OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

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

UNITED STATES

CAPTION: GARY GRAHAM, Petitioner v.

JAMES A. COLLINS, DIRECTOR,

TEXAS DEPARTMENT OF CRIMINAL

JUSTICE, INSTITUTIONAL DIVISION

CASE NO: 91-7580

PLACE: Washington, D.C.

DATE: October 14, 1992

PAGES: 1-44

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

RECEIVED
SUPREME COURT, U.S
MARSHAL'S OFFICE

'92 OCT 21 A9:56

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 GARY GRAHAM, :

4 Petitioner :

5 v. : No. 91-7580

6 JAMES A. COLLINS, DIRECTOR, :

7 TEXAS DEPARTMENT OF CRIMINAL :

8 JUSTICE, INSTITUTIONAL DIVISION :

9 -X

10 Washington, D.C.

11 Wednesday, October 14, 1992

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 1:00 p.m.

15 APPEARANCES:

16 MICHAEL E. TIGAR, ESQ., Austin, Texas; on behalf of the

17 Petitioner.

18 CHARLES A. PALMER, ESQ., Assistant Attorney General of

19 Texas, Austin, Texas; on behalf of the Respondent.

20

21

22

23

24

25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 MICHAEL E. TIGAR, ESQ.

4 On behalf of the Petitioner 3

5 CHARLES A. PALMER, ESQ.

6 On behalf of the Respondent 18

7 REBUTTAL ARGUMENT OF

8 MICHAEL E. TIGAR, ESQ.

9 On behalf of the Petitioner 39

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in number 91-7580, Gary Graham v. James A. Collins.
5 Mr. Tigar.

6 ORAL ARGUMENT OF MICHAEL E. TIGAR
7 ON BEHALF OF THE PETITIONER

8 MR. TIGAR: Mr. Chief Justice of the United
9 States, and may it please the Court:
10 Gary Graham was 17 years old and the product of
11 a profoundly troubled family background when he struggled
12 with, shot, and killed Bobby Grant Lambert in the
13 supermarket parking lot.
14 His case, and the issues presented today, must
15 be resolved, we suggest, by reference to precedent,
16 experience, and tradition.
17 Precedent, in the guise of Locket and Eddings,
18 yes, and Stanford v. Kentucky, in which the Court has
19 repeated over and over again the powerful mitigating force
20 of youth, and yes, precedent in the sense of Penry v.
21 Lynaugh, because this case, we submit, is stronger for us
22 than Penry's was for him because of the role of youth in
23 this Court's Eighth Amendment jurisprudence and because of
24 the presence here, as in Eddings, of the potentiating
25 force of the family background coupled with the evidence

1 of youth.

2 And it is weaker for the respondent than their

3 position was in Penry, not simply because Penry has in the

4 interim been decided, not simply because the prosecutor

5 here, as in Penry, sought to make the second Texas special

6 issue into a double-edged sword by arguing that the

7 condition in fact made the defendant more dangerous, but

8 also because in this case the trial judge told the jury

9 over and over again in voir dire, or voir dire, whatever

10 one prefers, that they were to consider the special issue

11 language in ways that cabined, confined, and constricted

12 those special issues, cabined and confined them so there

13 was no chance that the promise of Jurek could be redeemed.

14 Jurek was premised on a promise. The Court said

15 that it appeared the State -- that the jury could consider

16 certain things and the Court said that right after a

17 paragraph in which it enumerated age as among the things

18 it thought of constitutional significance. That's the

19 promise that has not been redeemed.

20 That is why Judge Higginbotham in the court

21 below said that this case is governed by precedent, so I

22 turn to the issues that the jury had before it, those

23 special issues 1 and 2, because those are the significant

24 ones.

25 Special issue number 1 has to do with

1 deliberateness, and yet the trial judge told the jury that
2 that meant nothing more than intentionality. That is to
3 say, the same element of the offense of which Gary Graham
4 then stood convicted, because that's the element under
5 6.02(a) of the Texas Penal Code that is a part of first
6 degree murder.
7 Special issue 2, future dangerousness -- here,
8 as in Penry, both double-edged and under-inclusive. It's
9 double-edged because Gary Graham is 17. He has a longer
10 time before he got old enough to outgrow the kinds of
11 behavior the trial judge said satisfied future
12 dangerousness: doing wheelies with your Harley on a lawn,
13 pouring paint on a car -- those sorts of relatively
14 trivial offenses.
15 Double-edged because there is in this court's
16 cases a deep and, we say, rationally-based social
17 consensus that youth is mitigating in and of itself. That
18 is to say, that it's mitigating beyond what it may have in
19 terms of predictive ability.
20 The prosecutor emphasized the double-edged point
21 by saying as the seed is planted so grows the sprout, as
22 the twig is bent, so grows the tree.
23 QUESTION: If we accept that, do we have to
24 overrule Jurek, because Jurek was premised on the fact
25 that the moral significance could theoretically at least

1 be considered within the framework of the questions, and
2 I'm not sure that the youth consideration could meet the
3 test, as you describe it, unless we overrule Jurek?
4 MR. TIGAR: No, Justice Souter, we do not ask
5 you to overrule Jurek, any more than the State asks you to
6 overrule Penry. No.
7 Penry said there would have to be an additional
8 instruction beyond the special issue, and all Jurek says
9 is that the jury may be asked to consider whatever
10 evidence of mitigating circumstances.
11 Jurek didn't say that it had to be within the
12 special issues, and the problem, Justice Souter, is
13 created by the Texas Court of Criminal Appeals, which in
14 Black v. State says, we will not retreat a millimeter back
15 from the language of the special issues. We won't
16 authorize giving any extra instructions. It's futile to
17 ask for them.
18 So no, we don't think that Jurek should be
19 overruled, and in fact the Court's opinion in Franklin
20 stands as a testament that under certain circumstances,
21 perhaps many, Jurek and what this Court said in Jurek,
22 what it said in later cases, can live quite happily
23 together without questioning Jurek.
24 QUESTION: Well, it seems, Mr. Tigar, that in
25 almost any case there's going to be some evidence of

