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OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LONNIE WEEKS, JR., Petitioner v. RONALD J. ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS.

CASE NO: 99-5746 c-1

PLACE: Washington, D.C.

DATE: Monday, December 6, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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LONNIE WEEKS, JR., :

Petitioner :

v. : No. 99-5746

RONALD J. ANGELONE, DIRECTOR, :

VIRGINIA DEPARTMENT OF :

CORRECTIONS. :

- - - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, December 6, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

MARK E. OLIVE, ESQ., Tallahassee, Florida; on behalf of the Petitioner.

ROBERT H. ANDERSON, III, ESQ., Assistant Attorney General, Richmond, Virginia; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 99-5746, Lonnie Weeks v. Ronald J. Angelone.

Mr. Olive.

ORAL ARGUMENT OF MARK E. OLIVE

ON BEHALF OF THE PETITIONER

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

There is an intolerable risk in this case that the jurors erroneously and mistakenly believed that in sentencing the petitioner, they had a duty to sentence him to death upon the finding of an aggravating circumstance. This violates the Eighth Amendment and the petitioner seeks resentencing.

Five facts compel this conclusion.

First, the jurors promised to do two things: one, sentence according to the instructions; and two, come back and ask the court what the instructions meant if they didn't understand them.

Number two, the actual sentencing instructions were quite short. The pertinent instructions are at pages 199 and 200 of the JA and are two-pages long.

Number three, the jurors had these short instructions read to them in court. They heard these

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short instructions.

Number four, the jurors then took these short instructions with them into the jury room. They had them in the jury room. If there was any confusion or lack of memory about what the instructions said, they had them there to study.

And number five, they clearly did study these jury instructions.

QUESTION: The instruction you're talking about was upheld in Buchanan, was it not?

MR. OLIVE: The instruction in the context of Buchanan was upheld.

QUESTION: It was upheld across the board I think. It didn't say in the context of Buchanan.

MR. OLIVE: Well, Chief Justice Rehnquist, as I read Buchanan, there is a footnote 4 in which you write that the instruction which would be unconstitutional would be a strained -- s-t-r-a-i-n-e-d -- strained construction of the statute. And then after that footnote, the Court goes on to say, were we concerned -- and that's where the Boyde citation is -- and the Court says, quote, in this context, in the context of all the things that had happened at trial -- in this context under Boyde is satisfied.

QUESTION: But the -- the qualification is were

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we to entertain any doubt, which is a subjunctive. It didn't say we did entertain doubt. It's an alternative ground.

MR. OLIVE: Well, my reading of the case is -- is the same as your reading of the case, that there was an application of Boyde. But also the fourth footnote says to me that if a juror had this understanding, the strained understanding, of the instruction, the Court would unanimously condemn it. And our argument is that these jurors had -- or there's a risk -- had this strained misunderstanding of the -- of the instruction.

QUESTION: Well, how broad a rule are -- are you asking for here? Is it limited to capital cases?

MR. OLIVE: The rule in this case we feel is compelled -- we're not seeking a rule. We think it's compelled by Eddings, and yes, the rule that we're asking for is a capital case rule.

QUESTION: And is it that whenever the jury asks -- sends a note to the judge asking a question that the judge can't refer them to an instruction; he has to respond directly to the question?

MR. OLIVE: Not at all. The rule --

QUESTION: Then how -- how do you differ that?

MR. OLIVE: Well, here you have a question which illustrates that the jurors are poised to violate Lockett

and Eddings. We have parsed this instruction. We have thought about it, and we have thought about it enough to -- to write out a question and to highlight what we think our options are. That's far different from, you know, what's -- what are we doing here?

QUESTION: Well, I think that may be reading more into the question than is justified. I think it may be a reasonably common practice for trial judges, when faced with a question from a jury about an instruction, to refer the jurors back to a particular instruction if the trial judge thinks that it's -- that it properly answers the question. And maybe they just haven't focused on that aspect of it. Is that not a practice that occurs not infrequently in trial courts?

MR. OLIVE: It -- it occurs not infrequently, primarily in non-capital cases, and it may, in fact, occur in some capital cases. The amicus brief, which says the cases that are illustrative there are no -- none of them are capital cases.

QUESTION: Do we -- do we also look at the surrounding circumstances, the arguments of both counsel and any other instructions that are included in the packet?

MR. OLIVE: I think that once the jury or the sentencer comes out and illustrates what they're thinking,

then the surrounding circumstances, which are so important in a Boyde context when you're trying to figure out what they might have been thinking, carries less weight. I think the overall content --

QUESTION: But it may carry some weight. I'm concerned that in this case both the attorney for the defendant and the prosecutor made clear during their closing arguments that the jury was free to impose a life sentence if they wished, despite finding an aggravating circumstance.

MR. OLIVE: And -- and the sentencing judge in Eddings had a statute -- and we presume he understood it -- that said any circumstances can be admitted and any circumstances could be considered. But the risk in Eddings was that judge's comment -- offhanded some would argue, or controlling others would argue -- that he believed he couldn't or might not be able to consider certain mitigating circumstances. And that was in the context of not argument, but a record full of mitigating circumstances on a statute that he was presumed to understand. And Your Honor wrote in concurrence that a reasonable argument could be made that that judge was just making an offhanded comment.

QUESTION: Mr. Olive, you --

MR. OLIVE: A reasonable argument could be made

here -- yes, Justice Scalia.

QUESTION: You argue as though the -- the judge did not give the jury any help at all when they asked this question, but that's not the case. He just didn't -- he just didn't snap back, well, you know, the question is already answered in the instructions. He specifically referred them to the -- to the paragraph of the instructions that answered the question. I think that's -- that's a considerable help.

And then you add to that the fact that -- that the jury, which had already asked two questions and therefore was not shy about asking when it didn't understand the instructions, did not come back and -- and say, we still don't understand. I don't know why you think there's a serious risk that they -- that they still didn't misconstrue it.

In fact, you know, you might argue there's a -- a greater risk of misconstruction when you're -- when you're dealing with a jury that has displayed it's -- it's reluctant to ask questions. Here's a jury that asked the question. The judge said, this is the paragraph that answers your question, and -- and you heard nothing more from them.

MR. OLIVE: It's the only paragraph in the -- the instructions that would have created the question.

