OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DOUGLAS McARTHUR BUCHANAN, JR., Petitioner v. RONALD J. ANGELONE, DIRECTOR VIRGINIA DEPARTMENT OF CORRECTIONS

CASE NO: 96-8400

PLACE: Washington, D.C.

DATE: Monday, November 3, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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DOUGLAS McARTHUR BUCHANAN, JR., :

Petitioner :

v. : No. 96-8400

RONALD J. ANGELONE, DIRECTOR VIRGINIA DEPARTMENT OF CORRECTIONS :

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Washington, D.C.

Monday, November 3, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

GERALD T. ZERKIN, ESQ., Richmond, Virginia; on behalf of the Petitioner.

KATHERINE P. BALDWIN, ESQ., Assistant Attorney General of Virginia, Richmond, Virginia; on behalf of the Respondent.

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P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-8400, Douglas McArthur Buchanan v. Ronald J. Angelone.

Mr. Zerkin.

ORAL ARGUMENT OF GERALD T. ZERKIN

ON BEHALF OF THE PETITIONER

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

Douglas Buchanan was sentenced to death by a jury entirely uninstructed as to those fundamental Eighth Amendment principles which could have saved his life. Indeed, neither the word mitigation, or anything related to mitigation, ever crossed the judge's lips.

There are only a couple of Virginia inmates who, like Douglas Buchanan, have been sentenced to death and have preserved challenges to the absence of mitigation instructions.

QUESTION: Mr. Zerkin, is the instruction given here typical of the instruction that is routinely given in Virginia in these capital cases, or is it different?

MR. ZERKIN: Justice O'Connor, it is -- it was somewhat typical. There is now recently, as of about 1993, a Virginia model jury instruction which is more

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expansive and has a definition of mitigation in it.

It came about from a case called Stewart v. Commonwealth in which the trial judge gave an expansive mitigation instruction, and the Virginia supreme court did not rule on whether that instruction was proper because it had been given. It did say that a further instruction, which was really not very much more expansive, would have been duplicative of what was given, but the model jury instructions now have that -- the instruction from Stewart in the book. That did not exist at the time of Mr. Buchanan's trial.

QUESTION: What is the specific test that you say we must employ in determining whether these instructions necessitate overturning --

MR. ZERKIN: Your Honor --

QUESTION: -- the sentence or the trial?

MR. ZERKIN: Yes. It's our position that the instructions must reasonably accommodate the dual interest that this Court has discussed --

QUESTION: Well, but what's the test that we employ?

Now, I had thought -- and you correct me if I'm wrong. I thought the test was, is there a reasonable likelihood that the jury applied the instruction in such a way that the jury was prevented from considering

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constitutionally relevant evidence.

MR. ZERKIN: Your Honor, that is --

QUESTION: Is that right?

MR. ZERKIN: Well, I don't think that that's the test that applies here --

QUESTION: Why?

MR. ZERKIN: -- because there's no instruction. at all on the issue of mitigation. If there were -- the Court has applied --

QUESTION: Applied the instructions --

MR. ZERKIN: The Court --

QUESTION: -- in the case in such a way that they were prevented from considering constitutionally relevant evidence. Now, I thought that was the test we employed.

MR. ZERKIN: The Court has --

QUESTION: Right or wrong?

MR. ZERKIN: In other contexts, right, and the reason I say other contexts, and it's critical here, or it's significant here, I think in fact we pass that test as well, and I will discuss that, but that arises in cases such as Boyde v. California, in which the question is whether or not the instructions are expansive enough to allow for consideration of all of the mitigating evidence.

Here, there's an instruction that violates Gregg

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in that it provides absolutely no guidance and doesn't discuss mitigation at all, and at the same time -- but at the same time violates Lockett, because what the judge -- what the trial judge says is, I will instruct you as to what the law is that you should consider.

He says it repeatedly, and a number of jurors, including those who sat in the case, under oath testified that they would accept the instructions and follow the instructions that the judge gives. The judge then, having said that, is now absolutely silent about the concept of mitigation.

In addition, the instruction that's given --

QUESTION: Well, the judge says to the jury, you are to consider all of the evidence that comes in at trial.

MR. ZERKIN: Yes.

QUESTION: And certainly there was evidence that came in of a mitigating nature. There was such.

MR. ZERKIN: Yes.

QUESTION: And the judge says, consider everything here.

MR. ZERKIN: But then what he says is, your decision is, impose life if you find from this consideration of all the evidence that death is not justified.

Now, justification sounds a lot more like aggravation than it sounds like mitigation. It says --

QUESTION: All right. Would your answer be different if the judge had modified his instruction in this respect. Instead of saying, if after considering all of the evidence you may determine that death is not justified, if he had said, after considering all the evidence, including such evidence as you find to be in mitigation, that the death penalty is not justified, would that pass muster?

MR. ZERKIN: Our position would be that that probably would pass muster and obviously even that wasn't done here.

The baseline at best is the instruction that's set forth in the footnote of the first Zant opinion, which although the Court didn't rule on it, has significantly more about mitigation than exists here. That is, the judge contrasted it with aggravation. The judge talked about it in terms of mitigation or extenuation.

QUESTION: But we're talking about the constitutional minimum, not the model charge, which I take it is a considerable improvement.

But what you're saying is, essentially four words were missing. After the words telling the jury that they were to consider all the evidence, if the judge had

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said, including the mitigating evidence, those four words, that would have brought it within the constitutional zone?

MR. ZERKIN: On one level, Your Honor, yes, and not on the other level. The other level is that in Virginia, unlike in Georgia, which was the subject of the decision in Zant, the General Assembly has set forth a specific list of mitigating factors, and that those factors are, under the decisions in Gregg and the decision in Ramos, the factors that the State, representing organized society, believes are most relevant to the sentencing decision.

QUESTION: I thought the jury had to be able to consider any mitigating factors. If I were a trial judge I'd be worried about specifically reciting mitigating factors lest a defense attorney come before an appellate court and say, the jury got the impression that these were the only mitigating.

MR. ZERKIN: It was not a problem here, Your Honor, nor is it theoretically. The problem is solved first of all in every State, because every State has found it perfectly able to define mitigating circumstances, including statutory circumstances, and still have a catch-all that avoids that, but in this particular case, Justice Scalia, the defense attorneys proposed a jury instruction that said that this was not an exclusive list, and that

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they could consider any other facts.

QUESTION: But Mr. Zerkin, I think you answered my question, yes, it would have been enough. I mean, you are now arguing for more, but I think when I asked you, suppose those four words had been included, including the mitigating evidence without a laundry list, that that would have been enough to satisfy the constitutional requirement.