1 troubled background, positive character traits, so I'm not
2 sure where the limits of your rule are. I have the same
3 experience as Mr. Justice Souter does. It seems to me
4 that in order to rule for you we have to overrule, if not
5 Jurek, certainly Franklin --
6 MR. TIGAR: Justice Kennedy --
7 QUESTION: And probably both.
8 MR. TIGAR: At the margin, there are surely
9 cases in which these issues are raised -- for example, in
10 Boyd v. California or Franklin itself. This is a case of
11 a 17-year-old whose mother was in and out of mental
12 hospitals 20 or 30 times.
13 So I look to Eddings, which is the closest case,
14 and see if maybe there's an opinion for the majority of
15 the Court that answers your question, and I think it does.
16 The Court there identified two things.
17 First, factors. The Eighth Amendment mandates
18 that certain factors shall be considered as mitigating,
19 and youth is surely among them if we take Stanford. A
20 troubled family background surely is among them. Then the
21 question is, if the factor has been identified, what
22 evidence, and the Eighth Amendment also mandates that the
23 defendant be able to put on evidence.
24 Now, surely, once the State has done that job as
25 it has done in the three statutes that the State in this

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

1 case clings to as good ones -- Saffle, Blystone, and
2 Boyde -- then we say that there can be a question, the
3 threshold question, as to whether the evidence proffered
4 entitles the defendant to an instruction that as whether
5 the evidence goes to or sufficiently relates to one of the
6 constitutionally identified mitigating factors. That's a
7 common question in all kinds of criminal cases in those
8 not involving the Eighth Amendment.
9 The Court started its opinion in Jacobson, for
10 example, by noting that if the evidence has been
11 different, Jacobson, quote, would not even have been
12 entitled to an instruction. The Court's been wrestling
13 with that threshold issue ever since the 19th Century, and
14 we suggest that those standards could be applied here.
15 But the third way, and this is -- in which the
16 evidence is under-inclusive is precisely because of
17 Eddings, that very powerful analysis, particularly in
18 footnote 11, about the consensus that adolescents tend to
19 be dangerous, particularly in the teenage years, that
20 there's a sense that it maybe society's fault. Not that
21 that's dispositive, or that you or I or any of us would
22 say that it is in a particular case, but that the
23 sentencer, in the words of Eddings, Locket requires the
24 sentencer to listen.
25 That comes back to the Jurek point. Penry says

1 you need an additional instruction. That's consistent
2 with Jurek, and why? Because of what the Court said in
3 Griffin, which is not a capital punishment case. In
4 Griffin the Court said juror intuition takes care of a lot
5 of problems about what the facts are, but we certainly do
6 not expect juror intuition to be able to deal with what
7 the law is. That won't -- their intuition can't save them
8 from the failure of the Court to instruct correctly on the
9 law.

10 And another analogy that we draw that we think
11 is powerful is last term's decision in Morgan v. Illinois.
12 If seating one juror who says, I ain't following those
13 mitigating instructions, is an error, how much more of an
14 error is it if the judge says in effect to the jurors, you
15 can't consider the mitigating evidence, which is what was
16 said here?

17 Because when the judge had finished with his
18 constricted view of the law, the last thing he said to
19 this jury before they deliberated the fate of this 17-
20 year-old young man was, you take your law from me. Your
21 other judge is the facts, but you take your law from me.

22 Beyond, then, the issue of precedent, it seems
23 to us that the Fifth Circuit has missed the Eddings point.
24 Interestingly, the respondent doesn't embrace the Fifth
25 Circuit's opinion we deal with in our brief. It seems to

1 us that the Fifth Circuit has mistaken a reweighing of
2 evidence for this constitutional duty under Eddings to
3 look at the factors that are mitigating and make sure the
4 jury hears about the factors.
5 The second element, if the Court please, is
6 experience, and by experience I mean the power that this
7 Court has traditionally recognized attaches to evidence of
8 youth, and that runs through many of the cases. Gary
9 Graham was 17 when he killed Bobby Grant Lambert. Nathan
10 Leopold was 18 when he killed his victim.
11 And Gary Graham doesn't say he has a
12 constitutional right to Leopold's result any more than he
13 has the right to an advocate as eloquent as Leopold's
14 advocate, but he does have the right to have his sentencer
15 free to consider the power of this mitigating evidence
16 that this Court has repeatedly identified as powerful in
17 the way that this Court's decisions teach.
18 The whole life of childhood, said Leopold's
19 counsel, is a dream and an illusion, and whether they take
20 one shape or another depends not upon the dreamy boy but
21 upon what surrounds him, evidence that evokes what Justice
22 Powell said for the Court in footnote 11 in Eddings.
23 I suggest they want you to forget as justices
24 that which you know as lawyers who have tried and presided
25 over cases, that which you know as men and women, and that

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

1 that Judge Higginbotham in his dissent identified as the
2 power of this evidence based on his experience as an able
3 trial lawyer and a trial judge before he went on the court
4 of appeals.
5 And of course, beyond experience there is
6 tradition. That's one reason I say that the case is
7 stronger for us than Penry's. The mitigating power of
8 youth is recognized in our legal tradition for at least
9 2,200 years, and we can trace it back that far.
10 In Stanford v. Kentucky this Court called out
11 the roll call of the States. It began by saying that one
12 sure guide to the Eighth Amendment duty of the Court is to
13 look at statutes passed by society's elected
14 representatives, and then the Court called out in this
15 roll call 29 States that expressly make youth a mitigating
16 factor -- 29.
17 And then, having done that, it's clear from
18 Stanford and from reading the statutes of the other States
19 that if they don't mention youth expressly that they all
20 have one of these catch-all clauses, catch-all mitigating
21 clauses that the Court has sustained in such cases as
22 Boyde and Blystone and Saffle that permit the lawyers to
23 argue it without being headed off at the pass by
24 prosecutorial or judicial argument.
25 Now, in response to these contentions that we

