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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: SCOTT WAYNE BLYSTONE, Petitioner V. PENNSYLVANIA

CASE NO: 88-6222

PLACE: WASHINGTON, D.C.

DATE: October 10, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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SCOTT WAYNE BLYSTONE, :

Petitioner :

v. : No. 88-6222

PENNSYLVANIA :

-----x

Washington, D.C.

Tuesday, October 10, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:01 p.m.

APPEARANCES:

PAUL R. GETTLEMAN, ESQ., Zelienople, Pennsylvania; on behalf of the Petitioner.

ERNEST D. PREATE, JR., ESQ., Attorney General of Pennsylvania, Harrisburg, Pennsylvania; on behalf of the Respondent.

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1 allows a jury to consider extreme mental illness or
2 substantial impairment. But in this particular case, Mr.
3 Blystone gave an extended confession to a police informant,
4 and in that confession he alluded to things like, well, it was
5 thrilling to kill somebody, and you really don't have to be a
6 bad person to kill, and alluded to aspects of the person's
7 brain coming out of his head.

8 Now, a juror who heard all this might think that this
9 individual is mentally ill to think like that, to have no
10 regard at all for life, but might feel that under the
11 definition of Pennsylvania's extreme mental illness, or
12 substantial impairment, it wouldn't qualify, because he might
13 feel extreme would be locked up in a mental institution or
14 taking thorazine. And what happens is that he is not allowed
15 to consider mental illness or substantial impairment in making
16 a decision as to whether or not death is the appropriate
17 sentence.

18 The Respondent had suggested that in the catchall,
19 number 8, the jury could then consider whether or not an
20 individual is simply mentally impaired or simply mentally ill.
21 But I think that -- that analysis is incorrect for this
22 reason. When the Pennsylvania legislature wrote this statute,
23 they included a burden of proof, proof beyond a -- proof
24 beyond a preponderance of the evidence, that there is a
25 mitigating factor. So if the -- the statute required proof

1 beyond a preponderance of evidence that it --

2 QUESTION: Proof beyond a preponderance or proof by a
3 preponderance?

4 MR. GETTLEMAN: Proof by a preponderance of the
5 evidence.

6 QUESTION: Thank you.

7 MR. GETTLEMAN: Thank you. Proof by a preponderance of
8 the evidence that an individual was severely mentally ill or
9 extremely mentally ill. If it could be picked up in this
10 catchall, then that would destroy the burden of proof, because
11 the jury would no longer have to find it by a preponderance of
12 the evidence. In addition, the language of the statute is any
13 other factor, and a fair reading of the word other would
14 probably mean other than the first seven factors. So, a
15 defendant in Pennsylvania would probably be left -- a
16 defendant in Pennsylvania who is just simply mentally ill, or
17 whose judgment was just substantially impaired, would be left
18 with a situation where the jury could not consider that, or
19 give any weight to it, in making a determination as to whether
20 or not death is the appropriate --

21 QUESTION: Well, I thought the Pennsylvania law allowed
22 full consideration of relevant mitigating evidence.

23 MR. GETTLEMAN: It does. But what I was suggesting to
24 the Court is this. Before that catchall, it has a -- a
25 specific mitigating circumstance of extreme mental illness or

1 a substantial impairment. Now, if a jury, in viewing all the
2 evidence, goes down the list and determines that he wasn't
3 extremely mentally ill, or severely emotionally impaired, he
4 would set that aside, or she would set that aside, and go on
5 down the list to see if it fit in any other category. And I
6 would suggest to Justice O'Connor that when the got down to
7 the catchall, and it says any other evidence, a juror who was
8 instructed probably wouldn't retrieve it back and conclude --

9 QUESTION: Don't you think that an attorney would argue
10 on the basis of all of the mitigating evidence that came in,
11 including whatever degree of mental impairment there might be?

12 MR. GETTLEMAN: Well, it is for a jury to give whatever
13 weight they consider to any particular factor, and it could
14 well be that amongst the 12 they might consider something that
15 would be mitigating which an attorney wouldn't have brought
16 up. In this particular case, the closing -- there was no
17 mitigation presented by Mr. Blystone. The closing argument by
18 his counsel probably was a minute and a half to two minutes,
19 because that was reflected upon one page of the transcript.
20 And the basic plea was don't execute him. There was no
21 argument vis a vis mitigation.

22 And, as I also have suggested, I think a juror who was
23 told that there was a certain burden of proof that had to be
24 met wouldn't go back, after he couldn't meet that burden, to
25 just apply it like that. All the cases that the Court has

1 talked about in terms of Lockett, Eddings, Jurek, they all
2 suggested that a juror should be allowed to weigh whatever is
3 mitigating and give whatever weight he feels it should have to
4 make a determination as to whether or not that --

5 QUESTION: Mr. Gettleman, I have some difficulty
6 understanding how this argument relates to the question we
7 granted certiorari to decide.

8 MR. GETTLEMAN: Well --

9 QUESTION: Is whether the mandatory feature of the
10 statute requires death when there is one aggravating
11 circumstance and no mitigating circumstance is valid.

12 MR. GETTLEMAN: It does --

13 QUESTION: And so we are assuming for purpose of
14 decision there are no mitigating circumstances.

15 MR. GETTLEMAN: Right.

16 QUESTION: (Inaudible) your question.

17 MR. GETTLEMAN: But the argument suggests that because
18 of the limiting nature or the limitations that Pennsylvania
19 puts on the mitigating circumstances, that's the reason why
20 there were no mitigating circumstances in this particular --

21 QUESTION: Well, that may be true, but I don't see how
22 that is relevant to the question you presented in your
23 certiorari petition.