MR. ZERKIN: Well, I have -- Justice Ginsburg, I have two positions on that. One is in terms of the general instruction that is correct, but that where, as in Virginia, you do have a declaration of the relevant mitigating evidence, which we have, unlike in Georgia, then that also should be part of the equation. We, I suggest, prevail in --

QUESTION: Well, you're giving very confusing answers. Let me ask you this way. Suppose the judge here had instructed on Virginia statutory mitigating evidence and that's all. Would you be here?

MR. ZERKIN: Yes.

QUESTION: Suppose the judge had done that.

MR. ZERKIN: If he did not include the catch-all it would be a Lockett violation, clearly.

QUESTION: And are you saying that he had to read the list from the statute of the mitigating evidence?

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MR. ZERKIN: The ones that were supported by the evidence, it's our position that he did have to do that.

QUESTION: But now, the only -- the only objection that you preserved, as I understand it, was that you requested the judge to charge that in several instances a particular kind of evidence was mitigating evidence. Is that right?

MR. ZERKIN: No --

QUESTION: You didn't ask for a definition of mitigation.

MR. ZERKIN: At every stage of the proceedings, from the trial on, counsel for Mr. Buchanan has argued that they were entitled to -- that he was entitled to --

QUESTION: Are you -- I'm talking to you about what instructions you requested. When you say every stage of the proceedings from the trial on, are you answering my question, or are you framing it differently?

MR. ZERKIN: No, I think I'm answering the question, Judge. At trial, for example, at pages 74 and 75 of the joint appendix, instruction (A)(B) said, in addition to mitigating factors specified in other instructions you shall consider the circumstances surrounding the offense, the history and background of Douglas Buchanan, Jr., and any other facts in mitigation of the offense.

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So beginning at the trial level and carried all through the proceedings Mr. Buchanan has maintained the fact that he was entitled to an instruction that included this.

Now, we're not here to prescribe what the instructions should be. What we're here to say is, he got absolutely nothing, and he -- whatever he's entitled to, he's entitled to more than nothing.

QUESTION: Well, but if the test is as I articulated it, is there a reasonable likelihood that the jury was prevented from considering the evidence, the answer to that may be no, because the judge said you will consider all the evidence.

And there's one other factor that you haven't talked about here. Both the prosecutor and defense counsel argued to the jury that they should consider, of course, the mitigating evidence, so is there a reasonable likelihood under those circumstances that this jury was prevented from considering evidence in mitigation?

MR. ZERKIN: Yes, Your Honor, because the trial attorney, the -- excuse me. The trial judge said repeatedly I am the one that's going to instruct you about the law. This Court has looked to --

QUESTION: Well, judges always say that, but this Court also in other cases has looked to the whole

picture and what was argued to the jury.

MR. ZERKIN: But --

QUESTION: And there is no question, is there, that both the prosecutor and the defense counsel told the jury, yes, you're going to consider these --

MR. ZERKIN: Well, actually there was some conflicting argument, because the prosecutor at one point said, you may sentence based upon your own caprice, and he told the jury that they can -- that you may -- you're entitled to consider this. He didn't tell them that you had to. Another place he told them that they had to.

QUESTION: Well, let's just take the judge's instructions. He says, you may fix the punishment of the defendant at death, or, if you believe from all the evidence that the death penalty is not justified, then -- then you shall fix the punishment of the defendant at life imprisonment. Now, if you believe from all the evidence. There was something like 2 days of testimony --

MR. ZERKIN: 2 days --

QUESTION: -- in this trial about his abused youth, and about his psychological problems. Isn't that correct?

MR. ZERKIN: Yes.

QUESTION: What do you think the jury thought this evidence was coming in for?

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MR. ZERKIN: Well, we don't -- we don't know what --

QUESTION: Any jury that had sat through 2 days of mitigating testimony about, you know, the terrible childhood and so forth, and then gets this instruction, if you believe from all the evidence that the death penalty is not justified --

MR. ZERKIN: But --

QUESTION: My goodness, you really think there's --

MR. ZERKIN: Yes, because the jury can look at this instruction and it can say, the question is whether it's justified or not, and there are four victims in this case, and that's what it's about. It's about justification.

QUESTION: But the jury in its form of verdict said that it had considered the mitigating evidence.

MR. ZERKIN: Well, but we don't know when that was even looked at, and the --

QUESTION: Well --

MR. ZERKIN: The practical -- I'm sorry, Your Honor.

QUESTION: Well, you know, we don't really know what the verdict of the jury was except from this same certificate.

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MR. ZERKIN: The practical difficulty, the reality of trying cases, is that juries make decisions based upon what the -- primarily what the judge instruction of the law is. At least, the system is set up to assume that.

If they looked at this, and we don't know when they looked at it, at the end, after the deliberative process was over, if they looked at this form and they said, oh, this says we're supposed to consider the mitigation, having already made their decision about whether it was justified or not based upon what the judge told them, and that's the first reference they see to mitigation, we can hardly expect that they then go back to the drawing board and start all over again making a new decision about the appropriate sentence based upon a consideration of mitigation.

So yes, they did -- they signed -- they signed the form, and they swore that --

QUESTION: Did any juror, other than the foreman --

QUESTION: Are you suggesting that the form saying that the verdict was -- was signed at the beginning of the deliberations?

MR. ZERKIN: No, Your Honor. It was probably signed at the end of the deliberations, that's my point,

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and therefore they had made their decision. By the time they saw anything from the judge that used the word mitigation they had already --

QUESTION: Well, but the foreman is saying that they considered mitigating evidence, just as the foreman is saying they voted unanimously.

MR. ZERKIN: That is correct, and we have absolutely -- because nothing was given to the jury about what mitigation was, or what it meant, or how it was supposed to be used, there was no context for it at all, we have no idea what role that played in the deliberative process.

QUESTION: Well, can we not consider this. As Justice Scalia -- number 1, we start with a jury instruction that did refer to consideration of all of the evidence in determining what is justified.

Number 2, we have, as Justice Scalia pointed out, a trial record in which there were several days of testimony which could only be regarded as testimony intended to be mitigating in the defendant's favor.

The testimony came in. The jurors I assume are entitled to assume that the judge is not allowing in effect irrelevant testimony in.

And number 3, although we do not allow the arguments of counsel to substitute for a jury instruction,

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I suppose it is appropriate, in determining whether a jury instruction which would allow consideration of mitigation to be sufficient, to bear in mind that the prosecutor got up and in his own argument admitted that there was mitigating evidence and addressed the question whether the jury ought to find that mitigation adequate.

In that total context, instruction that would allow it on its face, number 2, much evidence that came in, number 3, a concession on the part of the prosecutor that there was mitigating evidence, shouldn't we consider all three of those factors in determining whether the instruction here is sufficient?

MR. ZERKIN: Not where the instruction is completely devoid, as in this case, of any reference to mitigation.

