punished and abused by his father. And the judge said I can't consider that. And this Court then said that was one of the factors in Eddings that should have been considered by the Court in, in assessing the death penalty. So --

QUESTION: What do we mean by relevant mitigating evidence if we don't mean mitigating evidence that is relevant under the state law? Relevant under what else then would it be?

MR. MASON: Well, any -- any evidence that is going to make the jury -- okay. This evidence has to bear on the defendant himself, you know. You can't just take something that has absolutely nothing to do with the defendant and say -- like he's -- he's got a poor mother that doesn't want him to die, so don't give him the death penalty --

QUESTION: Well, why do you say that? Why do you say that? Once you -- once you say the state won't set

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

the limits, why can't I feel sorry for somebody because he's already had three brothers who have been -- who have been executed, and I feel sorry for him? He's the last of the family, and his mother will be -- why can't that be relevant mitigating evidence if I feel like it, unless the state tells me it's not?

MR. MASON: Okay. The -- this Court I think has said it has to do with the background or the record of the defendant. And -- I think it was in Lockett that it was noted that the court does have the -- the trial court now does have the right to limit the introduction of evidence that the trial court thinks is irrelevant.

Now, the trial court in Skipper, of course, tried to limit some evidence that -- and that -- and that was reversed because that was some relevant evidence about his background and behavior.

So, I think this Court has not left the trial judge completely helpless, but if it's evidence about the background and record of the defendant or the -- or something surrounding the crime, why it was committed and how it was committed, then the court is going to have to let that in if it would be something that could be considered mitigating.

QUESTION: I think you're saying that we decide what's relevant mitigating evidence. The term

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

"relevant" means relevant in the view of this Court, and, and our view is that it has to relate to the -- to the character, to the --

MR. MASON: That's -- that's --

QUESTION: -- acts of the defendant.

MR. MASON: That's right, Justice Scalia. That's why I think -- well, at least that's what I get out of the reading of your cases which they have considered this. Actually in, in Woodson, which started all of this, they termed it relevant, compassionate and mitigating evidence. And from then on, the other cases, the word "compassionate" I think seems to have been dropped out, but from what they're talking about, I'm not sure it's being left out of the consideration. It's just that they just now call it relevant mitigating instead of relevant, compassionate and mitigating evidence.

But anything about the defendant or the crime that would make a juror consider something that a sentence less than death is appropriate is something that they should be able to act upon. And that's where I think the problem is in the Texas statute is there's lots of things that are appropriate that would not be directly related to answering no to one of those special issues. And, and this is relevance beyond the special issues.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

And so, that's where the Texas statute or the way it's interpreted by the Texas Court of Criminal Appeals comes into problems.

And actually in, in Lockett, the Court phrased it as that the trier -- or the sentencer must be able to give independent mitigating weight to this evidence.

And in Mills v. Maryland, the opinion said that near the statutes, the sentencing court or evidentiary rules can place a barrier between the jury -- in the way of the jurors' considering -- considering mitigating evidence. And even they can't place a barrier in the way of a single hold-out juror in considering this evidence.

Brown v. California --

QUESTION: Just to make -- just to make one point clear, Mr. Mason, you don't dispute the fact that all relevant mitigating evidence that was offered was, in fact, received though.

MR. MASON: No, I don't dispute that. We have never disputed that the -- that they are keeping evidence from being introduced. I mean -- in Penry's case, in a recent case in -- that the, the state has used in their appendix, Burns v. State, it was reversed because they did not let in evidence. The trial court did not let in evidence. But that still leaves the

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

problem of what can the jury do with this evidence once it gets in because all of this evidence has to be channeled through negating one of these three special issues. And there -- they are -- there's lots of mitigating evidence that doesn't readily fit into negating one of those but may make a juror consider a sentence of death -- death inappropriate. And that's where the problem comes in.

Now, in the plurality opinion in Jurek, in that one, this Court first noted that the constitutionality of the Texas statute depends upon if the special issues allow consideration of particularized mitigating factors. Then the plurality opinion went on to give -- quote examples from the Court of Criminal Appeals' opinion in Jurek v. State. And then they concluded that it thus appears -- and I think I'd want to try to emphasize the plurality saying it thus appears -- that the Texas statute like the Florida and like the Georgia statutes are constitutional.

And Justice White in concurring in that now did indicate that the Texas statute did not allow for jury discretion and -- and I think really this is the way the Texas Court of Criminal Appeals is interpreting the statute. They are severely limiting the ability for a juror to have discretion in deciding whether a sentence

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

less than death is appropriate because there is just simply no way that all relevant mitigating evidence can be made relevant to one of those questions.