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There's no other operative paragraph in the instructions. And I would bet -- I want to focus not on -- on lawyers or judges or justices, but on jurors. And this quote's recognition many times -- once in Simmons at 512 U.S. 171 that we presume jurors are going to follow the instructions even if pointed back to them. And now I'll quote. Because the consequences of failure are so vital to the defendant, the practical and human limitations of the jury system cannot be ignored. And the practical and human limitations of the jury system here was I bet the jurors had memorized that instruction when it finally got back to --

QUESTION: But even -- even with --

MR. OLIVE: I'm sorry.

QUESTION: Even with laymen who are seeking advice of counsel, it's a common occurrence for them to phone counsel with a question and say, it's in the contract. Just read paragraph 2. It answers it. It's not just judges and -- and attorneys. We're used to the fact -- we say, look it, it's in the -- if you read the statute carefully, we've considered this and it's there.

MR. OLIVE: Well, a contract is a great example. It's like a RICO instruction. It's -- it's plausible, even probable that a juror or a client would say, I don't get it. That's because it's in paragraph 44(a)(2)(B).

Here, there was one instruction --

QUESTION: Suppose the --

QUESTION: And what was that instruction?

QUESTION: Suppose the judge had -- if I can just -- one follow-up. Suppose the judge had said, I'm going to tell you to -- to read paragraph of the instructions that answers your question. If you have any further questions, please do not hesitate to come back.

MR. OLIVE: That is --

QUESTION: Suppose he had said that.

MR. OLIVE: The -- the fact that the jurors came back two or three times, which Justice Scalia referred to, to me cuts in the petitioner's favor.

QUESTION: Suppose the judge gave the comment at the end of his -- of -- of his answer that I've -- that I've hypothesized.

MR. OLIVE: Well, say he did it in this case and in the context of this case. They came back three times, and every time they came back, they didn't get an answer. They got an answer which was no more helpful than what had already been given. The answer was follow my instructions. The answer that you just gave was follow this particular instruction, and the juror -- a reasonable juror, a practical juror would say, you know, I've got that memorized. That's why I'm here. I came out --

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QUESTION: No, but they didn't --

MR. OLIVE: I came out of the jury room.

QUESTION: But they didn't say that.

My -- I guess I want to be clear on one thing. Do you think there is anything either erroneous or at least in an objective sense incomprehensible about the instruction to which he referred them?

MR. OLIVE: Incomprehensible? No. Ambiguous? Yes.

QUESTION: What was ambiguous about it?

QUESTION: Ambiguous? What is -- I --

QUESTION: What page are we on? Let's hear the --

QUESTION: I frankly find it hard to see how you could have said it more clearly if he had tried to reformulate it in some other way.

MR. OLIVE: Well, the ambiguity would be the ambiguity recognized by the dissenters in Buchanan, is that if you find an aggravating circumstance, what you must do is impose the death penalty or -- and then the rest of the phrase -- to where if you -- if you haven't found an aggravating circumstance, then you shall not --

QUESTION: That's not what it says.

MR. OLIVE: -- which -- which didn't --

QUESTION: That's not what it says. It says, or

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if you believe from all the evidence that the death penalty is not justified --

MR. OLIVE: With the --

QUESTION: -- then you shall fix the punishment of the defendant at life imprisonment.

MR. OLIVE: With the ambiguity being parenthetically, i.e., that there is no aggravating circumstance found beyond a reasonable doubt.

QUESTION: Mr. Olive, the pattern instructions have been changed since the one the Court inspected in Angelone, and they are clearer now on the point that -- that you're raising. How do the -- how did that change come about? What precipitated the change so that now the jury would get a clearer answer had they come in with that question?

MR. OLIVE: I can only speculate. I do not know the historical background of that change. So, it would be speculation. But my speculation, which would be informed, would be this Court's opinion that there was a problem where there was a -- a discussion of a problem and a split in the Court about whether these were clear or not clear.

QUESTION: I thought that the -- sorry. Were you finished?

MR. OLIVE: Yes.

QUESTION: I thought the ambiguity was with the

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word justified.

MR. OLIVE: Correct.

QUESTION: I mean, I thought it read if you find the commonwealth has proved aggravators beyond a reasonable doubt, then you may fix the punishment at death, or if you believe, from all the evidence, the death penalty is not justified, then you shall fix the punishment at life. I suppose somebody hearing that might think if I find the alternatives, it's death. If I don't find the alternatives, it's life. Wasn't that the ambiguity that's there?

MR. OLIVE: Which is a --

QUESTION: Of course, a lawyer may know that the word justified refers to mitigators, which word never appears.

MR. OLIVE: That -- after the word justified come in the parenthetical. What do you mean by not justified? That there's no aggravating circumstance found.

QUESTION: That seems to me really a re-argument of Buchanan, and I thought this Court in Buchanan had said that instruction was -- was proper.

MR. OLIVE: What the --

QUESTION: And I -- I really think I'm hearing you suggest that we should adopt the view of the

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dissenters in Buchanan, and --

MR. OLIVE: No, I am not --

QUESTION: -- that would be difficult for us to do I --

MR. OLIVE: I'm not asking that. I'm -- I look at Buchanan actually as authority for the proposition in this case because of the footnote which says, well, yes, a jury could read this way. They'd just be wrong. And if this Court had had a jury reading this instruction this way in Buchanan, I doubt that we would have Buchanan written the way it is. Buchanan didn't announce a rule that forever and ever jurists and sentencers won't make a mistake or won't do a strained --

QUESTION: No, but it did announce -- it did announce that this instruction was sufficiently clear to be under the Constitution.

MR. OLIVE: That -- I think that that's -- and what we're arguing is that an application in particular cases, it would nevertheless not be constitutional. The court and jury --

QUESTION: Well, you're -- you're saying then that even though an instruction is perfectly sound, the Constitution requires that if a jury -- juror asks a question, the trial judge has to do something more than simply refer them to the instruction. That's an

extraordinary doctrine.

MR. OLIVE: Under some circumstances, it is not extraordinary. In fact, when jurors don't even ask a question. Penry, for example, perfectly constitutional sentencing instructions, but the circumstances of that case compelled an additional instruction.

QUESTION: Well, do -- do --

MR. OLIVE: And Skipper is another example.

QUESTION: Do you have any authority for the proposition that the Constitution will require a judge to answer a juror's question by something other than a referral back to an instruction? Is there any case where we have held that?

MR. OLIVE: I think that the -- the cases holding that either implicitly or expressly are Penry and --

QUESTION: Was that -- was that --

MR. OLIVE: -- and Simmons.

QUESTION: Was that a jury question?

MR. OLIVE: No. It was even less than that.