QUESTION: It's the missing word, or the missing four words.

MR. ZERKIN: Or the missing concept, and however it does it, that concept must be given the imprimatur of the presiding judge.

QUESTION: But it's got to be expressed.

MR. ZERKIN: Yes. It must be expressed, and he must be told that and, indeed, as early as Gregg this Court said that merely giving information under fair procedural rules to the jury is not enough. It would be

unthinkable --

QUESTION: Yes, but this is more than information. This is information of a mitigating sort, admitted by opposing counsel to be of a mitigating sort, which could be considered consistently with a jury instruction as mitigating evidence. That's more than just allowing fact in without any instructional basis for considering it in mitigation at all.

MR. ZERKIN: I disagree with the premise that the jury instruction allows for that, and that's because of the use of the word justification. The standard set forth here is whether the death penalty is not justified. The jury can decide --

QUESTION: Based on all the evidence, and all of the evidence is not merely, as you pointed out, the number of victims, but the evidence of mitigation which consumed several days of trial.

MR. ZERKIN: To do that the Court has to abandon what I think has been its principle throughout the course of its Eighth Amendment jurisprudence, that we must provide careful guidance as to both aggravation and mitigation. It's been a guiding principle from the very beginning.

And to do that we have to say, well, we don't really care about whether there's careful guidance from

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the court, or any guidance from the court, as long as the judge throws it out there that you're free to do whatever you want, for whatever reason you want. As long as you think that it's justified --

QUESTION: What about Franklin?

MR. ZERKIN: -- you can go out and do it.

QUESTION: What about Franklin?

QUESTION: Well, guidance about mitigation, I thought we have said quite the opposite, that you cannot constrain the mitigation. You tell them -- you tell the jury, mitigate. You know, you can consider in mitigation whatever you like. Do you consider that careful guidance?

MR. ZERKIN: There has to be both. Those are dual principles all coming from Furman. It's dual principles. What you can't do is cut off mitigation, and what you --

QUESTION: Furman wasn't even a Court opinion.

MR. ZERKIN: But the theories all stem from Furman, and it goes to Gregg.

QUESTION: The Court in a case -- I don't even know how to pronounce it. Tuilaepa?

MR. ZERKIN: Tuilaepa. I hope so.

QUESTION: Hard to pronounce -- said that States need not instruct juries as to how to weigh any particular fact in a capital sentencing decision.

MR. ZERKIN: We're not talking about --

QUESTION: They don't have to do that.

MR. ZERKIN: We're not talking about weighing. We've never asked for a weighing instruction. It's not a weighing system. We talked about the judge impressing upon the jury that this stuff is important.

QUESTION: What about Franklin?

MR. ZERKIN: The -- I don't -- I don't see Franklin as affecting the equation.

QUESTION: Well Franklin, as I read it, I -- you've probably read it more carefully and more recently, but I thought that they upheld a Texas instruction that never mentioned the word mitigation, that the Court rejected the need to have an instruction that told them about, you have to consider evidence that mitigates, that all the judge said in Franklin, the only relevant thing, was he read number 2 -- you know, that second part of the Texas thing that says, the jury must, to sentence a person to death, have to find beyond a reasonable doubt that there is a probability he will commit future crimes, and that was it.

I don't think there was any other relevant instruction there, except take into account all the evidence.

MR. ZERKIN: That's correct, but remember that

you're dealing --

QUESTION: Why doesn't that --

MR. ZERKIN: You're dealing with the uniqueness of the Texas statutory scheme, and the standard the court has set up for the Texas scheme is that there must be a vehicle for giving effect to the mitigating evidence.

The court decided in Franklin, unlike what it decided in Penry, where it reaches a different result and says it has to be an additional instruction, the court says in Franklin that you may give -- that the aggravating circumstances created the vehicle for discussing with the jury the mitigating evidence, so even though you didn't talk abut mitigation, the unique aspects of the Texas scheme created the vehicle for doing that.

That's not at issue here. We don't have those questions where you could argue age, for example, in the context of talking about future dangerousness or some other -- or deliberativeness. That is, if you're talking about mental health issues, whether that's a vehicle for it or not.

So the Texas scheme is unique, and the courts -- and in fact, when the court had to deal with an issue such as mental retardation, where it felt that that vehicle was not provided by the statutory questions in the Texas scheme, it said it's not enough, and you have to go back

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and tell them about mitigation so they can do it.

And as I understand it, in fact, Texas has now added a fourth question so that there is that vehicle, and every other State, every State has provided instructions on mitigation -- whether it's a weighing State or nonweighing State, every State but Virginia, and even now maybe in Virginia under the new model jury instructions --

QUESTION: Mr. Zerkin, the counsel discussed mitigation at length, both defense counsel and the prosecutor. Did the trial judge say anything at all to the jury before or after the summations?

MR. ZERKIN: He --

QUESTION: Sometimes a judge will say, you take the law from me and not from the counsel.

MR. ZERKIN: Now -- yeah. Yes, he did. excuse me, Your Honor. He said -- he didn't say, and not from counsel. He said, I will instruct you as to what the law is. He did it a couple of times, including as he was about to give the jury instruction. He says, it's the duty of the court now to instruct you as to the law applicable in this phase of the proceeding, and he then went into the instruction.

QUESTION: What did he say about the role of counsel? Did he say something to the effect that what the lawyers say is not evidence but it may help -- or the law,

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but it may help you to understand the law and the evidence?

MR. ZERKIN: I don't believe --

QUESTION: That's a typical instruction.

MR. ZERKIN: He did not -- he did not instruct them on that.

QUESTION: I don't find all of these instructions in the appendix filed here. I don't find the one you just read or anything else, just a few of them.

MR. ZERKIN: Your Honor, the -- what I just read to you comes from page 1573 of the transcript. It's the introduction to jury instruction.

QUESTION: So we have to go to the transcript rather than the --

MR. ZERKIN: For that particular --

QUESTION: -- appendix for these other instructions.

MR. ZERKIN: For that particular statement, it is not in the joint appendix, that is correct.

QUESTION: Did he say, Mr. Zerkin, as you have told us, I will instruct you as to the law, or did he say, I will instruct you as to the law?

MR. ZERKIN: He said, it's the duty of the court -- he said, it's the duty of the court now.

QUESTION: He said, it is the duty of the court

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to instruct you as to the law?

MR. ZERKIN: Yes, sir.

QUESTION: Or did he say, it is the duty of the court to instruct you as to the law?

(Laughter.)

MR. ZERKIN: I'm not sure which way he did it.

QUESTION: Well, I know you aren't.

(Laughter.)

MR. ZERKIN: I don't know which way he did it, and I don't think that would make the difference, or make up for the complete lack of guidance we have here.