There was a footnote in --

QUESTION: So, so you want an instruction that if on balance, after considering all of the mitigating evidence, you in your discretion think that, from the standpoint of your own conscience, this person should not be sentenced to death, that you are to -- that you are to give this -- not give the capital sentence?

MR. MASON: I don't think I'd put in your own conscience or anything like that. I'd just want the instructions to say after considering all the mitigating evidence, if you feel that he does not have the moral culpability --

QUESTION: Based on what standard? Based on what the individual thinks of moral culpability?

MR. MASON: I, I think you're going to have to leave -- let the juror have a certain amount of discretion in what their standard is.

QUESTION: You don't define moral culp -- culpability?

MR. MASON: That would be something that makes him -- the defendant less blameworthy. There is something about this defendant, the way he was raised, the way his

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

mind works, the way -- things like that that reduces his blameworthiness, you know. There is some type of reason or excuse --

QUESTION: None of those terms are defined in our cases to date, are they?

MR. MASON: No. I think they're -- those are the types of things that I think you -- okay, I'll borrow from the Court of Criminal Appeals that they can give the -- a common, ordinary meaning to those terms. Otherwise, it would appear that either this Court would have to completely define it or would have to require some kind of statue -- statutory definition of those.

But the line of cases starting with Woodson and going through Hitchcock all hold that the juror or the sentencer must be able to consider relevant mitigating evidence before making that final decision, this person should live or this person should die. And although a lot of those are plurality decisions, Hitchcock was for the unanimous Court. When Just -- Justice Scalia wrote over here, it was a unanimous decision.

And Hitchcock's mitigating evidence was very similar to -- well, actually Penry's mitigating evidence is stronger than Hitchcock's because Hitchcock's mitigating evidence was that he inhaled gasoline fumes when he was a child and passed out. His father died of

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

cancer at an early age, and his mind wandered after he inhaled the gasoline fumes. He was one of seven children from a poor family, such like that. That was the evidence that was -- that was not considered in Hitchcock and when it was reversed because the sentencer failed to consider all the mitigating evidence. And I think Penry's mitigating evidence is a lot stronger than that. And, and I think its relevance does, in fact, go beyond those Texas special issues.

QUESTION: Except in Hitchcock, it couldn't have been considered for any purpose at all, and here the, the assertion is that it could be considered for purposes of whether his act was deliberate as the charge to the jury required. I, I -- I'm sure --

MR. MASON: Well --

QUESTION: -- you appreciate, Mr. Mason, the problem with just saying throw it all to jury and whatever -- whatever you think is mitigating, allow that to be mitigating. It's, it's ironic. We got into this business in Furman in order to try to bring some order into -- into the imposition of the capital -- capital penalty. We, we were worried that it seemed arbitrary, and there was no rhyme nor reason to who got it and who didn't get it.

And now -- now you want us to give it to the -- you

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

say it must be given to the jury without any -- any channeling instruction. Just whatever you think deserves mitigation, so be it, so that you'll get widely disparate results depending on what a particular jury thinks is, is worth mitigation.

MR. MASON: Yes, but can the state then channel it in such a way that the jury cannot effectively consider it? And, and again, I go back to --

QUESTION: Well, are you asserting here that it couldn't be considered at all or only that it only could be considered for deliberateness? Surely it could have been considered on the point of deliberateness, couldn't it?

MR. MASON: Okay.

Again, I'll go back the Circuit Judge Reavley's statement. What is the juror going to do if after looking at the evidence, he decides, yes, he acted deliberately, but upon looking at the evidence, he says this is very compelling mitigating evidence? This man should not die. He has the mind of a seven-year old. He was severely abused. He is not fully responsible for the way he is today.

Now, he's not so bad that he can't act deliberately, and I would submit that if he was so retarded he was incapable of acting deliberately, he

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

would be so retarded that he would have never been considered competent to be tried and would have avoided all criminal responsibility altogether. And I'm not saying he should avoid all criminal responsibility. I'm just saying the jury needs to have a way, when they have somebody like Penry before them, to say I know the evidence shows he did it deliberately, but he should not die.

QUESTION: Well, that's just another way of making your argument that the jury ought to have open-ended discretion.

MR. MASON: No, I don't think that's open-ended discretion.

QUESTION: It isn't?

MR. MASON: No, because it has to be some kind -- something relevant to his character and personality.

QUESTION: Well, do you mean something the juror thinks relevant?