QUESTION: Well, I -- I'm asking you do you have a case from this Court in which the Court held it was constitutionally required when a -- a good instruction was given, but a juror asked a question, that the judge could not simply refer them to the instruction.

MR. OLIVE: I do not.

However, with respect to both Penry and Simmons, the issue was what would a juror think, and if it was possible and reasonably likely that a juror would think something, then this Court found that constitutionally adequate previously juror instructions were not sufficient in that case.

QUESTION: But how does it --

MR. OLIVE: And additional -- additional instructions had to be given.

QUESTION: Four members of the Court thought it was -- you were right on it being ambiguous on itself. Five --

MR. OLIVE: Buchanan?

QUESTION: Yes.

MR. OLIVE: In Buchanan.

QUESTION: Five didn't. So, it's okay. The instruction is okay. That's the end of it.

Now, you can't have a rule of law that says whenever a juror doesn't find an okay -- you know, whenever a juror is confused, the judge can never just refer them back to an okay instruction.

MR. OLIVE: No.

QUESTION: That couldn't be the rule of law.

MR. OLIVE: But you can have a --

QUESTION: Therefore, this case, if you're going to win it, must have a clear factor about it that makes this special and what is it?

MR. OLIVE: The clear factor about it that makes this special is that these sentencers were like the sentencer in Eddings. There is an intolerable risk that these sentencers believe they were precluded. Now, in Eddings, we had a judge who we presume knew the statute and had an offhanded remark --

QUESTION: If -- if the statute is, as you say, ambiguous, why would you think that some other jury that didn't ask a question was simply wrong in picking the wrong -- the wrong choice of the ambiguity? I -- I don't know why the asking of the question, if it's really ambiguous, there's -- there's an enormous risk that a jury that doesn't ask a question would have interpreted it the wrong way.

MR. OLIVE: But the Court in Buchanan stated that an interpretation like this would be a strained interpretation. When you have before you a sentencer who has a strained interpretation, as in Eddings, it is the responsibility of the State court or the Federal court --

QUESTION: Is there --

MR. OLIVE: -- to correct that strained

interpretation.

QUESTION: Is there some principle that a person who is taking a strained interpretation will normally ask a question?

MR. OLIVE: No, there isn't.

QUESTION: It -- it seems to me that's essential to your argument.

MR. OLIVE: No, there isn't, but when a court --

QUESTION: Well, if that's -- if that's the case, then the fact that they -- that they asked a question makes no difference. And if -- and we should simply say in all cases there's a risk that a jury is -- is going to come back with the wrong -- with the wrong answer to this. And -- and we said, you know, that that's not the case.

MR. OLIVE: It alerts the court that the jury or sentencer is poised to violate the Eighth Amendment.

QUESTION: It doesn't -- it doesn't --

MR. OLIVE: If they come back.

QUESTION: -- alert the court unless you -- unless you somehow sustain the principle that a person who is likely to take a strained interpretation is also likely to ask a question. And I don't know why that follows.

MR. OLIVE: You know, it's -- it is only in the

cases where the jury comes back and asks the question that I think that you can feel comfortable, especially under the circumstances of this case where they highlight and underline and tell you what they've been thinking, that they have interpreted the sentencing instruction in a way that could violate Lockett.

We have lots of judges -- now, I'm sure this won't be a popular notion -- who may not act according to a statute or many not act according to sentencing instructions because they make a mistake. That may happen all the time. But when the judge indicates that a mistake -- especially a capital sentencing judge indicates that a mistake may have been made, this Court does not tolerate the risk. And that's the Eddings principle.

QUESTION: Mr. Olive, what -- what do you make of -- of this portion of the -- the facts here?

We start with the assumption that we have a jury that is not too bashful to ask a question.

Number two, the judge refers them to an instruction which -- which we must take as a proper instruction. And in fact, I -- I do take it.

Number three, having been referred back to that instruction which the jury has in front of it, the jury then spends approximately 2 hours before it returns a verdict. It doesn't come back with a snap verdict 5

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minutes later saying death penalty, nor in that 2-hour period of time does it come back with a further question.

If we are going to engage in psychologizing here to try to find -- try to assess the risk, isn't the most probable inference the following one? That in fact this jury, which knew how to ask questions, didn't have a further question to ask, and number two, spent their 2 hours in considering the very discretion which, according to the instruction, they had?

And if we draw those inferences, I don't see where there is an intolerable risk or even a substantial risk that the jury misunderstood these instructions.

MR. OLIVE: There's something in this record that I've never seen before. The jurors come back with their verdict. And the juror then -- the jurors then are polled, one by one. And the first juror's name is called and the -- the question is, is this your verdict, the death penalty? And the court reporter sua sponte, without any request from anyone, puts in a parenthetical, whereupon a majority of the jurors were in tears.

Now, they were gone for 2 hours. Are they in tears because they think they have a duty they don't want to carry out?

QUESTION: That is -- I -- I don't see how that can possibly get us beyond pure speculation. Maybe what

you suggest is true, but it seems to me far more likely they are in tears because they have -- they have had as jurors to perform the -- the most terrible act that a juror can ever have to do, and that is to recommend a death sentence for someone. And -- and for me to say or for this Court to say, well, the -- the emotional reaction is, in effect, a -- a basis for inferring incapacity to understand instructions, rather than to say their emotional response was a response to the terrible burden that they have just discharged, would be pure speculation.

MR. OLIVE: And the other position would be pure speculation. And our obligation is to remove speculation.

Let me go to the second part --

QUESTION: No, but your -- the -- the burden of your argument is to -- is to indicate to us that there is the risk that you claim.

MR. OLIVE: Correct.

QUESTION: And I don't see anything more than a speculative basis for your argument.

MR. OLIVE: Well, referring the --

QUESTION: May -- may I, however, go back to my question, which has sort of dropped out of our dialogue here? If -- if we -- perhaps we should agree to disagree on the significance of the jury's emotional reaction. And let's go back to my question.

Non-bashful jury, question, referral to an instruction which is sound, 2 hours of further deliberation before the jury comes back, no further question. Isn't the most reasonable inference, if we're going to draw one at all, that this jury that knew how to ask questions didn't have a further question and spent the 2 hours, in effect, deliberating over the discretion that they understood themselves to have?

MR. OLIVE: No. I think the jury came back three times. They were promised during voir dire if you come back, you'll get further instruction that will help you, and three times they came back. The further instruction was not additional instruction, not a clarifying instruction; it was follow the instructions. So, your argument --

QUESTION: Well, no, but it wasn't just follow the instructions. The -- the response was go to a certain paragraph of instruction number 2 I think it was -- whatever -- which was the instruction that was right on point.