QUESTION: May I ask you if the instructions went to the jury?

MR. ZERKIN: The written instruction, one instruction and the verdict form went to the jury, that's correct.

QUESTION: The written instructions, all of them, or what?

MR. ZERKIN: Well, there's only one jury instruction, and that and the verdict forms went to the jury. They always go back in Virginia, so they had those.

QUESTION: And the verdict form included the word mitigation?

MR. ZERKIN: It said -- the verdict form said, we -- having considered the evidence in mitigation.

That's correct.

The difficulty again is with the trial judge not only saying, I'm going to instruct you, or the court is going to instruct you, but also saying that the state -- the question here is whether it's justified or not, and without giving any concept of mitigation, or any imprimatur to it that it's valid, I mean, it's --

QUESTION: Mr. Zerkin, you've not made any mention -- I don't think I found any in your brief -- about whether the rule you're arguing for might be Teague-barred.

MR. ZERKIN: We certainly think it is not Teague-barred, Judge.

QUESTION: But you did not address this.

MR. ZERKIN: We did not address it there, and we think --

QUESTION: Although the State has addressed it.

MR. ZERKIN: The State has addressed it, and we think that their argument on two points is so clearly wrong. One is, they say that we have -- that the Eighth Amendment jurisprudence on vagueness has never been applied to the selection phase of the process as opposed to the eligibility phase. This Court did that in Tuilaepa and did it in Stringer v. Black as well.

In Stringer, there was a vague aggravating

circumstance that was not necessary for eligibility, and the Court decided that it affected the weighing process which, of course, is at the selection phase, so the Court has very definitely applied its Eighth Amendment jurisprudence in terms of vagueness and jury instructions to the selection phase as well as to the other phase.

And as I've indicated, this rule comes clearly from the roots. It appears over and over in Proffitt, it appears in Gregg, it appears in Ramos. In every instance the Court is telling the jury -- and in Penry, and it's telling the jury that mitigation, that this is something, that mitigation matters, and the flaw of instruction clearly must be that that's contained in Zant.

Although the Court didn't rule specifically on the Zant instruction, that in any event provided the jury with some guidance as to mitigation, and indicated that mitigation was something that mattered, and under these instructions, the judge -- 2 days of evidence comes in, and the judge says nothing about it.

I will save, unless the Court has other questions, my remaining time for rebuttal.

QUESTION: Very well, Mr. Zerkin.

Ms. Baldwin, we'll hear from you.

ORAL ARGUMENT OF KATHERINE P. BALDWIN

ON BEHALF OF THE RESPONDENT

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MS. BALDWIN: Mr. Chief Justice, and may it please the Court:

I think it's very important in this case to understand what issue is before the Court, and what the instructions are that Buchanan asked for at trial, and in this respect, first of all there was never an objection made whatsoever to the Virginia pattern jury instructions.

Not only was there no objection made, defense counsel expressly agreed that that instruc -- those instructions should be given, the ones that were given in this case, as well as an express agreeal that the -- agreement that the verdict forms as written should be presented to the jury.

QUESTION: But weren't there additional instructions that were requested and specifically denied, and wasn't there --

MS. BALDWIN: Yes, Justice Ginsburg, and I think it's very important to know exactly what those instructions were as far as what this Court has said the Eighth Amendment requires.

This is what -- on page 75 of the appendix -- this is what Buchanan asked the court for, and this is what Buchanan says the Eighth Amendment requires that juries be instructed, and that is that if the jury -- there are four factors which he identified, page 75 and 76

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of the appendix, and in each one of those the instruction reads that if the jury finds a particular factor to be present, "then that is a fact which mitigates against imposing the death penalty."

Now, this Court has never held that the Eighth Amendment extends to instructing a jury in a capital murder -- a sentencing hearing that a particular fact is mitigating.

QUESTION: May I ask -- I think you're right in what you're saying, but do you think it would have been error for the judge to give the instruction?

MS. BALDWIN: Under Virginia law, the Virginia supreme court has interpreted the Virginia statutory system to say that trial courts should not give specific instructions on specific factors, because to do so could --

QUESTION: It suggests that there may be no catch-all. That's their -- isn't that their point?

There -- but what would have been wrong with giving the instruction supplemented by a statement saying, of course, you may also consider any other mitigating evidence? Would that have been error?

MS. BALDWIN: Under the Virginia supreme court rule it would, and the issue before the Court --

QUESTION: Why would it have been -- under -- if

the error is in not letting -- letting them think they can't consider other mitigating evidence if the judge expressly said you may do so, how could that violate the Virginia rule?

MS. BALDWIN: Well, because what the Virginia supreme court has said, and the issue before the Court today, is whether that was constitutionally reasonable. What the Virginia supreme court has said is that that could run the risk of having the jury think that they can only consider certain factors to the exclusion of others.

QUESTION: How could it run that risk if he expressly said otherwise? I don't understand that argument. I mean -- I'm not -- that really doesn't go to the constitu --

MS. BALDWIN: If he was -- Justice Stevens, if he was also given the catch-all, is that the question?

QUESTION: Yeah, that --

MS. BALDWIN: Well, it's our position that the Virginia pattern instructions which were given in this case accomplished that fact. They tell the jury to consider all the evidence.

QUESTION: But don't --

QUESTION: I understand you're saying -- but I'm trying to find out if -- why it would have been error if he had given the instruction. You seem to -- and I

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don't -- think it's not necessary to your position if they fail --

MS. BALDWIN: No -- no, you are correct.

QUESTION: Yes.

MS. BALDWIN: And in fact in some cases a particular judge has used his discretion to give instructions further than -- that go further --

QUESTION: Right.

MS. BALDWIN: -- than the Virginia pattern instructions, and --

QUESTION: No, but I thought it would be error -- say, for example, take the age instruction. The requested instruction -- I put it away, but in effect was you may consider the age, and may consider it as a mitigating factor, or a mitigating circumstance. That would be an incorrect statement of law, wouldn't it?

MS. BALDWIN: Yes.

QUESTION: I mean, the jury may or may not decide that his given age was a factor in mitigation, but it would have been error, I take it, to instruct the jury that it was a mitigating factor.

MS. BALDWIN: Yes.

QUESTION: And that's what he asked for.

MS. BALDWIN: Yes, you're absolutely -- in fact, the age instruction, which is on page 76 of the appendix,

is different from the other three. In fact, it goes even further. It -- it doesn't say the age is something that you may consider as a mitigating factor.

QUESTION: Right. Right.

MS. BALDWIN: It says, the age of Douglas Buchanan is a fact which mitigates.

QUESTION: Well, so do the other ones. Then --

QUESTION: Yes.

QUESTION: The other ones do, too. Committed while he was under the influence of extreme --

MS. BALDWIN: Correct.