1 make, the State does a number of things. It has some
2 statistics. We didn't bother to answer those in our reply
3 brief because they formed no part of the record below and
4 we think that the Court ought not to consider them, that
5 had they -- not having been subjected to adversary
6 scrutiny, they don't belong in the case.
7 But it's interesting to note that if you move
8 the age from 23 to 24, that the alleged disparity shrinks
9 to .5 percent instead of whatever they say it is.
10 It's interesting to note that there are 82, not
11 81 youths that got the life sentence, so their arithmetic
12 is off, and it's also interesting to note that if you run
13 the elementary statistical test of the null hypothesis,
14 that the results cannot be attributed to anything more
15 significant than chance.
16 But as I say, I don't think that the Court needs
17 to reach that.
18 The question might also arise in the Court's
19 decision, well, what should we do about marginal cases?
20 What does age mean, because that's in the court of
21 appeals.
22 Our contention is this: that age means that at
23 least the teenage years as identified in Eddings, that the
24 Fifth Circuit says 22, the State is willing to say 23, and
25 that time enough to resolve that question, because the

1 States are answering it.

2 This is a case of a 17-year-old, and as to 17-

3 year-olds, as to the mitigating force of youth for them,

4 after Penry, Oregon and Texas stood alone. Oregon quickly

5 changed its practice and then its statute, and as we point

6 out in our brief, Texas then amended its statute with the

7 aid of lawyers from the Attorney General's Office.

8 Indeed, the reason for that amendment is not

9 hard to find when one reads the stunning concession at

10 page 28 of the Attorney General's brief. That is to say,

11 the statutory terms at issue relate to matters that might

12 support affirmative answers to the special issues, i.e.,

13 aggravating factors that have no logical connection to the

14 inquiry as to whether a rational jury could give effect to

15 Graham's mitigating evidence.

16 In short, the State seems to be saying that the

17 factors are probably on their face more adapted to the

18 aggravators, and that additional instructions as required

19 in Penry might be the answer to redeeming the Jurek

20 promise, that under those circumstances, particularly when

21 you have the instructions in an as-applied way constricted

22 and confined by the trial judge's instructions and by the

23 prosecutor's argument, there's no chance that the

24 mitigating force of this evidence could have been

25 appreciated by the jury.

1 If we are to go back, then, to that most
2 objective and reliable indicium -- that is to say, what
3 the States have done -- it is clear that this is a little
4 like Coker v. Georgia, where, as the Court noted in
5 Stanford, Georgia stood alone.
6 Here, Texas stands alone, but within its own
7 house it is divided against itself, for by its legislative
8 enactment it has recognized that the mitigating evidence
9 that could not be considered under the former statute must
10 now be given a chance to be heard by the sentencer.
11 QUESTION: You raise two -- excuse me --
12 questions, I believe, and one has to do with youth and the
13 other with evidence of positive character traits.
14 MR. TIGAR: That is correct, Justice O'Connor.
15 QUESTION: Now, I suppose there isn't a
16 defendant in the world that hasn't patted a dog or kissed
17 a sibling or been kind to a grandmother at some time in
18 their life.
19 MR. TIGAR: Yes, Justice O'Connor, that's true.
20 We were asking the Court to illuminate what it means by
21 the word character in the character on record and then
22 circumstances of the offense language.
23 Character evidence is -- of course, is not
24 receivable unless it passes some minimal threshold of
25 relevance. That comes back, we believe, to the factors

1 evidence.

2 Here, the positive character traits must be

3 considered -- again, Eddings I think is our best

4 case -- because these positive character traits existed

5 despite the troubled family background.

6 That is, some -- I don't think that Hitchcock

7 comes out as it does just because Mr. Hitchcock is a kind

8 uncle. I think Mr. Hitchcock's kind uncleness is

9 important because, after a lifetime of adversity, he still

10 manages to do that, and here Mr. Graham loves the Lord,

11 cares for the children that he had, and shows these traits

12 despite what's happened to him.

13 So we say that whatever the threshold is, we

14 meet it, but also looking to such cases as Boyde, in which

15 the Court has quite frankly assessed the relevance of the

16 evidence to a factor already identified and said that

17 there might be some threshold that somebody would have to

18 meet, that that standard, or that analysis would permit

19 the Court to draw a line.

20 Our view is that wherever the line is drawn, we

21 have to disagree with the Fifth Circuit, because on this

22 record the combination of circumstances is even more

23 powerful than the Eddings combination as to which the

24 Court said you had to look at it as a whole and that the

25 sentencer there was not authorized to just focus on you.

1 QUESTION: Let me ask you one question on
2 something you haven't touched on in the course of the
3 argument. You mention in your brief that there is perhaps
4 a theoretical flaw, or at least a theoretical inadequacy
5 in placing great reliance on the second Texas question,
6 the prediction of future dangerousness.
7 Because that is basically -- by its very nature
8 it is a predictive inquiry, whereas the judgment which
9 must be expressed consistent with Eddings and Locket is a
10 moral judgment about the individual and the act, if we
11 accept the view that the second question, the predictive
12 question is in fact not a moral question, let's say in a
13 utilitarian sense or a moral inquiry in a utilitarian
14 sense, does it follow from your argument, if we accept it,
15 that there will for practical purposes always have to be a
16 Penry kind of catch-all question?
17 MR. TIGAR: No, it does not, Justice Souter, and
18 I think Franklin is the answer to that.
19 Franklin did not contend that his evidence,
20 however characterized, did more than help the jury answer
21 no to the second question, so that there is a case in
22 which the Court said, it's adequate.
23 The concession the State makes at page 28 of its
24 brief, however, troubles me, as your question troubles me.
25 I suggest to the Court that the problem is this, that

1 maybe it's true, and the Court could conclude that the
2 second question simply isn't adequate to that purpose.
3 That is, in this calculus of which you speak, it really is
4 an aggravator only, as the State seems to suggest.
5 Then all that would mean, however, is that in
6 order to redeem the promise of Jurek, the State Court of
7 Criminal Appeals would have to moderate its language a
8 little bit, and instead of saying things like, we will
9 never retreat, it would have to pay attention to what this
10 Court made the quid pro quo for upholding the statute on
11 its face in Jurek.
12 That is to say, to accommodate the statute to
13 circumstances that are presented to it, the State had this
14 opportunity and has repeatedly refused to avail itself of
15 it. It was one reason why the claim couldn't conceivably
16 be procedurally defaulted, because it was so cleared of
17 futility, but I hope I've answered your question.
18 QUESTION: Good enough for now.
19 MR. TIGAR: Thank you very much.
20 QUESTION: We pose the questions, we don't
21 answer them.
22 MR. TIGAR: Well, I understand that, Mr. Chief
23 Justice. I'm sorry, I was trying to get my paper graded,
24 and that was very improper of me to do that.
25 I'd like to reserve the balance of my time, if I

1 may.