QUESTION: That's the instruction that gave rise to the question.

MR. OLIVE: The instruction -- the instruction gave rise to the question.

QUESTION: If there ever was a circular

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argument, that's it.

MR. OLIVE: And the -- the question supposes that repetition equals clarity for these jurors --

QUESTION: Well, sometimes --

MR. OLIVE: -- and that's -- that's an inference that we can't draw as well because I think that --

QUESTION: Sometimes in reading briefs, I find that reading a paragraph a second time helps me, and I understand it the second time when I didn't the first time. And the premise of the judge's response is that something like that may happen with jurors in jury instructions, and it seems to me a pretty sound assumption to make.

MR. OLIVE: That's why I've tried to set the table with these jurors did that. They read the -- the paragraph a second time, and I think it's reasonable to conclude, they read it over and over. These jurors came back with a very detailed question, illustrating they had read the paragraph or the instruction again and again. They had a simple yes or no question they had crafted, illustrating to the court what they thought the problems were with the case and what their confusion was. They had highlighted it. I can't for a moment think these jurors hadn't read and reread, been confused, read it again, and formulated the question.

Under those circumstances, I don't think it does any good whatsoever to send the jurors back. My response as a juror would be I've practically memorized this instruction.

QUESTION: Is your point -- is your point -- I don't want to put words in your mouth, though I suppose I will be, but I mean, if their confusion is they do not know if the two words, not justified, refer to absence of aggravators or presence of mitigators, if that's their confusion, I guess reading those two words, not justified, 10 million times will not clear up the confusion.

MR. OLIVE: Well put.

(Laughter.)

QUESTION: Mr. -- Mr. Olive, is this a case controlled by AEDPA, the -- the new statute dealing with post-conviction relief?

MR. OLIVE: There have been arguments made that 2254(d) applies. The arguments back and forth. I'll go into them if -- if Your Honor would like me to, but I guess the simple answer is --

QUESTION: What is your position?

MR. OLIVE: That --

QUESTION: Is it or not?

MR. OLIVE: That the standard of review under 2254(d) ought not to apply in this case.

QUESTION: Why?

MR. OLIVE: And the reason that it ought not to apply in this case is because 2254 and -- and all of A-E-D-P-A, or AEDPA, has as it's policy concern or -- or recognition that State courts that grapple with Federal constitutional issues ought to be rewarded or certainly not punished for their good faith efforts to enforce the Federal Constitution by looking at the legal landscape and applying the law. And when you have a decision from a State court which doesn't reflect that struggle, which is simply a summary denial, then you don't have an adjudication or an opinion to which deference ought -- ought to apply.

Now, that issue has not been thoroughly briefed or addressed by the parties, but that would be my argument with respect to 2254(d).

QUESTION: I'm surprised you call it a summary denial because the Supreme Court of Virginia wrote an opinion dealing with all sorts of issues at some length, and they said this issue simply was -- was barely averted to and no supporting authority. So, they said we will -- you know, we'll rule against you on it.

MR. OLIVE: It said just denied and that's what I mean by summary --

QUESTION: Are you talking about the --

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MR. OLIVE: On these -- on these claims, the State court simply said we find no merit and denied and didn't state the legal basis for it and didn't give us what the legal landscape was.

QUESTION: Well, but it said that the -- that the claims were simply stated and not argued, didn't it?

MR. OLIVE: It said that these so-called arguments we reject, and in the brief the so-called arguments were our reference to Penry and to Woodson and to Brown. So, yes, it did say that, but the court in its opinion didn't indicate on what basis it was rejecting the claims.

QUESTION: Well, if section 2254(d)(1) is applicable --

MR. OLIVE: Yes.

QUESTION: -- then we would have to say and determine here that the Virginia Supreme Court, in denying the claim, rendered a decision that was contrary to --

MR. OLIVE: Correct.

QUESTION: -- or involved an unreasonable application of clearly established Federal law as determined by this Court.

MR. OLIVE: Correct.

QUESTION: And I'm troubled by that because I don't know of any case where we have articulated anything

about a duty to instruct in different terms rather than call a jury's attention to an instruction the court believes covers it.

MR. OLIVE: Our --

QUESTION: So, I -- I don't see how we're -- if -- if AEDPA applies, I don't see how you can meet the standard.

MR. OLIVE: Our argument is that Penry recognized that the Eddings rule applied to juries as of 1986. Our position is that the Eddings rule is that if there a risk that the sentencer considers themselves precluded, then the State has to correct that misimpression. So, Penry would be our argument that Eddings was the law, that the Virginia Supreme Court opinion is contrary to or that they applied in an unreasonable manner.

QUESTION: Mr. Olive, you may have adverted to this earlier and I may not have been paying attention when you did. But let me ask you this. If the judge in this case had followed his reference back to the instruction by saying the following thing, would you still have an argument here? What if the judge had said, if after you have reread the paragraph I've referred you to, you still have a question about the way it should be applied, come back and we'll go further? If the judge had said that,

would you have any case here?

MR. OLIVE: I believe I would. Again, I got two -- I have two answers to that. One, they might not believe that, having been promised that throughout voir dire and three times it not happening.

But number two, the McDowell case, which we put in the -- in the petition and is also in -- in the blue brief -- that's a case in which the jury came back, asked a question, the judge answered it, and the judge said to the jurors, now does that answer your question? And all the jurors -- or at least one of the jurors on behalf of the jurors said, yes, that answers our question. And in McDowell, the Court said by referring them back to the same instruction, it would be folly to presume that that instruction really helped them out of their dilemma. So, I think we would still have the same problem.

QUESTION: That's a Ninth Circuit case?

MR. OLIVE: Correct. It's Judge -- Judge Trott.

QUESTION: Mr. Olive, I thought in response to the 2254(d) that you were relying on Boyde to say that if the jury misunderstood to the extent that it wasn't going to take mitigating factors into account --

MR. OLIVE: Right.

QUESTION: -- then that would be reversible -- cause for reversal.

MR. OLIVE: Well, Penry I think involves a Boyde analysis as well, if I'm not mistaken. But our position is that once the juror -- once we know what the jurors are thinking, once they have given us an Eddings statement, Boyde may no longer be the test. The test may instead be a test that has a different risk assessment, which is an Eddings test, whether there's a -- a risk as opposed to a reasonable likelihood. And if there's a difference between those tests that's more petitioner-friendly, I would assume the Eddings test would be the test that applied.