QUESTION: -- mental or emotional disturbance. That is a fact which mitigates against.

MS. BALDWIN: That --

QUESTION: Whereas the Virginia statute says, facts in mitigation may include, but shall not be limited to.

MS. BALDWIN: That's correct, and that's why the --

QUESTION: It does not say facts in mitigation --

QUESTION: Yeah.

QUESTION: -- do include.

MS. BALDWIN: And that --

QUESTION: It's up to the jury whether --

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MS. BALDWIN: That's right, and that is why the Virginia supreme court has interpreted the statutory system to -- such that the courts should not and may not give specific instructions that highlight or single out certain factors which may or may not be mitigating.

QUESTION: What about what I think is a separate argument, a totally separate argument, is not on page 75 but on page 74, and in instruction (A)(B) what he does is, he asks the judge in a separate matter that was separately refused simply to tell the jury that they can consider anything in mitigation growing out of the person or the crime.

Now, I take it his basic separate argument is that he asked the judge in that instruction, not the ones you quoted, to consider -- just consider mitigation, and there was nothing else in the other pattern instructions that told him that.

So if your argument is he hasn't properly raised the question he's trying to raise, I'm slightly stymied, because it seems to me he has in instruction (A)(B) on page 74.

Now, is there any response to what I just said?

MS. BALDWIN: No, I disagree with you, Justice Breyer.

QUESTION: Oh, you do. That's why I asked.

MS. BALDWIN: Because I think -- and my argument is not that he has not preserved an objection to the refusal of these instructions.

QUESTION: All right. Well then, if you --

MS. BALDWIN: My argument is, that is all that he has preserved, not that he's --

QUESTION: Oh, fine. But -- yeah, but then, isn't he in section (A)(B) raising the point he wants to make, which is that the judge has to tell the jury something about mitigation, because (A)(B) is very generally phrased. It refers to nothing specific. Now, what is your response to that specific point?

MS. BALDWIN: My response is still that he is not -- I don't believe -- his argument on brief and his argument this morning is to look at the Virginia pattern instructions that are given and to complain that the phrase, all the evidence, does not --

QUESTION: I thought --

MS. BALDWIN: Does not allow --

QUESTION: -- Mr. Zerkin made it clear that that was the model instruction.

MS. BALDWIN: Yes.

QUESTION: He did say to me, although it was somewhat equivocal, that it would be enough to say, and you may take into account all the evidence, including the

mitigating evidence, which, as Justice Breyer pointed out, is essentially what instruction (A)(B) seeks, and that was denied. That is, if you find any facts which mitigate a death penalty, mitigate against the death penalty, you shall consider those facts.

MS. BALDWIN: If his argument is somehow only married to that one instruction -- and I don't think so. I think his argument is that he should have all the --

QUESTION: He has a separate argument.

MS. BALDWIN: Right.

QUESTION: Which I think is married to the instruction, which is that the pattern instruction would be fine if they'd given (A)(B).

QUESTION: But (A)(B) --

QUESTION: If they didn't give (A)(B), it wouldn't be fine.

MS. BALDWIN: But it's merely duplicative. It's merely cumulative of the instruction that already was given.

QUESTION: Counsel, (A)(B) includes as its first words, in addition to the mitigating factors specified in other instructions.

MS. BALDWIN: Right. It's a package.

QUESTION: Do you think (A)(B) -- meaning the ones later on.

MS. BALDWIN: Correct.

QUESTION: The things did come in a package.

MS. BALDWIN: Correct, and in fact the record -- it's not in the appendix, but in the record of the case, what the -- what Buchanan actually asked for initially, and then he himself voluntarily withdrew, were a number of jury verdict forms and other instructions that clearly set the whole system up as a weighing system.

QUESTION: Okay, but didn't -- I want to get clear on (A)(B) and the question whether we've got a case here.

As I read (A)(B), there are two parts to it one is the part that refers to other instructions. It then goes on to say -- this is the first sentence. You shall consider the circumstances surrounding the offense, the history, background, et cetera, and any other facts in mitigation.

That part of the request I assume has the same flaw, as you see it, that the age request had. It in effect implies that the facts surrounding the killing were mitigating, and I take it you say that was properly refused.

MS. BALDWIN: Mm-hmm.

QUESTION: But then there's a second sentence. If you find the existence of any facts which mitigate,

then you shall consider these facts. That, I take it, even on your view, was not a request which it would have been erroneous to give as an instruction, and that's the request that raises this issue. Am I correct?

MS. BALDWIN: I'm looking at the second sentence.

QUESTION: Yeah.

MS. BALDWIN: And there would be nothing wrong with that, that one sentence, but that's not the instruction that was offered.

QUESTION: Oh, I quite agree, but I mean, we've got two issues here. Number 1 is, did he truly raise the issue that we've taken this case for, and I assume that the second sentence is at least enough to get him across the line on that.

MS. BALDWIN: Well, frankly it's been hard for me to figure out exactly what the issue is that he is saying the Eighth Amendment requires in this case, because it seems to me he's changed it from trial to direct appeal to collateral review to here, and I think that the important issue for this Court to decide is, this is a coll -- this is a case that is 10 years old. It is here on collateral review, and the Court must, before it can consider granting relief, determine whether what he's asking for is a new rule.

And to do that, what we have to do is look at what was done in the case and the rulings that were made, and were those constitutionally reasonable, and on that score we have, I believe, a strong argument that considering what this Court has said the Eighth Amendment required in capital sentencing hearings in 1989, when the Virginia supreme court decided this case, 1990 when it became final, or even today, clearly the Virginia supreme court rule and the instructions that were given fell well within constitutional parameters.

What this Court has made very clear is that there are only two requirements from the Eighth Amendment as far as capital sentencing hearings, and one is that the class of persons eligible for the death penalty in the first place has to be narrowed and, secondly, that the jury not be prevented from considering any evidence, relevant evidence in mitigation.

This Court has never held that specific instructions need to be given to a jury considering the sentencing hearing and, in fact, has said over and over that States are free to structure and shape what types -- what the procedure is going to be in the hearing.

QUESTION: Ms. Baldwin, the questions presented in petitioner's petition for certiorari, the first question -- I think it's the first one that we granted

cert on -- does say, is the Eighth Amendment right to be free from arbitrary and capricious imposition of the death penalty violated when the jury is not instructed regarding the existence of statutorily defined mitigating circumstances, so I really -- I took it to be a requirement that the jury -- (A)(B) wasn't at issue. It was rather the later instructions, AH and so forth, which does say you will consider age and so forth in mitigation.

MS. BALDWIN: Well, what Buchanan has argued all -- what he argued on direct appeal, which is what we say is preserved, was that his instructions that were refused were a violation of the Eighth Amendment, and that included instruction (A)(B).