MR. MASON: Yes, but, but it can have some guidance from -- as to this. Otherwise, how can -- okay. How can the sentencer be so restricted and especially when -- after the Court of Criminal Appeals has said we are going to define these terms in such a way that all this mitigating evidence is going to be taken into consideration, and yet completely abandons that as soon

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

as Jurek is decided?

And the Court of Criminal Appeals had two superb chances, one in '77 and one in '78 of defining what deliberate is so that it could be taken into consideration.

The first one was a shootout in a jail in which one of the officers was killed by a stray bullet from a fellow officer. In that case, the jury answered no to the first special issue, and the argument was that because deliberate and intentional mean the same thing, that means it's inconsistent and he should have been found innocent of capital murder.

The Court of Criminal Appeals responded not by showing why he acted intentionally but didn't act deliberately. They adopted the reviser's note and said all a no answer to special issue number one means is the juror used nullification to decide he didn't deserve to die. So, they just voted no.

The second time they had a chance to define deliberate in such a way that it could be -- mitigating evidence could be taken into consideration was in -- I think that was Nichols v. State. In this case, the defendant burglarized a residence, went in unarmed and in the process of burglary took the gun. The -- the victim came back to the apartment, was armed when he

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

came in, pulled his gun, pointed it at the burglar and was about to shoot him when the burglar pulled the gun he had stolen and shot one shot, killed him. His confession was I was so scared I didn't have the slightest idea of what was happening.

The Court of Criminal Appeals reversed that case, but it didn't reverse by finding he didn't act deliberately even after though they said it wasn't a -- well, let me see if I can find the right phrase that they used in that one.

(Pause.)

MR. MASON: Anyway, what they found in that case was that it wasn't -- he didn't really have a conscious desire to shoot him.

And then they reversed on the second question based upon the fact that since he really had not formed a conscious intent to shoot the man, that it showed he was not a danger to society. They didn't -- they completely -- no, pardon me.

Here's what they said. "The facts of the instant case reflects a criminal act of violence, but it was not a calculated act." And I think that's a superb chance for them to show the difference between deliberate and intentional. Instead, they went on and said because it wasn't a calculated act, he wasn't -- there was no

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

evidence he was a future danger and reversed on question number two.

QUESTION: I take it you've decided not to argue the point that a mentally retarded person cannot be executed?

MR. MASON: I'm sorry. No, I do want to argue that point. (Inaudible). Yes, okay.

Again, you know, the basic question is how can somebody this retarded have the moral culpability to deserve the death penalty? Now, I would parallel the argument to that in Thompson, and I would specifically go on Justice O'Connor's here's concurring opinion as well as I think Justice Scalia's dissenting opinion.

QUESTION: You're arguing just this case now?

MR. MASON: Well, no. That, that -- right now I'm arguing that case. Okay.

QUESTION: Suppose there are degrees of mental retardation?

MR. MASON: That's why I want to get into arguing that case, Justice Blackmun.

QUESTION: Do, do you take it per se rule that any kind of mental retardation is disqualifying from the death penalty?

MR. MASON: No. That's not what I'm getting ready to argue, Justice Blackmun.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

Justice O'Connor in her -- in her concurring opinion said that there could be a consensus of this Court that there is some age below which a juvenile does not have the maturity to be executed.

The dissenting opinion in Thompson now said we may go as far as saying that there is a rebuttable presumption that somebody of Thompson's age could not be executed. And then they went into the common law which said at the age of 12 or under, you could not commit a capital felony. Thirteen and 14 there is a rebuttable presumption that you could not commit a capital felony.

I think a parallel to that in mentally retarded cases is that you could -- there is some age, such as Perry's, where there can be a consensus, some retardation, some mental age, let's say, reasoning age, like he has, which is seven. There should be a consensus that --

QUESTION: Isn't -- isn't there more apt to be debate or disagreement though about one's mental age than one -- about one's chronological age?

MR. MASON: Yes, but there's -- but that is in -- an -- a more precise, say, way of determining that than like insanity. There are tests. There are historical records showing that he was mentally retarded as a child. And so, what I'm trying to say is that the way

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

to go about it would probably be having a rebuttable presumption like somebody in the upper mild retarded extending probably into the lower, dull, normal rebuttable presumption that they should not be executed and yet then pick a -- an age where --

QUESTION: When you talk about age, you -- you don't want --

MR. MASON: I'm talking mental age.

QUESTION: -- you don't want us to consider Penry as a nine-year old, do you?

MR. MASON: No.

QUESTION: I mean, there's difference -- there's a great difference between him and someone who is chronologically nine years old, is there not?