2 QUESTION: Very well, Mr. Tigar.

3 Mr. Palmer, we'll hear from you.

4 ORAL ARGUMENT OF CHARLES A. PALMER

5 ON BEHALF OF THE RESPONDENT

6 MR. PALMER: Mr. Chief Justice and may it please

7 the Court:

8 Graham's claim that his jury could not give

9 mitigating effect to his constitutional evidence is both

10 factually and legally insufficient to establish an Eighth

11 Amendment violation.

12 It fails as a factual matter because many of the

13 assertions on which his legal theory is based were not

14 supported by the record, and it fails as a matter of law

15 under Jurek.

16 QUESTION: Could you speak up a little bit,

17 Mr. Palmer?

18 MR. PALMER: Yes, sure.

19 QUESTION: I think some of us may be having a

20 hard time hearing.

21 MR. PALMER: I'm sorry.

22 One would think that if Graham's mitigating

23 evidence were as compelling as he suggests, that it would

24 be included in the join appendix. It is not. The joint

25 appendix consists of 612 pages, 434 of which are devoted

1 to voir dire, a matter that to my mind at least does not
2 bear on the question presented.
3 Graham's punishment phase evidence, by contrast,
4 is quite scant. It may be found in the record at volume
5 20, pages 474 to 86. It occupies 13 pages of the record,
6 and would have occupied 7 pages of the joint appendix, yet
7 it is not included.
8 Examination of the record reveals, I believe,
9 the reason for this omission. For instance, Graham tells
10 us that he worked a job to support his two children. The
11 basis for this assertion is six lines of hearsay
12 testimony. There is absolutely no competent evidence in
13 the record that Graham was gainfully employed or that he
14 supported his family.
15 In the same theme, Graham's assertion that his
16 17 years had been characterized by religious devotion,
17 again, the only basis for this assertion is four lines of
18 his grandmother's testimony that he attended church with
19 her between the ages of 3 and 11. She admitted that she
20 had no knowledge of his activities after the age of 11,
21 and there is absolutely no other evidence of his
22 supposedly religious nature.
23 As to Graham's troubled childhood, the only
24 basis for this assertion is 15 lines of testimony from the
25 grandmother. There is no evidence that Graham was

1 mistreated in any way as a child, and there is absolutely
2 no showing that any event of his childhood contributed to
3 make him the extremely violent person he had become at the
4 age of 17.
5 In addition, Graham misconstrues the record of
6 the voir dire examination at his trial. While the judge
7 and counsel for both the State and Graham offered varying
8 definitions of the word, deliberately, the trial court did
9 not in fact define that word for the venir members so as
10 to reduce the State's burden of proof.
11 The record shows that the trial court repeatedly
12 advised the venir members that the term would not be
13 defined at trial and they were to use their own common
14 sense interpretation of what the word deliberately means
15 in answering the first special issue. To support that
16 statement, I would refer the Court to the joint appendix
17 at pages 90, 169, 205, 291, 353, and 419.
18 Finally, Graham's assertion that the trial
19 court's definition of the term, criminal acts of violence,
20 somehow reduced the State's burden of proof on the second
21 special issue is likewise reputed by the record. The
22 examples offered by the trial court of relatively minor
23 offenses were included in a broad definition of that term,
24 which also referred to robbery, rape, and murder. Again,
25 as with the term, deliberately, the trial court told the

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

1 venir members that criminal acts of violence would not be
2 defined at their trial, and as with the term,
3 deliberately, the jurors would use their own common sense
4 interpretation.
5 Not only is Graham's claim factually lacking, it
6 also is untenable as a matter of law under Jurek. In
7 Jurek, this Court upheld the constitutionality of the
8 statute at issue here precisely because it allows the jury
9 to consider whatever evidence of mitigating circumstances
10 the defense can bring before it.
11 The Jurek court did not believe that the special
12 issues were so narrow as to foreclose consideration of
13 mitigating evidence, but instead found that they got in
14 focus the jury's consideration of the circumstances of the
15 individual offender and his offense.
16 Jurek controls Graham's claim. There, as here,
17 the defendant was a young person at the time of his
18 offense. Both the Texas Court of Criminal Appeals and the
19 Fifth Circuit have held that youth includes defendants up
20 to the age of 23 at the time of their offense.
21 Graham acknowledges, as he must under Jurek,
22 that his jury could give mitigating effect to his youth in
23 answering the second special issue, but he claims that it
24 had relevance outside the scope of the Texas statutory
25 scheme.

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

1 As the court of appeals observed, though, to say
2 that youth cannot be considered under the special issues
3 is necessarily to say that any evidence to which a
4 defendant ascribes mitigating value cannot be considered.
5 QUESTION: Are you going to get to -- did
6 someone else speak?
7 Are you going to get to his specific argument
8 that in this case he was sufficiently young so that when,
9 for purposes of the second question, future dangerousness,
10 the jurors considered that youth, their likely response
11 would be that he is so young that even after conviction
12 he's still going to remain young, and it's going to be
13 quite some time before he outgrows the impulsiveness,
14 violence, whatever the case may be, and therefore,
15 considering youth, it really must be considered as an
16 aggravating factor rather than a mitigating one, with the
17 result, unless there is a special Penry kind of circuit-
18 breaker here, that there would be no way to consider the
19 youth as a mitigating factor?
20 What is your response to that argument?
21 MR. PALMER: My response is, Your Honor, that
22 examination of the trial record reveals that youth was
23 offered for one purpose only, and that was to show that
24 Graham would not be a future danger.
25 Although Graham introduced no evidence of his