QUESTION: I guess if we adopted your position, States would have to have two form instructions because if you say just repeating the form instruction is not enough, you'd either leave it to the judge to do a seat-of-the-pants reformulation of the -- of the standard State instruction or you -- you would have to have a second -- a second alternative prescribed as a form instruction. Indeed, maybe a third because if they don't understand the second and they come back and ask the question again, you're going to need a third one. Or else you let each judge seat-of-the-pants it every time they -- every time they say, I don't really understand it.

MR. OLIVE: In -- in Eddings, this Court didn't remand the case back to the trial court and say read the

statute, just read the statute. This Court said, you've got to consider mitigating circumstances.

QUESTION: Thank you, Mr. Olive.

Mr. Anderson, we'll hear from you.

ORAL ARGUMENT OF ROBERT H. ANDERSON, III

ON BEHALF OF THE RESPONDENT

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

First, let me deal with the Buchanan holding and counsel's suggestion today that the holding in Buchanan upholding the validity of the model jury instruction that was given verbatim in this case somehow was something less than an unqualified holding. Counsel today, for example, talks about that the instruction was ambiguous but not wrong, and he refers to this ambiguity being recognized by the dissenters in Buchanan.

But in the Fourth Circuit, after Buchanan had been decided, Weeks repeatedly indicated in his brief and his other post-opinion pleadings that Buchanan had, in fact, upheld and made clear the facial validity of the model jury instruction. He didn't say anything along the lines of, well, in certain contexts the instruction would be okay, but not in others. It was just a flat-out acknowledgement of the obvious, that the holding in Buchanan was, in fact, a holding on the merits and made

clear that the jury instruction adequately explicated to the jury its sentencing options.

In his cert petition -- and this Court in Buchanan talked about the model instruction establishing a decision. I think the words were a simple decisional tree. And Weeks in his cert petition echoed -- he parroted that very language. He said much the same, that the model instruction given in -- in the case and that the court referred the jury back to, that it established this decisional tree that a juror ought to understand. The cart petition was premised upon a facially valid jury charge, and the question was, well, if you have a facially valid jury charge, but the jury, nevertheless, asked a question about that, where does that leave you? What sort of duty does the judge have with respect to dealing with that?

But the point is the cert petition specifically presupposed the facial validity of the jury charge for purposes of this case. And this Court has made clear in any number of cases that where you have a premise in a cert petition, such as the one I've just said, that you can't later try to wiggle away from that and say, well, that's not really the premise --

QUESTION: No. It assumes the -- the instruction was facially valid, but that this particular

jury, just as the dissent in the other case predicted, did in fact misunderstand it in precisely the way the dissent predicted it. Isn't that correct?

MR. ANDERSON: Well, I'm --

QUESTION: That's why they asked the question.

MR. ANDERSON: No, I don't -- I don't agree that that's why they -- they asked the question.

QUESTION: Well, the question certainly would be the question that one reading the dissent would expect a jury to ask --

MR. ANDERSON: Well, it's -- it's --

QUESTION: -- if one thought the dissent was right, which I happen to, of course.

(Laughter.)

MR. ANDERSON: And it was a very eloquent dissent, Your Honor.

(Laughter.)

QUESTION: I didn't -- I didn't write it.

But it does raise the question that a jury might so interpret the instruction, and it appears from this record the jury did so interpret the instruction.

MR. ANDERSON: Well, let's go to the dissent in Buchanan. It was -- it was a 6-3 vote, and it's very interesting because the dissenting opinion repeatedly, or at least several times, talked in terms -- it didn't say

the instruction was just flat-out wrong or constitutionally deficient. It said it was overly ambiguous. But it said several times in the course of that dissent that if there had been an instruction on mitigation, that would have handled the matter. That would have made it clear to the jury.

We have a mitigation instruction here -- and this is one of the two differences between this case and Buchanan which otherwise, for purposes of the present case, is -- is so similar in terms of procedural incidents. But we have in -- in Buchanan -- excuse me -- in this case in distinct contrast to Buchanan, which was one of the primary complaints there, an instruction on mitigation that went well beyond what is even the model instruction in Virginia today on mitigation.

It said -- and this is at 195 of the appendix, and it goes on in the first paragraph to define mitigation evidence generally. It says in the final sentence of that paragraph, the law requires your consideration of more than the bare facts of the crime. And considering in this case that the only factor, aggravating factor, found by the jury was vileness, that's another way of saying, you have to consider more than the -- the vileness of the murder.

Then the second --

QUESTION: Mr. Anderson --

QUESTION: Do you think that's an equivalent of saying that even though you find the aggravating circumstances, you may nevertheless impose a life sentence? Do you think that sentence does that job?

MR. ANDERSON: Well, I think we have to look at the -- at the rest of it. The --

QUESTION: Well, what other sentence in -- on 195 conveys the message that the jury sought in this case?

MR. ANDERSON: The -- the final paragraph, the first sentence says, you must consider a mitigating circumstance if you find there is evidence to support it.

Now, the argument here, Your Honor -- it's very important to bear in mind. The argument consistently and exclusively has been that the answer -- there's never been any claim, and there couldn't be, that this jury ever received any misinformation from -- from the trial judge, from the commonwealth's attorney, from defense counsel on such basic principles as the fact that you have two sentencing options in the sentencing phase, life and death, that the death penalty under no circumstances is mandatory, that the life sentence under a certain circumstance is, and that under any circumstances, you must consider the mitigating evidence.

But the argument has been that the answer didn't

go far -- not that the answer was wrong, but the answer was -- didn't go far enough and left open too much possibility that the jury would disregard the mitigating evidence. Period. Not that it might consider the mitigating evidence in some fashion, but that it -- but that it's consideration was too restrictive a la, say, for example, in -- in Penry. And those -- those are very different matters.

QUESTION: Mr. Anderson, may I back you up a bit? Because you said the instruction that was given at 195 goes beyond what is the instruction today. The instruction today on mitigation is very clear. It says that even if the commonwealth had proved beyond reasonable doubt the existence of an aggravating circumstance, the jury must, nonetheless, consider the mitigating circumstances and weigh that against the aggravator, precisely what was lacking in this case. So, I can understand your argument when you say this instruction was enough, but for you to say that it went beyond what today would be told to a Virginia jury I think is quite wrong.