QUESTION: Well, in fairness to the petitioner, the question presented also concludes with, where the jury charge is devoid of any reference to the concept of mitigation, so we can -- can we discuss just that --

MS. BALDWIN: Now, that was definitely not preserved, Justice Kennedy, absolutely not, because there was --

QUESTION: Well, let's assume -- let's assume that it was preserved.

MS. BALDWIN: All right.

QUESTION: His argument is that, given our Eighth Amendment jurisprudence, you have to give the jury

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some framework, some guidance for considering whether or not factors that have been introduced into evidence may be mitigating. Now, would you tell us what's wrong with that position, if that --

MS. BALDWIN: To my knowledge, this Court has never held that. What the Court has held is that a defendant -- is that a jury may not be prevented from considering any relevant mitigating evidence.

There's never been a question in this case the jurors understood their duty when they were told to consider all the evidence, and the Court has never said we hold --

QUESTION: Can a -- does a juror perform his or her constitutional duty when he says, I'm not going to consider any evidence of mitigation in this case? I don't want to even talk about it. I don't want to even consider it.

MS. BALDWIN: No, he -- that's a violation of the Eighth Amendment. When the sentencer says, I refuse to consider it, or --

QUESTION: And it's a violation of a judge's charge to the jury here if he tells them to consider all the evidence, isn't it?

MS. BALDWIN: The --

QUESTION: I mean, if a juror that Justice

Kennedy hypothesized were to say, I'm not going to consider any mitigating -- he would be violating the judge's charge to the jury.

MS. BALDWIN: That's exactly right.

QUESTION: Which told the jury to consider all the evidence.

MS. BALDWIN: That's exactly right. That's --

QUESTION: Is that right? That's the part that I'm actually interested in.

MS. BALDWIN: Yes. It -- yes. The --

QUESTION: Leaving aside the structural thing and whether you have to structure it or not, let me go back to Justice O'Connor's original point.

Is there a reasonable likelihood that the jury applied the instruction in such a way that the jury was prevented from considering constitutionally relevant evidence? All right. That's the standard I'm focusing on.

Let me read to you exactly what's bothering me, and I'll leave a few words out of that instruction and I'll use my tone of voice so you can see what's bothering me, even though, I grant you, as Justice Scalia said, he probably read this, the judge, in a monotone. All right. But I won't.

This is the instruction, modified a little, I

think in harmless ways. If you find from the evidence that the Commonwealth has proved vileness, then you may fix the punishment at death. All right?

Or, if you believe from all the evidence the death penalty is not justified, then you shall fix the punishment at life.

Now, I've read that two or three different ways in my mind, but it seems to me one big way that stands out is the possibility the jury thinks if we find vileness, we can fix death. If we don't find vileness, we can fix life. You see? And it's because of the presence of that word justified, and the presence of the word, or, and certainly one of the arguments he makes -- of course, that would be totally wrong. That would be incorrect under the Constitution. It would meet the standard that Justice O'Connor mentioned.

And I've read that three times in my mind, and I've come to thinking that well, gee, the way I just read it with my tone of voice is certainly a way the jury might have understood it, and that's -- that's what I want you to respond to.

MS. BALDWIN: Well, the standard comes from Boyde, and Boyde says that the standard is not if there's a possibility that there was some misunderstanding.

QUESTION: Yeah, a reasonable likelihood --

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MS. BALDWIN: Or incorrect --

QUESTION: Mm-hmm.

MS. BALDWIN: But there has to be a reasonable likelihood --

QUESTION: That's why I used my voice -- isn't there a reasonable likelihood. No. Okay. Well --

MS. BALDWIN: There can't be in this case. It is impossible for that to have occurred in this case, because of the considerations that you look at under Boyde. It is not just the instruction.

Now, I would argue that that reading --

QUESTION: Well, you say it's not because you have to look at the arguments of counsel and so forth, I assume.

MS. BALDWIN: That you have to look at everything. You have to --

QUESTION: But if you read it as Justice Breyer did, that is troublesome indeed, because the instruction has collapsed both the eligibility for a death penalty factor in with the sentencing factors in a single instruction.

MS. BALDWIN: Well --

QUESTION: That is troublesome.

Now, I'm not sure the petitioner raised that. It is very hard to know, looking at the petition, that

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that was even raised, even though I personally would find it somewhat troublesome had it been raised. Do you have comments about that?

MS. BALDWIN: Justice O'Connor, I don't think it does -- collapses the two parts at all, because the eligibility instructions are in the first -- are in the second paragraph. These are a number of instructions that happened to be in various different paragraphs, but there are a number of instructions.

You have to understand something that Virginia does. Virginia triple narrows for the class of eligibles, I think unlike any other State that I know of.

In Virginia, in the guilt phase we can't get a capital murder unless it is a premeditated murder and unless it is a premeditated murder coupled with another circumstance, such as in this case, the killing of more than one person in a single transaction.

And then in the sentencing phase, we have a third narrowing of class eligibles by a requirement of finding one of two additional aggravating factors.

QUESTION: What about Justice O'Connor's question? Was the point that she commented on and that Justice Breyer made, was that argument -- is that preserved here under the question presented in the proceedings in the --

MS. BALDWIN: I don't believe it is at all, and I think especially because the record shows that Buchanan agreed to these -- to the pattern instructions.

QUESTION: Well, I also want to say, I don't agree that the words that Justice Breyer left out are inconsequential. I think the problem is that --

MS. BALDWIN: They're the whole guts of it.

QUESTION: Everything is summarized in the second paragraph, the requirements that must be proven, and then the court says, if you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life.

I don't see how that lends itself to --

MS. BALDWIN: It is complete -- it is our position that it is completely --

QUESTION: Well, I think the only words I left out were the word life imprisonment and reasonable doubt. I mean, I don't -- the sentence I'm reading -- I'll read the whole thing if you want, but I won't read it again.

QUESTION: I must say I think there's some merit to Justice Breyer's point that this -- the instruction is

in the dysjunctive, with the or.

QUESTION: That's right.

QUESTION: So that it indicates that if you go through step 1 -- if you find from the evidence that the Government has proved beyond a reasonable doubt that the aggravating factors exist, that were specified in the previous paragraph, then you can stop.

MS. BALDWIN: Well --

QUESTION: And --

MS. BALDWIN: -- you can't stop because --

QUESTION: Well, if you believe from all the evidence that a death penalty is not justified, that indicates that maybe the aggravating factors have not been established.

MS. BALDWIN: Well, the important word here --

QUESTION: And so -- so all the defendant is saying is, in this context you should say something about mitigation, what I want you to tell them about is the statutory factors.