1 age at the time of the offense, he was tried 5 months
2 after the offense, and the jury was able to observe his
3 apparent age at the time of trial.
4 In addition, defense counsel stated without
5 objection that Graham had been 17 at the time of the
6 offense. Defense counsel argued that because of his youth
7 Graham had, and I'm essentially paraphrasing his closing
8 argument, had redeeming value, that he could be
9 rehabilitated, that he would change, would slow down, if
10 his life were spared.
11 The record is devoid of any suggestion that
12 Graham wished for his youth to be considered for any other
13 purpose at trial. The trial court was not requested to
14 give the supplemental instruction to which Graham claims
15 he is now entitled.
16 Perhaps most damaging to Graham, rather than
17 whatever aggravating quality might be attached to his
18 youth is the fact that the State proved that he was a
19 demonstrably violent person, as evidenced by the number of
20 extraneous offenses they introduced at the punishment
21 phase of trial.
22 The State, as recited in our brief, proved up a
23 number of robberies and rapes committed by Graham over a
24 1-week period. In addition, they offered the testimony of
25 a juvenile probation officer that Graham's reputation for

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

1 being a peaceful and law-abiding citizen is bad. Her
2 evidence -- her testimony obviously supports the inference
3 that prior to this 1 week in May of 1981 he had not been a
4 model citizen.
5 If, however, Your Honor, we accept the
6 definition of youth as given by the Court of Criminal
7 Appeals in the Fifth Circuit, we have to consider it as
8 going all the way up to 23, in which case it falls apart.
9 A 23-year-old defendant cannot make the same argument as
10 Graham can. Indeed, a 17-year-old defendant who is --
11 obtains a reversal of his conviction, is retried at the
12 age of 24, cannot make that argument.
13 Although Graham acknowledges --
14 QUESTION: Counsel, how many cases are there
15 with a death sentence pending now in Texas --
16 MR. PALMER: Under this statute, Your Honor?
17 QUESTION: That fall under this old statute
18 where the argument is made that youth was a factor?
19 MR. PALMER: Your Honor, I do not -- there are
20 360 pending cases. I do not know at how many of those
21 trials that argument was made.
22 QUESTION: 360 under the old statute?
23 MR. PALMER: 360 inmates on death row in Texas
24 who were convicted under the old statute.
25 Although Graham concedes, as he must, that Jurek

1 remains --

2 QUESTION: Did the Texas courts under the old

3 statute, other than perhaps in the Penry case, grant

4 supplemental instructions in any cases?

5 MR. PALMER: Your Honor, I am aware that that

6 has been done. I don't think it's been done --

7 QUESTION: Mr. Tigar represented to us that the

8 Court of Criminal Appeals said we will not retreat from

9 this. I wasn't sure if that was pre-Penry or post-Penry.

10 MR. PALMER: Well, Your Honor -- no, Your Honor.

11 What I'm saying is not that the Court of Criminal Appeals

12 required it, but I know in at least some cases, and I

13 don't want to misspeak, I know it's a very small number,

14 the trial court gave those instructions when requested

15 even though there was no State appellate authority for

16 doing so.

17 QUESTION: What is the date of the new statute?

18 MR. PALMER: It became effective September 1st

19 of 1991.

20

21 QUESTION: '91.

22 MR. PALMER: Although Graham concedes, as he

23 must, that Jurek remains good law --

24 QUESTION: May I ask on the timing --

25 MR. PALMER: Yes, Your Honor.

1 QUESTION: Your opponent cited Black v. State,
2 which I haven't read. What is the significance of that
3 case in this time sequence? It's a 1991 case, I think.
4 MR. PALMER: Your Honor, I'm not sure I know --
5 if it's the case I think it is, it had to do with excusing
6 a defendant's failure to raise the issue at trial. In
7 other words, excusing a procedural default, but I will
8 defer to what Mr. Tigar tells you in that regard.
9 As I was saying, Graham concedes, as he must,
10 that Jurek remains good law, yet he asks this Court to
11 interpret Penry in a manner that can't be squared with
12 Jurek. As the court of appeals observed, Graham's
13 interpretation of Penry is so broad that it requires that
14 Jurek be overruled.
15 Viewed in that light, his claim has failed
16 because it is a new rule that would be barred by Teague v.
17 Lane, or in the alternative, if Penry is to be interpreted
18 as Graham urges -- that is, to abrogate Jurek -- then
19 Penry was wrongly decided and should be overruled.
20 The Court need not go that far, however. They
21 can decide this case simply by doing as the Fifth Circuit
22 did, attempting to reconcile the two lines of capital
23 sentencing precedent and by clarifying the holding of
24 Penry.
25 As the Court has noted many times in explaining

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

1 the operations of the Texas statute and in reconfirming
2 the validity of Jurek, Texas narrows the class of death
3 eligibles at the guilt phase to the statutory elements of
4 capital murder.
5 QUESTION: But I take it your position is that
6 youth is not a mitigating factor in the sense that it
7 reduces the culpability of the offender for having
8 committed the offense.
9 MR. PALMER: No, Your Honor -- or, yes, Your
10 Honor, that is what I'm saying.
11 QUESTION: Yes, and that is -- if culpability
12 for the crime that's been committed were a mitigating
13 factor the second question the jury has to answer does not
14 reflect that. It goes only to future dangerousness.
15 MR. PALMER: Yes, Your Honor, but the point I'm
16 making is that his present culpability, his culpability
17 for the crime itself, is taken into account by the jury at
18 two different stages of the trial: 1) in finding him
19 guilty of the capital murder itself, because in doing so
20 it has found him to be eligible for the death penalty, and
21 then the second time, through the first special issue of
22 whether or not he committed the crime deliberately.
23 QUESTION: Well, deliberately just means
24 intentionally, or --
25 MR. PALMER: No, Your Honor. The Texas Court of

1 Criminal Appeals has said that deliberately is not the
2 linguistic equivalent of intentionally. Deliberately is a
3 state of mind that embraces more than a will to engage in
4 the conduct. It is a mental process that activates the
5 intentional act.
6 QUESTION: So to the extent that it is claimed
7 that a youth as compared with an adult is really not in
8 full control of himself, that may be considered under
9 issue 1.
10 MR. PALMER: Yes, Your Honor, and it's also
11 something that necessarily can be considered under
12 issue 2, because the jury knows and is told, as it was by
13 Graham's counsel at his trial, that he will not remain a
14 youth forever. He will change. He will slow down.
15 QUESTION: I understand that. I understand
16 that, but that has to do with the future.
17 MR. PALMER: Yes, Your Honor, that does.
18 QUESTION: How does youth enter into the
19 determination of guilt initially, just in this same way to
20 find that the requisite intent existed? That's
21 duplicated --
22 MR. PALMER: Well, Your Honor, I'm not sure --
23 QUESTION: I thought you'd indicated that youth
24 was taken into account in deciding whether he's guilty to
25 begin with -- guilty of the murder.