MR. ANDERSON: Well, Justice Ginsburg, we -- we have two different model instructions here, and I -- if I recall correctly, the one you're alluding to is the model instruction dealing -- the current version of what was instruction 2 in this case, which is if you find

aggravating evidence and then if you find mitigating evidence, et cetera. The model instruction I'm referring to is the Virginia model instruction on mitigation.

QUESTION: Yes. This is one is labeled Capital Murder Bifurcated Penalty Trial Mitigation. That's the one I just read to you. Then there's the other change in the capital murder, one aggravator instruction. So, there were two changes that were made.

MR. ANDERSON: Well, the model -- I have what I understand to be the current model jury instruction in Virginia on mitigation which simply says, if you find that the commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance in determining the appropriate punishment, you should consider any evidence presented of circumstances which do not justify or excuse the offense, but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment. That's the one I'm alluding to.

And the instruction here, which in the second paragraph detailed a number of examples of mitigation --

QUESTION: It didn't say anything about if you find one aggravator nonetheless. That's what was missing from the old instruction and is present in the new one.

MR. ANDERSON: Well, of course, the -- the old instruction six members of the Court -- and as Weeks

repeatedly conceded -- the old instruction --

QUESTION: Six members of the Court thought that what happened in this case wouldn't happen under this instruction, and they were wrong.

MR. ANDERSON: Well, I --

QUESTION: It did happen in this case. What they -- what was predicted in the dissent happened in this very case.

MR. ANDERSON: Well, but the -- the point is, Your Honor -- and it seems to me the underlying premise in -- in many respects of this appeal -- is that the asking of the question was some sort of extraordinary development that -- that basically rendered both before and after everything in this case essentially meaningless. And it changed the case for good.

But we cited many cases --

QUESTION: -- every instruction that a jury asks a question about has to be a flawed instruction?

MR. ANDERSON: No. No. No, sir.

QUESTION: But do you concede that -- back away from this case -- not this case. Is it possible that a perfectly valid instruction could be given in a criminal case and a jury could inquire of a judge and indicate such confusion that some clarification might be required?

MR. ANDERSON: Yes, Justice O'Connor. Suppose,

for example, the jury either in an initial question or, say, a follow-up question -- of course, it's highly revealing that there was no follow-up question here. But suppose the jury had not merely asked the question in general terms -- and by the way, the question didn't say, we've reviewed instruction number 2 repeatedly and we now ask the following question. It did not advert to the instructions at all. It simply asked in general terms if we find an aggravating factor, basically where does that leave us? Do we go ahead and automatically impose the death penalty, or do we, on the other hand, consider all the evidence and -- and decide the punishment?

But if the jury had said, in -- in complete contrast to what in fact happened here, something to the effect of, we've looked at instruction number 2 repeatedly and we think we understand it. And as we -- as we -- our understanding is that if we find one of the aggravating factors, that's it. That's the end of our inquiry. And we just basically want to make sure that's right. I think clearly the judge would -- would be required to knock that down and say, no, that's not right.

And then as part of -- of doing that, he'd have every right to say something along the lines of go back to instruction number 2, beginning with the paragraph X, and that in fact properly explains and sets forth the

sentencing scheme.

But, I mean, if there was some pretty conspicuous or egregious misconception expressed in the jury's question, then that would be something a judge would have --

QUESTION: But why -- suppose it isn't that. Suppose, for example, a totally different case. There's a State law problem. You have a terrifically adequate, perfect, wonderful instruction, and it happens to use the word abscond. And the jury comes in and says, Judge, we know that most people would know what this means and, unfortunately, our English teacher in high school -- four of us had a terrible teacher. And we just haven't a clue what that means. Just please tell us what it means.

MR. ANDERSON: The word is abscond, Your Honor?

QUESTION: Yes. And the judge says, I'll tell you what you do: go read the instruction. Now, would that be reversible error in a Virginia court? It happens to be that abscond is the whole key to the case. Would it happen to be reversible error?

MR. ANDERSON: It would be a closer question.

QUESTION: All right. They might reverse that. Fine.

If that -- if in fact there's a judgment of the Constitution of the United States requires that the jury

have a meaning of what abscond is, would you say maybe there was a constitutional issue in that case? Nothing wrong with the instruction in general, just in this case because the jury has made it totally clear they haven't a clue what the key word means.

MR. ANDERSON: I -- I disagree with the premise, Your Honor, that the --

QUESTION: Well, I'm making it as a hypothetical. So, I haven't talked about this case yet. So, don't disagree with the premise.

(Laughter.)

QUESTION: In my case with abscond, would you say that it was reversible?

MR. ANDERSON: It's -- it's very hard to answer that in any kind of meaningful way without knowing the -- the full context of the case.

QUESTION: Oh, I'll give you as much context as you'd like. The -- I make it up as I go along.

(Laughter.)

QUESTION: So -- so, you imagine the context. It happens the word is absolutely key to the case. There -- courts and the cases under the Constitution, one called Pocket I think, not Lockett, which happens to say that the word abscond is 100 percent must be clear in the jury's mind. The instruction is perfect. The jury just happens

to say, because of our English teacher, we haven't a clue what this word means.

Now, do you have to say something?

MR. ANDERSON: Well, surely one of the members of the jury would have had an English teacher that would have --

QUESTION: I mean, does the judge have more of an obligation to explain it than another juror?

MR. ANDERSON: I -- I think that the short answer is I -- if -- if the instruction has been upheld as adequate, I think the -- the judge, as a matter of constitutional law, would be perfectly within his rights to refer the jury back to the instruction and the -- and the answer -- the judge could -- could reasonably conclude that if the jury -- and you have 12 members in there. Perhaps you have two alternates as well -- that before they return the verdict, that they will come to some acceptable understanding of the word abscond.

QUESTION: Maybe -- maybe an instruction would be invalid if it used a term so technical that there was a possibility that nobody on the jury would know what it meant.

MR. ANDERSON: Well, that would -- that's an interesting --

QUESTION: Maybe that's why you have 12 jurors,

so that even if -- if some have had bad English teachers, the rest would be able to help them out as to what fairly standard words mean.

MR. ANDERSON: They'll fill in the briefs, Justice Scalia.

QUESTION: And if you use a word so hypertechnical, maybe the instruction would be bad if -- if indeed it's likely nobody on the jury would know what it meant.

MR. ANDERSON: And -- and the comfort we can take from this case is that we know from Buchanan that that's not the situation we have here.