MR. MASON: That's correct.

QUESTION: And that difference can be --

MR. MASON: But --

QUESTION: and that difference can be taken --

MR. MASON: But --

QUESTION: -- into account for purposes of the cruel and unusual punishment clause, I take it?

MR. MASON: Well, the cruel and unusual clause punishment is -- where that comes in is that the punishment should bear some relationship to moral culpability. And if you're as retarded as Penry is,

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

then that significantly reduces his moral culpability and -- so that he should not be given the death penalty. That -- but I'm not saying that he shouldn't be punished.

QUESTION: Why do you say that? Why --

MR. MASON: Because the death penalty should be reserved --

QUESTION: Does it go to moral worth too? Are people who are less intelligent -- I suppose, if they -- if they can't be morally blameworthy, they also can't be as -- quite as morally virtuous as -- as more intelligent people. Is, is, is that true? Is, is, moral --

MR. MASON: They -- if --

QUESTION: Is moral culpability --

MR. MASON: If Penry was raised properly, he probably could have learned the virtues, but he would have had to have been raised properly and he would have had to have been raised with real delicate care and a real understanding and -- so that he could learn how to -- to conform his actions to society. He just wasn't.

QUESTION: Well, now wait. You're not saying that he didn't know how to conform his actions to -- are you -- he knew the --

MR. MASON: Okay.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

QUESTION: -- difference between right and wrong. He would have gotten off on an insanity defense if that wasn't case.

MR. MASON: Okay. He had difficulty in conforming his actions. That's part of the mental retardation. That -- and as a matter of fact, that's part of the definition of mental retardation, that there is a deficit in acaptive behavior.

Thank you.

QUESTION: Thank you, Mr. Mason.

Mr. Palmer, we'll hear now from you. You don't have to worry about pronouncing voir dire in this.

ORAL ARGUMENT OF CHARLES A. PALMER

ON BEHALF OF THE RESPONDENT

MR. PALMER: Thank you, Your Honor.

I'd like to first discuss the mental retardation issue. In so doing, I in no way denigrate the importance of the other issue. We think it's very important, but I think the argument will flow more smoothly this way.

Implicit in Penry's Eighth Amendment argument is the suggestion that this Court should abandon to mental health professionals the task of determining the mental status of defendants in criminal cases. The difficulty with this is that even though there might be some areas

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

of the law in, in which it would be desirable for the social sciences to inform the Court's decision making process, Penry's case provides a perfect example of why they should not do so in this context.

I think it's a popular misconception that there are all -- all mentally retarded people are the same, that is to say, they are so mentally deficient that they're unable to care for themselves or unable to function in society. In fact, as Justice Blackmun adverted to somewhat earlier, there are varying degrees of mental retardation. And Penry is in the category which is most nearly normal.

Further, regardless of whether or not Penry might properly be diagnosed as mentally retarded, it is clear that he is capable of deliberate actions, and it is clear that he is fully aware of the consequences of those actions.

It is also clear that in the criminal proceedings which led to his conviction and sentence of death, that his mental status was taken into account on at least three occasions.

Prior to trial he filed a motion asserting he was incompetent to stand trial. In accordance with Texas law, a jury was impaneled to determine the competency issue. Both Penry and the state presented psychiatric

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

evidence, and Penry himself testified in his behalf. He testified, among other things, that he had worked as a busboy, that he had been paid $2.50 an hour, that he had previously been incarcerated in the Texas prison. He was able to name the unit of the prison and the town in which it was located. He was able to tell the date on which he was paroled.

He described delivering appliances to the home of his murder victim, described being paid $18, being paid by check, the floor plan of the house, the tasks that were necessary to install the appliances. And finally, he testified that he consented to a search of his home because he believed that thereby he would obtain more lenient treatment.

At the conclusion of the competency hearing, the jury found by a preponderance of the evidence that he was competent to stand trial. The jury was then dismissed and the second jury was impaneled to hear the trial on the merits.

Penry pled guilty by reason of insanity under the Texas insanity statute, which provides an insanity defense may be based on either mental disease or a mental defect such as Penry's. Again, the jury heard conflicting psychiatric testimony from the state and from Penry. Penry did not testify, but he was present

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

in the courtroom during the week-long trial, and the jury was able to observe his demeanor and actions.

In addition, the state introduced Penry's two written confessions, which severely undermined his insanity defense as well as his Eighth Amendment claim before this Court. Penry not only confessed to the rape/murder for which he is presently on death row, but also to two prior rapes. And I'd like to recite very briefly what the evidence showed with regard to those offenses because I think it belies any assertion Mr. Penry is not competent, sane and fully accountable for his actions under every test currently operative under the law.