1 MR. PALMER: If that was how Your Honor
2 understood me, I apologize. What I was saying was that
3 his present culpability is determined at the guilt stage
4 and under the statute, of course, youth is not a legal
5 excuse for committing a capital murder, but it is
6 something that can be and has been argued on the first
7 special issue. That is, the deliberateness.
8 QUESTION: So you're back just to the special
9 issues. You indicated that Penry should or could be
10 clarified. Do you have a suggestion or formulation to
11 clarify Penry?
12 MR. PALMER: Your Honor, we would urge that what
13 the court of appeals did in this case is a noble attempt
14 to reconcile the Court's two lines of cases. I really can
15 add nothing beyond that.
16 QUESTION: Well, it -- do you think the court of
17 appeals dealt with youth in terms of culpability at all?
18 I thought it just said as long as youth could be
19 considered a factor in future dangerousness, which it can,
20 that was as far as --
21 MR. PALMER: No, Your Honor. I believe what the
22 court of appeals said is that the special issues allow --
23 the special issues, particularly the future dangerousness
24 issue, allow the jury to consider youth as a mitigating
25 factor, and it is our position that the first special

1 issue does so also.

2 QUESTION: Well, did the court of appeals

3 expressly deal with the notion of youth as a mitigating

4 factor in the sense of less culpability for committing the

5 crime that he's committed? Did the court of appeals talk

6 about that, other than by saying you don't need to -- you

7 don't need a special instruction on that?

8 MR. PALMER: I'm not sure they'd rest it in just

9 the terms Your Honor has posed. What they did say, and

10 what I would argue strenuously to the Court, is that there

11 is no showing that youth is mitigating other than the

12 purpose for which it was offered at trial, and that was in

13 regard to the future dangerousness issue, and in that

14 regard we'd rely on Boyde, where the Court observed that

15 the mitigating value of evidence can be determined from

16 the purpose for which it was offered.

17 QUESTION: But the opinions of this Court,

18 perhaps some that I haven't joined, really refer to

19 culpability, don't they?

20 MR. PALMER: They do, Your Honor, and again, it

21 is our position that the first issue raises that.

22 QUESTION: And there is plenty of support in the

23 cases that youth is a factor that is fairly considered in

24 terms of culpability.

25 MR. PALMER: Yes, Your Honor. I don't wish to

1 beat this too much, but again, the first issue focuses on
2 present culpability, the second on future dangerousness.
3 QUESTION: Yes, all right.
4 QUESTION: Mr. Palmer, I'm not sure I understand
5 how youth is considered under the first question. As a
6 premise to asking you about that, may I just ask you to go
7 back a moment to something that I think I recall your
8 saying when you were commenting on the manner in which the
9 Texas courts have defined deliberateness, and you said
10 they didn't simply equate it with intention.
11 If I remember what you said correctly, you said
12 that they had defined deliberateness or deliberation as
13 the process which leads to the doing of an intentional
14 act, is that correct?
15 MR. PALMER: That is correct, Your Honor.
16 QUESTION: All right. Well, does it follow from
17 that that whenever an intentional act has been committed
18 that it must therefore have been a deliberate act, or the
19 result of deliberation?
20 MR. PALMER: No, Your Honor. The way --
21 QUESTION: Then I don't think I understand you.
22 MR. PALMER: Well, Your Honor, quite frankly,
23 I'm not sure I understand all the nuances of mens re
24 myself, but as I understand it, what the Court of Criminal
25 Appeals has held is, deliberateness falls somewhere

1 between premeditation and intent, and it involves some
2 mental process more than simply the intent to do the act
3 but less than deliberated premeditation.
4 QUESTION: So it isn't merely an element leading
5 to an intentional act, it is some -- in some sense it is a
6 further mental element in addition to intentionality --
7 MR. PALMER: Exactly, Your Honor.
8 QUESTION: And it has been so defined by the
9 Texas courts.
10 MR. PALMER: Yes, Your Honor.
11 QUESTION: This is -- I don't mean to put you on
12 the spot here, but could you give me a cite to a case --
13 MR. PALMER: Yes, Your Honor --
14 QUESTION: In which they have so construed it?
15 MR. PALMER: I would site Firens v. State. It's
16 a 1981 case, 620 Southwest 2d, 577.
17 QUESTION: I'm sorry, 6 --
18 MR. PALMER: 620. 620, Your Honor, 577.
19 QUESTION: Southwest --
20 MR. PALMER: 2d.
21 QUESTION: Yes. Now, with that as a premise,
22 would you explain to me how youth comes into the
23 consideration of deliberateness? Is it in the sense that
24 a young person is thought to be less capable of engaging
25 in this kind of deliberative process, is that the point?

1 MR. PALMER: Yes, Your Honor. I think that much
2 can be gleaned from Graham's brief in this case where he
3 lists the qualities of youth that are deemed to be
4 mitigating, and among them is impulsiveness, the inability
5 to think rationally or maturely before acting, obviously
6 deliberate is going to be the converse of impulsive, and
7 if a quality of youth is impulsiveness, then just as
8 obviously the deliberateness inquiry will encompass that.
9 As I was saying moments ago, the class is
10 narrowed at the guilt phase, then we have the punishment
11 phase at which the State bears the burden of proof beyond
12 a reasonable doubt on all of the special issues.
13 We know from Walton v. Arizona that it is
14 permissible for the defendant to prove mitigation by a
15 preponderance. Texas affords the defendants -- its
16 capital defendants much more protection in that regard by
17 requiring the State to prove the issues beyond a
18 reasonable doubt.
19 The defendant is allowed to introduce whatever
20 evidence he wishes in mitigation, and the jury normally is
21 instructed, as it was in Graham's case at page 10 of the
22 joint appendix, that it is to consider all the evidence
23 presented. Not only is there no instruction limiting the
24 jury's consideration of that evidence, but it is in fact
25 instructed to consider all of the evidence introduced at

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

1 both phases of trial.