Now, maybe he's wrong about that, but his question presented indicates that where the jury charge is devoid of any reference to the concept of mitigation, don't you have to do something?

MS. BALDWIN: Well, and it's our position that Virginia does that.

Justice Kennedy, it's important -- and I don't believe that this issue we're talking about, and that is an interpretation of this paragraph as being somehow ambiguous, I don't believe that's preserved at all. It was not raised, an objection to this.

However, the Fourth Circuit, in other cases where it has been preserved, has rejected this exact argument by saying that what a jury is -- what a jury may do, they're free not to do, and this is in essence a followup to the second paragraph that says, jury, before you can even consider a death penalty, before you can even consider two options, you have to find that it's vile.

QUESTION: Is it correct --

MS. BALDWIN: Now, if you find --

QUESTION: I'm sorry. I didn't want to interrupt you. You finish.

MS. BALDWIN: Thank you. Now, if you find that it's vile -- this is in the third paragraph -- you may sentence him to death, or if you believe from all the evidence that the death penalty is not justified -- I -- to say --

QUESTION: It seems to me that you're --

MS. BALDWIN: To say that the jury is going to read this and stop there and not read the rest of their instructions is a presumption that I don't think this

Court has ever indulged in.

QUESTION: But isn't --

MS. BALDWIN: That a jury doesn't read it's instructions.

QUESTION: Isn't it correct that you're assuming that the jury would interpret the word or in that instruction as saying, in effect, but even if you do so find, you may nevertheless do the rest?

Because that's -- you're assuming that they understand the or means, even if you find that, then there's this other alternative, but as Justice Breyer points out that a reasonable juror might think there are two alternatives, either the first clause or the second.

MS. BALDWIN: Well, I think the -- I think instruction is incredibly simple, and I think that no -- it's not a reasonable probability, I don't think it's any probability that a jury, reading this entire instruction --

QUESTION: Would be --

MS. BALDWIN: -- could possibly come away with the belief that they somehow can't consider mitigation, they can't consider the evidence that the defendant's put on for 2 days --

QUESTION: It is dysjunctive, and the question, I suppose, is whether a reasonable jury would think that

what the dysjunction is is between, if you find, and then you -- or if you believe, or whether it's between, then you may fix the punishment at death, or, then you shall fix the punishment at life imprisonment, and it seems to me that the latter dysjunction is much more reasonable.

MS. BALDWIN: Yes, I agree, Justice Scalia.

QUESTION: May I ask another -- I -- we sort of milked this paragraph to death. May I ask you to respond before you're through, and do it at your own leisure, to the argument that they make, and I don't know whether it's valid or not, that in every other State in the country that has capital punishment this instruction would not have been sufficient. Is that correct, do you think?

MS. BALDWIN: That's not correct because -- I think because of what the Court has said in case after case about States being free to structure and shape their sentencing hearings.

In this -- and the argument that Buchanan makes as to all the other States is completely beside the point, because there's really no State that's like another State completely. I mean, that's a comparison that has no constitutional significance.

QUESTION: Well, maybe that's not an argument that should persuade us, but I'm just kind of asking you, can you name another State in which this instruction would

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have been sufficient?

MS. BALDWIN: I think what Justice Breyer pointed out in Texas. In Texas -- in fact, in Texas, not only is the word mitigation not used under the cases where the system has been upheld, but it's a much more restrictive system than Virginia.

QUESTION: Right.

MS. BALDWIN: The Virginia system is that even if an aggravating factor is found --

QUESTION: I understand.

MS. BALDWIN: -- and no mitigating factors, a jury in Virginia is still free to give a life sentence. That's the argument that Penry asked for, and that this Court said you didn't have to go that far.

QUESTION: We're not challenging the system as a whole. That certainly is acceptable. The question is whether that latitude is adequately made known to the jury. That's the question under this instruction, and they -- and my specific question to you -- you named Texas. Are they correct that no other State would have accepted this instruction?

MS. BALDWIN: I don't know that their argument is that no other State would have accepted it, Justice Stevens. Their argument is, look at this compilation of statutes and instructions from apparently today and see

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how different they are from Virginia. I'm not sure that -- no other State supreme court could pass on that, because they don't have the system that we have.

Our system under this instruction, and under Boyde I think it's very important to look at, you're not only looking at this instruction, because even if the Court believes that there is some ambiguity in the instruction, and I don't believe there is, but even if the Court does, under Boyde there's no possibility that the jury in this case believes that it was prevented from considering mitigating evidence.

QUESTION: Well, on that particular point, I'm a little bit concerned, because what the prosecutor said in the course of virtually conceding that they should take into account mitigation --

MS. BALDWIN: Yes.

QUESTION: He says, well, you are entitled to follow your own caprice.

MS. BALDWIN: Yes.

QUESTION: Well, I mean, I'm sitting there, a jury, thinking maybe he means that we don't have to follow the law. He says we can follow our own caprice. I mean, that isn't exactly a --

MS. BALDWIN: I think that's taking a --

QUESTION: -- a clear statement that you can

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take mitigation into account under the law.

MS. BALDWIN: I think that's taken --

QUESTION: So I'm raising this to get your response.

MS. BALDWIN: I think that's one word taken out of context.

QUESTION: Mm-hmm.

MS. BALDWIN: And if you look at the context of the prosecutor's --

QUESTION: He said enough in the rest of it.

MS. BALDWIN: -- argument he made very clear that what he was talking about specifically was, even if you find vileness, jury, it's your duty to consider his mitigation, and you can come back with a life sentence, and I'm not going to tell you anything different because that's not the law, and that's what the prosecutor said over and over.

Plus at the very end of the prosecutor's rebuttal closing argument, he read the jury verdict form to the jury, and in that jury verdict form is where it says, where the jury certifies that it considered mitigating evidence, and then the jury came --

QUESTION: Couldn't the jury say, the prosecutor and the defense counsel spoke about mitigation. That judge, look at this charge. He didn't say one word about

mitigation, and I'm thinking about how this Court has handled the reasonable doubt charge. Those words must be spoken. The court doesn't have to define them, but it has to at least speak the words, and here you're saying the charge is okay even though it doesn't even mention the word mitigation.

MS. BALDWIN: But there has never been a ruling that a State court has to use a specific word, even the word mitigation. Mitigation is a lawyer word.

QUESTION: But it is used now. I mean, at least that model charge that we've been hearing about.

MS. BALDWIN: Yes. There -- it has been incorporated in it now, but under the instructions that Buchanan's jury were given, they were absolutely constitutionally reasonable.

What the jury was told is, consider all the evidence, and then in their verdict form they were told, you have to certify that you considered all the evidence in mitigation, and then you have both attorneys arguing not just that they have to consider mitigation, but telling the jury what mitigation was, and describing it to them in great detail in general sense and in a statutory sense, and this is a jury that knew how to ask questions, too, because in the guilt phase they came back and asked for a definition of a particular instruction.