The first rape took place when Penry approached his victim's trailer home at night and flipped off her electric power switch to entice her outside the house. He was wearing a stocking over his face so that he would not be identified and was wielding a screwdriver, which he used to force her to submit to an act of rape and to perform an act of oral sodomy on him.

Several weeks later, when he learned that she had reported this incident to the police he returned, again with a stocking over his face, and this time wielding a switchblade knife, severely beat his victim and pushed her off the roof of her trailer house.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

The second rape took place when he encountered a woman whom he knew personally and fabricated a story about his brother having been in a car wreck to persuade this woman to give him a ride. She did so, and he raped her twice at knife-point. He was convicted of this rape and sentenced to five years in the penitentiary.

He had been on parole from that conviction for some seven months when he committed the rape/murder that the case today is concerned with. Again, the evidence showed that Penry went to his victim's house with an open switchblade knife in his pocket and with the conscious intent to kill her after he had raped her so that she would not testify against him.

The evidence further showed that she resisted vigorously, attempted to stab him with a pair of scissors, but that he overcame her resistance and forced her to submit by throwing her to the floor and kicking her with his cowboy boots. The evidence showed the rape took half an hour to consummate, and after it was over, Penry retrieved the scissors the victim had used, walked back over to her, sat down on her, told her he was going to kill her and plunged the scissors into her chest.

The jury rejected the insanity defense and found him guilty of capital murder.

At the punishment phase, the jury was asked to

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

answer three special issues, the first of which inquired whether Penry's conduct was deliberate. Again, the jury was instructed to consider Penry's evidence of mental retardation. The jury answered all the special issues affirmatively.

In arguing for a --

QUESTION: Mr. Palmer, can I interrupt you because I want to be sure I understand the thrust of your argument? You, you tell us in very unpleasant and disturbing facts, of course, that indicate that this man was a very dangerous man. And -- but are you making the point that as a matter of fact, he was not mentally retarded and therefore we don't have the issue before us of whether there can be an execution of a mentally retarded person?

MR. PALMER: No, Your Honor. I am trying to make the point that regardless whether he fits within a clinical definition of mental retardation, that his mental status is such that he knew what he was doing.

QUESTION: Well, I mean, there are seven-year olds who know what they're doing and nine-year olds who know what they're doing. Is that -- does it mean that -- Are you willing to accept for purposes of our decision that this is a person with a mental age of seven, eight or nine?

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

MR. PALMER: Yes, Your Honor. I, I --

QUESTION: I see.

MR. PALMER: In arguing for a bright line rule --

QUESTION: But not that he -- but not that he is in all respects like a person seven, eight or nine.

MR. PALMER: No, Your Honor. I don't think it requires any argument on my part for the Court to understand that children of that age do not commit these sorts of acts.

QUESTION: Well, I, I don't -- I don't know what it means to have a mental -- what does it mean to have a mental of seven, eight or nine? Do, do all portions of the -- of the brain in a retarded person -- are they all retarded equivalently? I gather there are different portions that perform different functions. I have no idea --

MR. PALMER: Your Honor --

QUESTION: -- what it means to say that someone has a mental age of nine. All his -- all his intellectual functions are at a nine-year old's level or just some of them or just those that are tested by an IQ test or what? What do you mean by he has a mental age of nine?

MR. PALMER: Your Honor, I possess no expertise in this area. These mental ages that have been referred to came from Perry's expert witnesses at the trial, and it

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

was not explored through cross-examination or otherwise what this meant. What they testified was he intellectually functions at an age between six and seven and functions in a social environment at age between nine and ten. Beyond that, I can assist the Court no further.

If the Court is to accept Penry's Eighth Amendment claim, what it will mean is that mental health professionals, rather than the courts, will make these determinations. And I think there's some compelling reasons why this should not be so.

Penry's definition is based in large part on IQ tests, which are subject to inherent defects. For instance, it's well documented these tests do not take into account an individual's social and cultural background. And it's also well documented that individuals' scores in these tests can vary widely. Perry's case illustrates both these points. He has been tested between 50 and 63. It's a deviation of more than 25 percent. And there was also testimony at trial that his deprived background contributed to his low score.

Penry's reliance on Thompson v. Oklahoma we believe is misplaced. The rule announced in Thompkins -- Excuse me, Your Honors -- in Thompson was based on the entirely objective test of chronological age. Here Penry's test

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

is based on IQ scores and medical diagnoses, which are necessarily subjective, and as such we would submit are inappropriate for a bright line constitutional rule.