QUESTION: No, but you basically -- if I understand your answer to Justice Breyer's question, you basically reject the proposition that it's the obligation of the judge to explain the law to the jury in a way that the jury can understand. You -- you reject that proposition because you say even if it affirmatively appears that the judge has not done that, we'll leave it to the other jurors to -- to help their -- their lagging friends to figure out what it means. So, you basically reject the -- the proposition that the judge has the obligation.

MR. ANDERSON: No, Justice Souter. I -- I think we have obviously a continuum of questions and -- and

concerns they raise. What I'm --

QUESTION: Well -- let's go back to Justice Breyer's hypothetical. You -- you say, as I understand it, that when the jury makes it clear beyond peradventure that some of its members do not understand a word which is crucial to the instruction, it does not necessarily follow that the judge has got to explain that to the -- to the jurors who are having the difficulty.

MR. ANDERSON: I don't think that it invariably would require it under any and all circumstances.

QUESTION: Well, how -- what are the circumstances in which we decide we'll play roulette and -- and take a chance that a juror will return a verdict using a term that the juror does not understand?

MR. ANDERSON: I think we have to -- I've given an example where the jury in this setting says something that flatly evinces its misunderstanding of its obligation to consider the mitigating evidence. I would agree if you --

QUESTION: Well, I thought the test we had articulated was whether there is a reasonable likelihood that the jury misunderstood its ability to consider the mitigating evidence.

MR. ANDERSON: Yes, Justice O'Connor. That's clearly --

QUESTION: Do you agree with that as the test?

MR. ANDERSON: That's -- in this case clearly that is the test, and I think Weeks fails miserably.

QUESTION: Mr. -- I -- I don't know why you're not willing to grasp the bull by the horns and say that there is -- once -- once an instruction has been found clear, there is no obligation to clarify it any further. Indeed, I would think that the term that a jury most often doesn't understand is beyond a reasonable doubt, and I bet they come in with questions about that all the time. And as you know, that is a mine field and any judge would be out of his mind if he did anything except read back the State formulary instruction as to what beyond a reasonable doubt means, rather than ad lib a response to that difficult question.

MR. ANDERSON: Well, and in fact, Justice Scalia, I had hoped to be able to get to that at some point today. It seems to me by the logic of Weeks' argument -- and there can't be anything more fundamental in the criminal law than the concept of reasonable doubt and proof beyond a reasonable doubt. It seems to me by Weeks --

QUESTION: No, but there's a -- there's a vast difference between a general misunderstanding of a term like that and a question that was asked in this case. If

we believe that Lonnie Weeks, Jr. is guilty of at least one of the alternatives, then is it our duty to -- as a jury to issue the death penalty?

MR. ANDERSON: And I'm saying, Justice Stevens --

QUESTION: That's a yes or no question that doesn't require any ad libbing.

MR. ANDERSON: Well, but we're -- the fact -- concededly the judge could have answered it yes or no. But that is not the controlling question here. The question --

QUESTION: Could he -- is there any possible answer that would have been clearer than either a yes or a no?

MR. ANDERSON: I don't know if there's one any clearer. But the -- the question here is whether or not the trial judge -- this is, after all, a Federal habeas case where we're considering in this collateral setting subject, among other things, to the Teague new rule doctrine in 2254(d) -- whether or not the judge was constitutionally required to give that answer or whether or not he was constitutionally --

QUESTION: Was constitutionally required to ad lib either yes or no.

MR. ANDERSON: I don't think he was -- well, if

-- if you want to refer to -- to the term ad lib, I do not think he was constitutionally required by a long shot to ad lib and give that answer. He was -- just as importantly, he was not constitutionally obligated or prohibited --

QUESTION: And it's perfectly satisfactory to refer the jury back to the very question in -- very sentence in the instructions that gave rise to the question. That's a -- that's an adequate answer in your judgment.

MR. ANDERSON: Yes, sir. Yes, sir.

QUESTION: May -- may I go back to your answer to Justice O'Connor's question in which you indicated the -- that the -- that your answer might be different, the result might be different, if the jurors had come back and -- and had, to a degree not present here, made it affirmatively clear that they just were not able to follow the -- the instruction. If they had said, look, we -- we just don't understand what you're trying to get at by this instruction, that there the judge might have had a further obligation.

MR. ANDERSON: No. I -- Justice Souter, if -- the example I gave is where the jury flatly manifests some affirmative misunderstanding of the law rather than simply we're having a hard time understanding it.

QUESTION: Yes. Let's say the jury comes back and say, we -- we understand that once we find an aggravating circumstance, we've got to impose the death penalty. Period. Right? Have we got it right? In that circumstance -- I think that was your hypo before or something like that.

MR. ANDERSON: Something --

QUESTION: In that -- in that circumstance, you would say, well, yes, the judge has got to explain that.

MR. ANDERSON: Well, he certainly at a bare minimum constitutionally would have to say, no, that is not right. You need -- I want to refer you back to instruction number 2, beginning with the second paragraph. That will explain -- that will tell you, in fact, how the sentencing process works in Virginia. What you've just said is incorrect. If he said something along those lines, I think that's perfectly fine constitutionally.

QUESTION: What is the difference in principle between a jury coming back and indicating precisely the -- the erroneous conclusion they're drawing from the instruction on the one hand and the juror coming back saying, in effect, we don't know what to infer from the instruction. We don't know whether the answer to our question is yes or whether the answer to our question is no. Why should there be a distinction in principle

between those two situations?

MR. ANDERSON: Because I -- I would say that there -- we're looking at what the judge did and, among other things, we're having to determine whether or not it's even a constitutional matter to begin with. And by the way --

QUESTION: No. Stick to my question for a minute. Why should there be a distinction in principle between the jurors who manifest -- and -- and affirmatively manifest an erroneous reading of the instruction and the situation in which the jurors clearly manifest that they don't understand the instruction?

MR. ANDERSON: Because I -- I think it goes to just how much realistically there is a danger that the jury will, in fact, misapply the instruction. And I might point out that --

QUESTION: You're saying in the first place the -- the odds are up at about 99 percent that they're going to misapply it, and in the second case, we don't have a clue what they're going to do. We can't tell you what the odds are.

MR. ANDERSON: No. That is -- well, it may be as to --

QUESTION: Isn't that the difference between the two situations? If the jurors say, we don't know what the

thing means. You know, they might jump this way. They might jump that way. We don't know. So -- so, we can't give you any odds in the second situation. In the first situation, we know darned well what they're going to do if the judge doesn't head them off.

MR. ANDERSON: Well --

QUESTION: That -- that's the difference, isn't it?