2 Penry simply held, we believe, that supplemental

3 instructions were required in that case to allow the jury

4 to give effect to his mental retardation and childhood

5 abuse as mitigating factors, and that holding followed

6 from the recognition that although Penry's evidence had

7 mitigating quality, that it was essentially aggravating as

8 to the future dangerousness inquiry.

9 QUESTION: But wasn't it also true that there

10 was some emphasis in the opinion on the lesser moral

11 culpability for a mentally retarded person?

12 MR. PALMER: That is true, Your Honor, and I

13 suppose to that extent Penry's evidence cannot be

14 considered within the first special issue, either.

15 QUESTION: To that extent, I guess --

16 QUESTION: Excuse me, you suppose to that

17 extent, what? I'm having trouble hearing you.

18 MR. PALMER: That the jury was not able to give

19 full mitigating effect to his evidence within the first

20 special issue as well as the second.

21 QUESTION: But to that extent isn't that case

22 somewhat similar, at least, to this case, in that at least

23 under Justice White's questioning you suggested that youth

24 may reduce the moral culpability of the defendant, but --

25 oh, you take the position it does not reduce the moral

1 culpability of the defendant. The chronological age does
2 not, but mental age might.
3 MR. PALMER: No, Your Honor, we will accept that
4 perhaps chronological age does, but that it has no
5 relevance outside the inquiries posed by the two special
6 issues, the first two.
7 QUESTION: That the reduced moral culpability of
8 the defendant has no relevance.
9 MR. PALMER: No. No, Your Honor, we accept that
10 that's relevant and that is a consideration as far as
11 mitigating evidence goes. It's simply our position that
12 the special issues allow consideration of that with regard
13 to whether he acted deliberately and then as to future
14 actions, through the second issue.
15 QUESTION: That the special issues do allow
16 adequate consideration of reduced moral culpability.
17 MR. PALMER: Yes, Your Honor.
18 QUESTION: But then, why wasn't that a
19 satisfactory answer in Penry? That's what I'm not clear
20 on.
21 MR. PALMER: Well, again, I would defer to what
22 the court of appeals said, and that is that Penry suffered
23 from a uniquely severe permanent handicap. That is, the
24 standard the Fifth Circuit has enunciated that a capital
25 defendant must satisfy to prevail on a Penry claim and --

1 QUESTION: I see the relevance of that when
2 you're predicting future dangerousness, but I'm not quite
3 sure I understand why that seriously distinguished the two
4 cases on moral culpability.
5 MR. PALMER: I'm sorry, Your Honor, I can't give
6 you any other answer than I have.
7 QUESTION: Thank you.
8 QUESTION: Suppose 10 years goes by so that a
9 17-year-old is not sentenced until he's 27 years old, does
10 future dangerousness then take into account his youth at
11 the time of the commission of the crime?
12 MR. PALMER: I would say not, Your Honor.
13 QUESTION: It was 4 years in this case until he
14 was sentenced.
15 MR. PALMER: No, Your Honor, he was tried and
16 sentenced 5 months after --
17 QUESTION: Oh, 5 months.
18 MR. PALMER: Now, again, my primary position --
19 and forgive me for articulating it so poorly, is that it's
20 the first special issue that focuses on the present
21 culpability, but the second special issue allows the jury
22 to give mitigating effect to his youth as having the
23 capacity for rehabilitation, the capacity for
24 rehabilitation being an equally valid sense and concern as
25 his personal culpability.

1 Graham also argues that the prosecutor argued
2 his youth as a basis for a sentence of death. The record
3 does not support this assertion. The argument which is
4 contained at page 480 of the joint appendix simply
5 stressed that Graham is a demonstrably violent person and
6 that his past actions were probative of his future
7 behavior. The prosecutor did not argue, even remotely
8 suggest, that Graham deserved to die because he was young.
9 Finally, Your Honors, in closing I would like to
10 respond to what I would consider a rather curious
11 assertion that the act of the Texas legislature in
12 amending the statute somehow lends validity to Graham's
13 claim.
14 As an initial matter, I would note that it is
15 incorrect, as Graham asserts at footnote 11 of his reply
16 brief, that the Office of the Attorney General drafted and
17 sponsored the new statute. In fact, the statute that was
18 passed is not the one that was drafted and supported by
19 our office.
20 That matter aside, it can hardly be doubted the
21 legislature acted prudently in responding to the Penry
22 court's concerns, and in amending the statute they
23 necessarily did so broadly enough to encompass the class
24 of Penry excludables. Their action in doing so, however,
25 should not be taken as a concession as to the validity of

1 the 360 remaining convictions. I think this assertion is
2 perhaps supported by the fact that there have been 21
3 executions that have taken place since Penry, all under
4 the old statute.
5 In closing, Your Honors, I would like to
6 emphasize that the scope of the decision in this case far
7 exceeds mere youth. We are seeing -- since Penry was
8 decided, we've seen a number of claims by capital
9 defendants as to what constitutes mitigating evidence, and
10 included in those are the fact that the defendant was a
11 sociopath, a condition this Court has found very
12 aggravating in Smith v. Estelle --
13 QUESTION: That's claimed to be mitigating, the
14 fact the person's a sociopath.
15 MR. PALMER: Yes, Your Honor. James
16 Demouchette, the last prisoner to be executed in Texas,
17 the execution of which took place last month, that was
18 precisely is submission -- that he was a sociopath, that
19 that explained his actions, that he could not control it,
20 and that therefore it was mitigating under the rule of
21 Penry.
22 We've also been told things such as -- by a
23 Hispanic petitioner who claimed that it was part of
24 Hispanic culture to smoke marijuana and to get into
25 fights, and that the evidence he presented of that at his

1 trial was mitigating.

2 We've been -- we've seen claims from defendants

3 who were brought up, they claim, to hate a particular

4 racial group, and therefore the acts of violence they

5 committed on members of that group were mitigating.

6 Again, these claims, bizarre as they may seem,

7 fit within the language of Henry in that they explain the

8 defendant's actions and they show that he is burdened with

9 a condition over which he has no control.