QUESTION: Well, I take it his, his mental capacity was considered both in determining whether he was competent to stand trial and in determining the deliberateness and intention of his actions?

MR. PALMER: Yes, Your Honor, and in between those two occasions at the guilt/innocence phase of trial in determining whether or not he was suffering from a mental defect such as to render him in -- insane under Texas law.

QUESTION: But then, Mr. Palmer, the -- the psychiatrists or whoever it was that testified -- they didn't decide the issue. They testified and the jury disagreed with them. They could disagree I suppose on this issue too.

MR. PALMER: I'm sorry, Your Honor. I don't --

QUESTION: You -- you suggested earlier that if we ruled against you on this issue, that would mean we'd turn the trials over to the psychiatrists.

MR. PALMER: Uh-hum.

QUESTION: It would mean that they would be allowed to testify, but the jury and the judge would still decide whether to believe their testimony.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

MR. PALMER: Well, but as the system is now in operation, Your Honor, the jury or judge decides based on the legal tests that this Court has propounded for competency, sanity and the deliberateness test under Texas law. What Penry seeks to do is put a -- yet another test, which is totally a clinical test, not a legal test, and, and have that the, the relevant consideration for sentencing purposes.

QUESTION: Let's say you, you confuse the issue for me a little bit by, by -- by conceding that, that -- that he has a mental age of nine, but then saying you have no idea what it means to have a mental age of nine.

MR. PALMER: Well, Your Honor, I concede --

QUESTION: Why should you concede it if -- if it doesn't have any meaning for you?

MR. PALMER: I concede it because there's no testimony to the contrary in the record.

QUESTION: What you're conceding really is that a witness on his behalf testified to this effect.

MR. PALMER: And no witness testified to the contrary for the state. That's correct, Your Honor.

Penry's second claim --

QUESTION: Well, do -- do you think that testimony was -- should have been stricken?

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

MR. PALMER: No, Your Honor.

QUESTION: Well, why was it relevant?

MR. PALMER: It was relevant to his sanity defense. I think it was relevant to the deliberateness issue. But the state psychiatrists testify that even though he was retarded --

QUESTION: Something is relevant even though we don't know what it means?

MR. PALMER: Well, I think -- again, Your Honor, this -- this was Penry's evidence not mine. I'm, I'm not arguing that it, it should be binding on, on this Court or that it should have been binding on the jury. I'm simply acvising the Court what's in the record.

QUESTION: But, Mr. Palmer, you would agree that it would have been error for the judge to exclude the evidence, don't you?

MR. PALMER: Certainly, Your Honor. I, I think -- the testimony about Penry having the mind of a six-year old or functioning as a nine-year old is one extremely isolated part of a great deal of psychiatric evidence, the, the brunt -- the -- of which went to the legal issues before the court. So, perhaps the court could have stricken the part about a six-year old and let the rest in, and that would have been permissible. I don't know, but I, I don't understand that to, to be an issue

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

here today.

QUESTION: Well, but even just under Lockett and even under the Texas procedure, which I think allows all mitigating evidence to be offered on behalf of the defendant, you would not disagree that this at least qualifies as mitigating evidence, would you?

MR. PALMER: Certainly, Your Honor.

QUESTION: Yes.

MR. PALMER: And --

QUESTION: And therefore it was admissible.

MR. PALMER: Yes. And -- and we certainly don't claim to the contrary.

Penry's second claim concerns the jury's refusal of his instructions at the punishment phase of trial. In Penry's opening brief in this Court, he disavowed any intent to challenge the constitutionality of the Texas statute or to have this Court overrule Jurek. After listening to Mr. Mason today, I -- I'm not sure that he's adhering to that position.

But as the question was framed in the cert petition and as is framed in his brief, it -- it deals with the refusal of these jury instructions at the penalty phase of trial, which he says prevented the jury from considering mitigating evidence and thereby undermined the fundamental fairness of the trial.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

QUESTION: Let me just ask you how, under the instructions that were given, a juror who thought that Penry deliberately killed the victim here but nonetheless thought that Penry, due to this mental retardation, was not sufficiently morally culpable of what he did to deserve the death penalty -- how under the instructions would the juror have fitted that belief into their vote?

MR. PALMER: Well, Your Honor, first of all, I -- well, I think the issue of his abusive childhood -- the evidence of that would go not just to the deliberateness issue but to the second and third issues also.