MR. ANDERSON: Two -- two things, Justice Souter. First on the --

QUESTION: Well, but just yes or no. Isn't that the difference between the two situations?

MR. ANDERSON: No.

QUESTION: All right. What is the difference?

MR. ANDERSON: The difference is, in terms of applying the Boyde test, we cannot just freeze in time the question and answer, which is what Weeks wishes to do in this case. Everything --

QUESTION: Well, you're -- you're not answering my hypo.

QUESTION: Let him explain.

QUESTION: No, but I -- I think he should answer my hypo.

MR. ANDERSON: I think that there is a fundamental difference, as the Ninth Circuit recognized in

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a later case, Barrigan-Devis, that -- that limited the McDowell case that counsel cited today. There is a fundamental difference in terms of what the -- the judge's duty and obligation in responding to the jury's question between a jury -- a question that simply says how does it -- how does it work versus we think we know how it works and then they say something that is wrong.

QUESTION: But under Boyde, why should that be so?

MR. ANDERSON: Well, under Boyde, the test is whether or not the jury has applied -- that is the phrase -- whether the jury -- excuse me -- whether a reasonable likelihood exists that the jury has applied the allegedly ambiguous instruction in a constitutionally impermissible fashion.

And Boyde also talked in terms of -- of the common sense proposition about everything that has taken place in the trial. It seems to me you cannot just fix on the question and answer and say that that is controlling above everything else, both before and after.

One of the ironies of this case is that but for the question that was asked -- and that is the linchpin of this appeal in the first place -- but for that, we would not know certain things that are highly probative under the Boyde reasonable probability test. We know, for

example, because the question was asked, that there were no follow-up questions, even though the jury in voir dire had basically said, if we do not fully understand an instruction, we promise to seek any necessary clarification. So, for 2 and a half -- they had no follow-up questions.

We also know that the jury deliberated for almost 2 and a half additional hours. It seems to me by the logic of Weeks' argument, that the deliberations should have essentially come to a screeching halt, that the jury, once it heard this answer, they come back, much like in Bollenbach, 5 or 10 minutes later and say, Your Honor, we're back. We sentenced him to death. If you'll just tell us where we can pick up our things and we'll go home. Nothing remotely happened like that. And it seems to me the very fact --

QUESTION: May I -- may I ask a question just on the background facts of this case? At 196 of the joint appendix, volume II, you give us two of the verdict forms that I assume were submitted to the jury. The one at the top of 196 indicates that there would be a death penalty because the jury unanimously found that there would be future dangerousness. And the second one has future dangerousness and vileness. Was there a third one for just vileness?

MR. ANDERSON: Yes, and -- yes, Justice Kennedy. If you look at page 228 of the appendix, that is the one -- and I think this is hugely significant. That is in fact the verdict form that the jury found. There were five verdict forms in this case, and the verdict form seems to me to -- to make it crystal clear that the jury considered and gave effect to the mitigating evidence because the --

QUESTION: I was --

MR. ANDERSON: I'm sorry.

QUESTION: It seemed to me that it's -- one way to read what the jury said is -- is in effect this. Judge, if we have found that this was a vile crime and we are -- have voted to what they call issue the death penalty in their term -- to issue the death penalty on that, do we have to go and talk about future dangerousness? It seems to me that's a plausible way to read their -- their concern. And the answer it seemed to me doesn't make much difference if -- if they've -- if they've agreed on the death penalty.

MR. ANDERSON: But the -- the problem with that is that the question on its face did not -- it did not advert to either aggravating factor -- to -- to construe or equate the jury's question --

QUESTION: Well, I -- I thought the question was

-- was a little bit confusing. And I thought that that was at least one interpretation of the question. I don't think that necessarily hurts your case.

MR. ANDERSON: Well, it -- it seems to me, Justice Kennedy, that it would be just rank speculation or conjecture to say that at the time the jury asked the question that the jury had in its mind, well, we're inclined to find vileness here and if we find vileness, let's find out from the judge whether that's the end of the inquiry.

QUESTION: But it was page 228 that was the form that was submitted I take it.

MR. ANDERSON: Right.

QUESTION: That was returned by -- by the --

MR. ANDERSON: Yes, sir.

QUESTION: May I ask just one last -- one question before you light goes off? Would you agree that if the judge had responded, instead of saying see second paragraph, instruction 2, which begins if you find, if instead he had responded with the reference to the second clause, if you believe from all the evidence, that the answer would have been clearer?

MR. ANDERSON: I'm sorry, Justice Stevens. Could you repeat the question?

QUESTION: See, when he -- when the judge

responded to the question, he referred the jury to the entire paragraph, beginning if you find from the evidence. And I'm suggesting that the response would have been clearer if he had said -- referred them to the second clause in the paragraph, or if you believe from all the evidence, that that would have been more directly responsive to the jurors' question. Do you think that's correct?

MR. ANDERSON: It -- it might have been --

QUESTION: It might have been.

MR. ANDERSON: -- marginally clearer, but I think the constitutional --

QUESTION: But that is -- it is the second half on which you rely as the clarity of the answer, isn't it?

MR. ANDERSON: Well, the second half in particular. But you take the paragraph as you find it, as this Court did in Buchanan.

QUESTION: But the first part of the paragraph is not responsive to the question, and the second half is.

MR. ANDERSON: Well, the Court dealt with the overall instruction and said the paragraph itself created a simple decisional tree, which again in the cert petition Weeks affirmatively tracked that language --

QUESTION: If he said the second clause, I'm not sure that the -- the --

QUESTION: If he used the same words --

QUESTION: -- the fictional high school teacher taught them what a clause is either. I'm not sure.

(Laughter.)

QUESTION: I'm not sure I would have been -- I would have been --

QUESTION: Leaving the teacher out of it, if -- if he referred just to that one sentence, then it's rather hard to see the decisional tree that was necessary to do the clarification because a key part of that decisional tree comes in the -- in the later sentence to which he did not refer. Am I right about that?

MR. ANDERSON: Are we -- are you referring, Your Honor, to the --

QUESTION: I don't want to go on at length. I'm looking in the blue brief and it looks as if to me on page 14 there are two separate paragraph -- forget it. Forget it. That's okay.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Anderson.

The case is submitted.

MR. ANDERSON: Thank you, Your Honor.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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LONNIE WEEKS, JR., Petitioner v. RONALD J. ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS.
CASE NO: 99-5746

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BY: Ilona M. May
(REPORTER)