10 If the Court has no further questions, that

11 concludes my remarks.

12 QUESTION: Thank you, Mr. Palmer.

13 Mr. Tigar, you have 9 minutes remaining.

14 REBUTTAL ARGUMENT OF MICHAEL E. TIGAR

15 ON BEHALF OF THE PETITIONER

16 MR. TIGAR: We have a watershed difference here

17 about what the jury was told in this case as to special

18 issue number 1 and the intent element of the offense, and

19 something of a difference about Texas law. I'd like to

20 try to resolve it.

21 At pages 6 and 7 of our brief, quoting from the

22 joint appendix, we have extensive quotations from the voir

23 dire as to what the jurors were told: deliberately means

24 that in my mind anyway it is a person's intention to do

25 something, and other remarks to the same effect.

1 At joint appendix 5, we have the jury
2 instructions given in the guilt phase. Intentionally, or
3 with intent with respect to the nature of his conduct, or
4 to a result of his conduct when it is his conscious
5 objective or desire to engage in the conduct or cause the
6 result.
7 Now, all that complicated language does is read
8 out section 6.02(a) of the Texas Penal Code, which differs
9 from the model penal code quadripartite intent elements
10 only in that Texas chooses to use the word intention
11 rather than purposefulness, which is the more preferred
12 model penal code formulation, but then when it's defined,
13 it's the same thing. It's in terms of this conscious
14 objective or desire, so there can't be any doubt that the
15 trial judge conflated these two standards and thus took
16 care of any mitigating force that might have been in
17 special issue number 1.
18 QUESTION: Well, is the jury entitled to
19 consider the strength of the State's evidence on intent?
20 MR. TIGAR: The standard of proof, Justice
21 Kennedy, is the same with respect to both of the elements,
22 so that there really isn't any opportunity for the jury to
23 do other than look again to the same things they looked at
24 plus, of course, to the additional aggravating evidence
25 when they get on to the punishment phase. That's the

1 difficulty.

2 Then we look at Black v. State. Now, that's a

3 post-Penry decision, and there's a defendant up in --

4 QUESTION: Mr. Tigar, your argument that you

5 just made that in this case the judge conflated this and

6 that, I suppose that doesn't go to the facial validity of

7 the Texas statute.

8 MR. TIGAR: No, it doesn't Justice White.

9 That's --

10 QUESTION: And so you might win this case, but

11 if the trial judge had spoken differently you might lose

12 it.

13 MR. TIGAR: That's correct, Justice White, and

14 we might lose -- might have lost this case if the

15 defendant were 25 years old. I mean, if the case were a

16 different one than it was at the margin as opposed to

17 right in the center, then there'd be a different result.

18 That's the meaning of an as-applied challenge, and if I

19 may interrupt my Black v. State discussion, that's what we

20 think is wrong with the court of appeals.

21 The court of appeals turns Penry on its head,

22 because it doesn't look at this question of youth in its

23 relationship to the very thing that the Court identified

24 in Eddings as central. Instead, it goes off on this

25 future dangerousness thing and analyzes it in that regard

1 and then gets to the result that it gets to.

2 QUESTION: Mr. Tigar, your opponent says that

3 claims have been raised in Texas now since Penry that

4 being a sociopath is in effect a mitigating circumstance.

5 If you prevail here, do you think that would have to be

6 regarded as a mitigating evidence?

7 MR. TIGAR: Of course not, Justice Rehnquist.

8 Of course not. I mean, this Court said in Eddings how

9 this is to be done. There are these constitutionally

10 mitigating factors, and then there's an assessment of the

11 evidence standard. The opinion for the Court in Boyde v.

12 California should teach anyone foolhardy enough to come up

13 here what's going to happen to them if they make an

14 argument of that kind, so I don't think that the Court

15 needs to worry about that.

16 The problem is that, of course, the Court of

17 Criminal Appeals will decide those cases and presumably

18 the Court won't -- won't want to hear them. The problem

19 with the Court of Criminal Appeals in this Black case is

20 that at page 364 they say, unless your name is Penry and

21 you took the same IQ test, what they say we will not

22 retreat means no additional jury instructions. It's

23 futile to ask for them. No procedural bar.

24 QUESTION: Well, it could be that mental

25 retardation is such a -- so likely in every case to affect

1 somebody's control that you just have a per se rule about
2 it that you have to have a separate instruction, but just
3 being useful, maybe it ought to be decided on a case-to-
4 case basis, which arguably, at least Texas argues, is
5 amply taken care of in issue 1.
6 MR. TIGAR: It could be, perhaps, Justice White.
7 QUESTION: In some other case.
8 MR. TIGAR: That was the promise of Jurek.
9 QUESTION: In some other case.
10 MR. TIGAR: Well, they promised in Jurek they
11 were going to do it and then they didn't, and that, it
12 seems to me, is the difference between the facial and as-
13 applied challenge.
14 To look at it more broadly, in Stanford v.
15 Kentucky the Court wrote an opinion. You counted the
16 statutes. You looked at the 29 States that said, let's
17 put youth in there. 29 is surely more of a constitutional
18 consensus than that found inadequate in Stanford and yet
19 not quite so much as the one you had in Coker, so I think
20 that it's a fair question whether you have to say youth or
21 whether under one of these catch-all statutes it would be
22 adequate to those purposes.
23 And the final observation I would make is that
24 we are told that mitigating evidence didn't take up very
25 many pages in the transcript. The Fifth Circuit accepted

1 it for what it was, so that issue has been resolved. The
2 hearsay point, I wonder where trial counsel for the State
3 was, or for the district attorney. It wasn't objected to.
4 The point about youth is that it only takes a
5 word in the transcript -- he's 17 -- and the evocative
6 power of it in our law life for 2,200 years of recorded
7 legal history has been enough for sentencers to say, oh,
8 he is? That's mitigating.
9 And that, if the Court please, is our respectful
10 submission.
11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tigar.
12 The case is submitted.
13 (Whereupon, at 1:57 p.m., the case in the above-
14 entitled matter was submitted.)
15
16
17
18
19
20
21
22
23
24
25

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:

Gary Graham v. James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

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

BY ______________________

(REPORTER)