For instance, counsel argued -- defense counsel argued at the punishment phase the evidence was relevant to all three issues. And they focused naturally enough on the deliberateness issue. But they also referred to the fact that Penry had been placed in institutions as a child and had been withdrawn from those institutions after a brief period and returned to his abusive home environment, and thereby suggesting to the jury that if he were sentenced to life and placed in a controlled environment such as prison, that perhaps he would not be a danger to others. But I think even more than that second issue, the -- the evidence would have gone to the first issue of deliberateness.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

QUESTION: Well, what if the juror thought that this is a very dangerous person, that there's no likelihood in the future that his conduct will improve, and that what he did was entirely deliberate, but that taking into consideration the mental retardation of the person that he wasn't sufficiently culpable to deserve the death penalty? Could that have been properly the juror's vote under the Texas instructions?

MR. PALMER: No, it couldn't, Your Honor. But I don't think it was proper to consider moral culpability apart from the special issues. As Your Honor pointed out in your concurrence in California v. Brown, it is a belief long-held by this society that persons such as Penry with disadvantaged backgrounds are less morally blameworthy. The 12 members of this jury who sat on this case were every bit as much members of this society as everyone in this courtroom today, and as such, they required no instruction to tell them about a belief long-held by this society and necessarily by themselves.

In addition, as Your Honor suggested again in California v. Brown, moral culpability must take into account some nexus between the evidence and between the defendant's actions in committing the crime, and there was nothing offered in that regard in this case. Penry laid out in extensive detail how he had been treated as

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

a child and all the psychiatric evidence pertaining to his mental status. And certainly he argued at length how his mental status affected his actions whether or not he was suffering from mental defect, whether or not he acted deliberately. But he made no effort and, indeed, today in argument and in -- and in his brief in this Court has he ever suggested how the abusive childhood contributed to his acts in the rape/murder for which he is now under sentence of death.

Although Penry made a number of objections to the court's charge, those objections contained only one requested instruction, where he asked that the jury be told to consider all the evidence whether aggravating or mitigating in nature. Well, the charge which the court actually gave the jury was that it was to consider all the evidence submitted at both phases of trial. Penry's requested instruction differed only in that it added the phrase "whether aggravating or mitigating in nature." It added nothing to the charge the court gave.

Now, Justice Kennedy suggested that perhaps Penry's dilemma might have been solved by an additional instruction which said even though you find the answers to these special issues to be yes, would you, based on what you've heard, sentence him to life rather than death? But that was not an instruction which he

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

requested and was not even the substance of any of the other objections which he made.

He made -- there -- he made 13 objections which were overruled. Only six are at issue here today: the one I've just mentioned, three others dealing with the definitions of statutory terms, and two additional ones. His objection number 10, where he asked for a discretionary grant of mercy -- that was refused and properly so I would submit. There's no authority of this Court which supports it, and it is contrary to the Court's reasoning in California v. Brown.

The last remaining instruction Penry asked for was number 13, that the state be required to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Again, there is no decision of this Court which supports the requested instruction and, in fact, it is directly contrary to the Court's holding in Zant v. Stephens.

If Penry is complaining about the jury instructions, we would submit that they fail based on the authorities I've just discussed.

If Penry is attacking the constitutionality of the Texas special issues, which I did not understand until today that he was doing, we would submit that that argument should be rejected for two reasons, the first

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

being that the Texas special issues adequately channeled the jury's consideration to relevant sentencing considerations, and that the mitigating evidence he offered had no relevance outside those sentencing considerations.

I've heard it said a number of times here today in Mr. Mason's argument that they had relevance outside the issues, and just -- Judge Reavley said as much in his opinion in the court below. Yet, no one, Judge Reavley, Mr. Mason, nor the numerous amici, have suggested any relevance whatsoever other than they might allow a -- a discretionary grant of mercy.

QUESTION: Well, he, he did ask for an instruction based on a discretionary grant of mercy, did he not?

MR. PALMER: He did.

QUESTION: Objection 10.

MR. PALMER: He did. Well, he did not request the instruction. He objected to the charge for failure to give -- give such --

QUESTION: Well, under Texas law, is that the same?

MR. PALMER: I -- I believe substantially the same, yes, Your Honor.

In Lowenfield, the Court made it clear that all capital sentencing statutes don't have to work the same, that the -- the same end of reliability and

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

even-handedness in sentencing can be accomplished through more than one statutory vehicle. And in Texas, the narrowing of the class takes place initially at the guilt/innocence phase.