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This jury asked no questions when they were sent back to the jury room with the jury instructions and the written verdict forms, and when they came back and the written verdict form certifying that they had considered all the evidence in mitigation was read in open court, the trial judge polled each juror individually and said, is that your verdict, and each one said that it was, so the --

QUESTION: The instructions were given to them in writing and they took them into the jury room, is that correct?

MS. BALDWIN: As well as two written verdict forms, one for life and one for death, and the judge read in open court the jury instructions and said I'm also sending back the jury verdict forms with you, and then the prosecutor in his closing argument read the jury verdict form, including the words certifying that they had considered the evidence in mitigation.

QUESTION: But the instructions went into the jury room, too?

MS. BALDWIN: And the instructions went into the jury room, and it is I think a cynical view of juries to say that they did not read these instructions, or did not read the verdict form, and then certified that they had in fact considered the evidence in mitigation, when that was

the only issue before the jury for 2 days of evidence.

It was conceded by both sides what their duty was, what the evidence was, even the fact that there had been mitigation that had been proven. The prosecutor said if the only issue was, is there mitigation, we could have all gone home Thursday night.

I mean, this was -- there was no question in this case, much less a reasonable probability, that the jury took these instructions that they were given and then somehow believed when they went back to the jury room after hearing that, the prosecutor's argument, and after reading the instructions, and after listening to 2 days of evidence, that somehow they were precluded from considering the evidence in the defendant's favor that he had put on, and this Court has never held that the word mitigation has to be used in a jury instruction sentencing phase, or that --

QUESTION: Thank you, Ms. Baldwin.

MS. BALDWIN: Thank you.

QUESTION: Mr. Zerkin, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF GERALD T. ZERKIN

ON BEHALF OF THE PETITIONER

QUESTION: Could you address, Mr. Zerkin, whether or not you preserved the point that this

instruction in itself is flawed and that therefore some corrective measure is required?

MR. ZERKIN: Yes, sir. It was raised throughout. It was raised on direct appeal. The argument on direct appeal was that the jury had received no guidance. In the State habeas petition we raised the fact that there was a failure to instruct as to mitigating circum --

QUESTION: Well, but I would think -- Justice Kennedy can speak better than I, what he's talking about -- what I would be interested in, and if -- is this particular point, that this third paragraph of the instruction, the word or, because of its dysjunctive phrasing, was that raised, and if so when and where?

MR. ZERKIN: The issue of --

QUESTION: Answer -- I think that can be answered yes or no.

MR. ZERKIN: I think the answer to that is no, that it was not specifically -- that that was not specifically raised. What's been raised is the failure -- throughout has been the failure to mention mitigation, to discuss it, to describe it, to give the statutory mitigating circumstances, to do anything with mitigation at all.

It's been Mr. Buchanan's position throughout

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that the difficulty here was that nothing was done, and that the Court had -- if he didn't like his jury instructions, understanding there was no model jury instruction at the time that dealt with mitigation, if you don't like the ones that I've done, do one yourself, come up with the issue, and you know, do something with mitigation.

It was raised in the Virginia courts throughout, and the Virginia court in the State habeas proceeding ruled that when we raised it, we were raising the same claim that had been raised on direct appeal. They applied the rule of the case Hawks v. Cox, which is that we dealt with this on direct appeal, it was raised, it's preserved, and in that we raised all -- the failure to mention mitigation and all of those issues.

So that's come up all along, and in the cert petition at pages 19 to 20 we raised -- the issue that we talked about was the failure to do anything in reference to mitigation, so that issue has in fact been put before every court that's looked at it, and the Virginia supreme court recognized when it came up on State habeas that it was exactly the same thing that had been presented before, and the same issue was presented.

Justice Breyer, let me note that --

QUESTION: You say it's on page 19 to 20 of your

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cert petition? Let me --

MR. ZERKIN: At the bottom of 19 it talk --

QUESTION: Yes.

MR. ZERKIN: It talks about, absent any instruction on the meaning of mitigation.

QUESTION: On the meaning of mitigation and what kinds of evidence comprise mitigation, which I think goes to the same point that you raise in question 1 of the question presented, that the specific mitigating circumstances, the statutorily defined ones, were not the subject of the instruction.

MR. ZERKIN: But as Justice Breyer pointed out, also in that question is that, despite counsel's request for such instructions, and where the jury charge is devoid of any reference to mitigation. I mean, that's -- that goes -- that clearly raises that part of the issue. There are two parts to it.

QUESTION: But that doesn't specify the dysjunctive, or. I mean --

MR. ZERKIN: Yes, you are correct. You are correct.

The issue that you raise, Justice Breyer, is -- I think is actually exacerbated by the verdict form. I mean, if we assume that the jury looks at the verdict form, on page 77 and 78 of the joint appendix, what it --

one of the verdict forms recites the fact that they have found an aggravating circumstance. The other verdict form does not have the recitation of an aggravating circumstance, so the --

QUESTION: So what you raised -- I'm trying to be favorable to you in this question, because I want to see if you -- and so don't let me be too favorable, but I take it you'd raise the fact that the instruction, perhaps because of the word or, or without it, or it didn't mention it, is a zero, and since it's a zero, there's nothing about mitigation and you have to say something.

MR. ZERKIN: That's correct. We have argued --

QUESTION: And in your calling it a zero, did you talk about the word or, or not?

MR. ZERKIN: I don't think we talked about the word or. What we talked about was the fact that the jury instruction was devoid of any reference to mitigation.

The difficulty that we have with the verdict form is that you have -- it exacerbates the problem of confusing mitigation with aggravation, because what it says is, once you find an aggravating circumstance you then -- the only choice you have, the only place that's recited is in the first verdict form, and that verdict form provides one possibility, and that's death.

The other alternative form which provides for a

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life verdict doesn't recite the fact that you found an aggravating circumstance, so once again, it doesn't provide clarification for the jury. It actually provides further confusion for the jury.

QUESTION: Well, it does say having considered -- it does say having considered all of the evidence in aggravation and mitigation.

MR. ZERKIN: It does, and if we assume that that's part of the jury instruction and the jury looked at it, we have that additional problem that the aggravating circumstance only results in death, and it's -- where no aggravating circumstance is found results in life.

CHIEF JUSTICE REHNQUIST: I think you've answered the question, Mr. Zerkin.

MR. ZERKIN: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

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

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DOUGLAS McARTHUR BUCHANAN, JR., Petitioner v. RONALD J. ANGELONE, DIRECTOR VIRGINIA DEPARTMENT OF CORRECTIONS
CASE NO: 96-8400

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

BY Ann Marie Federico

(REPORTER)