Under the Constitution and this Court's decisions, Texas is not required to narrow the class any further. And yet it goes further than that by submitting these special issues to further narrow the class and ensure that only those convicted of the most horrible crimes are given the death penalty.

What Penry is essentially doing is turning this further narrowing which inures to his benefit on its head and arguing that it prevents the consideration of mitigating evidence. Yet, none of the authorities upon which he relies support that proposition. Lockett, Eddings, Hitchcock, Skipper, all of those dealt with either court instructions or statutes which specifically provided that certain things were not to be considered. We, we do not have that in this case and, in fact, what we have is a jury instruction telling the jury to consider everything. And we have no ruling of the court excluding evidence in -- as in Skipper and no ruling of the court circumscribing the argument of defense counsel in this regard.

QUESTION: Yes, but isn't it true, Mr. Palmer, that

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

this evidence under the three special verdicts, particularly under the second one, could only be harmful to his case because I think it inevitably would tend to persuade a jury that there's a greater likelihood that he would commit more acts of violence in the future and be a continuing threat than -- and it couldn't help him under any of the three special questions --

MR. PALMER: Are you referring to the evidence of mental retardation, Your Honor, or the abusive childhood?

QUESTION: Well, the evidence that, -- yes, the -- both, both.

MR. PALMER: Well, it is often true in a variety of contexts in criminal trials that, that evidence may work to the benefit or the detriment of a defendant, and I think --

QUESTION: No, but the point -- let's -- let's leave it to the abusive childhood and all. I think that that tends to indicate a greater probability of future wrongdoing, doesn't it, which -- which could only hurt him under these -- under the limited questions the jury was permitted to address?

Under -- under Eddings, this Court has held that that must be offered and considered as mitigating evidence. But I don't see how it could be considered as mitigating evidence under the Texas scheme.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

MR. PALMER: Well, Your Honor, I -- with all due respect, I disagree with your interpretation of Eddings. There is a statement in Eddings to the effect that -- that nothing in that decision is -- is to impinge on the jury's freedom to weigh the evidence as they see fit.

QUESTION: Right.

MR. PALMER: And I think the evidence we're -- we're dealing with here is no different from --

QUESTION: They must be free to -- they don't have to, you're right, but they must be free if they think it's appropriate to do so to consider it mitigating evidence.

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

QUESTION: But they can't do it in Texas.

MR. PALMER: Well, I believe they can. They -- They can look at this and say, my God, this boy was treated so badly. It has got to have had an effect on him. He couldn't possibly have been deliberate in his conduct. Or they've got to say this boy has been treated so badly that he has turned out the way he has and he can't function in society. But maybe if we lock him up for life, he won't be a future danger.

I, -- I think what's important to realize is that Perry's evidence is really no different from other kinds

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

of evidence that will cut both ways. For instance, a capital murder defendant may have been under the influence of drugs at the time of the offense, and certainly he can offer that in mitigation. By the same token, the jury can take that evidence to mean that this person is a drug abuser and given a chance, he'll, he'll abuse drugs again and commit these sorts of acts.

So, really what we have here is, is no, no different than what occurs in -- in criminal trials throughout this country on a daily basis where defendants face difficult choices about whether or not they should present certain evidence. For instance, defendants may wish to take the stand and deny commission of the offense, and yet they know if they do so, it exposes them to impeachment through their prior convictions and -- and through other sorts of evidence.

In Penry's case he, he made the election to present the evidence. And, and we would submit to the Court that the Texas special issues do provice for its consideration.

QUESTION: What if he wanted -- again, this wouldn't be this case. But what if a defendant wanted to get on the stand and say I know I couldn't avoid doing this same sort of thing over and over again? I have this compulsion to do it and all, but -- but I am

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

remorseful and I am trying to -- you know, he demonstrates in some way that he has actual -- the motive to try and do well, but he can't do it. But that evidence would still be harmful to him under the Texas system because it would fit right in to the second --

MR. PALMER: Well, Your Honor, when a defendant takes the stand and says I'm going to be a future danger, he essentially answers the question himself. That's -- that's tantamount to a confession to the crime.

QUESTION: Correct. That's exactly my point.

MR. PALMER: And -- well, but I think what -- what's important here is to make a distinction between remorse, culpable testimony that even though I'm remorseful, I'm going to go out and kill again, and remorse to the effect that I am going to make every effort to better myself and no do this sort of thing again.

If the Court has no further questions, we would ask the judgment of the court below be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Palmer.

The case is submitted.

(Whereupon, at 2:42 o'clock p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 87-6177 - JOHNNY PAUL PENRY, Petitioner V. JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'89 JAN 19 P3:48