24 MR. GETTLEMAN: Okay, well then, let me just go right
25 to that, then.

1 In Pennsylvania the situation is that if there is one
2 aggravating and no mitigating circumstances, then the jury is
3 instructed that they must return with the verdict of death.
4 In that particular case there is no weighing, as had just been
5 suggested in the last argument, in North Carolina, as to the
6 strength of the aggravating circumstance. I think, in an
7 opinion that you co-authored in Barclay, you had suggested
8 that if the aggravating circumstances outweighed the
9 mitigating, but weren't so weighty as to require death, then
10 the jury should be permitted to return with the verdict of
11 life, because it wouldn't have been the appropriate sentence.

12 Also, in North Carolina v. Smith, you had suggested
13 again that there is almost a constitutional right for a jury
14 to exercise its discretion and return with a verdict of life,
15 even though there might be more aggravating than mitigating,
16 when the strength of the aggravating is not such that would
17 require the death sentence.

18 In Pennsylvania, what happens is that if there are no
19 mitigating circumstances, the jury is instructed that they
20 must return with the verdict of death. They have absolutely
21 no discretion at all.

22 And it seems to me that this falls under the same
23 problem as Caldwell v. Mississippi. In that case the jury was
24 told that it's really not ultimately up to you to decide
25 whether the person is going to die. The Mississippi Supreme

1 Court has an overview of that. In Pennsylvania, what they
2 tell the jurors are that you really have no choice, or you
3 have no discretion. The verdict is mandatory; you must return
4 with the verdict of death.

5 QUESTION: Well, but Caldwell was at least in part
6 based on the idea that the -- there were -- wrong statements
7 of law, misleading statements of law made to the jury about
8 their responsibility. Here, it seems to me, that when the
9 judge says the jury -- tells the jury you don't have any
10 choice, they don't have any choice. You say that is wrong,
11 but I don't think it makes it a Caldwell case.

12 MR. GETTLEMAN: Well, only to suggest that in Caldwell
13 this Court spoke about the -- the awesome responsibility it --
14 is upon a jury when they decide whether or not to take
15 somebody's life. And the fact that that responsibility is
16 somewhat delegated by suggesting that it -- the -- that the
17 Supreme Court could review that. In this particular case, the
18 analogy would be that some of the responsibility for the jury,
19 in deciding whether somebody should live or die, is being
20 taken away from them when they are told that it's really not
21 up to you. Once you find an aggravating circumstance, then
22 you must return with the verdict of death.

23 QUESTION: Well, your -- your argument then is that --
24 that -- the jury must always be permitted, no matter what sort
25 of facts it finds, to find in its discretion, whether it's

1 life or death.

2 MR. GETTLEMAN: I do. I think that the Eighth
3 Amendment would suggest that there is a certain reliability
4 necessary to make a determination as to whether death is an
5 appropriate sentence. In Pennsylvania --

6 QUESTION: Well, what has this got to do with
7 reliability?

8 MR. GETTLEMAN: Well, reliability in the -- in the
9 respect that a jury really doesn't get to consider whether
10 there is an -- just because there is an aggravating
11 circumstance, that death is an appropriate sentence. It is
12 not a situation like had been suggested in the North Carolina
13 legislature, where even though mitigating circumstance --
14 excuse me, even though aggravating circumstances are found and
15 no mitigating circumstances are found, the jury still makes an
16 independent determination as to whether the strength of that
17 aggravation is enough to warrant a sentence of death.

18 QUESTION: But -- but I -- I know Pennsylvania is
19 different from North Carolina. But here the jury has
20 considered all the mitigating evidence, I guess by hypothesis,
21 and found that no mitigating circumstance exists.

22 MR. GETTLEMAN: Well, I would only like to suggest, and
23 what I was trying to suggest to Justice Stevens, is simply
24 this. It is our position also that Pennsylvania limits the
25 types of mitigation that can be considered --

1 QUESTION: But that really isn't your question
2 presented, is it?

3 MR. GETTLEMAN: Well, only in the respect that you had
4 suggested to me Pennsylvania had already found that there was
5 no -- there was no mitigation. But I am suggesting the reason
6 that they found that there was no mitigation is because they
7 were limited by the statute in finding that mitigation to
8 engage in a weighing process. In Pennsylvania there is no
9 weighing process at all. It could be the most minimal of
10 felony murders, and a defendant would be sentenced to death if
11 the jury didn't find any aggravating circumstances beyond a
12 reasonable doubt.

13 So what I am suggesting is that --

14 QUESTION: Any mitigating circumstances.

15 MR. GETTLEMAN: If they didn't find any mitigating
16 circumstances that outweighed aggravating circumstances, the
17 verdict would have to be death. Or if they found no
18 mitigating circumstances at all, then the verdict would have
19 to be death. And I think that it goes also in line with what
20 Justice Blackmun was saying about the dangers of having a
21 mandatory sentence. The dangers of having a mandatory
22 sentence are that you can't judge or evaluate the strength of
23 a mitigating circumstance.

24 QUESTION: So, in your view, I take it, if in
25 Pennsylvania, and I'm not sure that this is the case, the

1 killing of a police officer in the line of duty is an
2 aggravating circumstance, you think the Constitution requires
3 a system in which the jury can find no mitigating
4 circumstances, and then say well, really I don't think killing
5 a police officer is a crime that deserves the death penalty.
6 You, constitutionally, you say that that is constitutionally
7 required, that the jury has that authority.

8 MR. GETTLEMAN: I think it is constitutionally required
9 that the jury can weigh an aggravating circumstance to make a
10 determination --

11 QUESTION: Well, what about the case that I put? They
12 find no mitigating circumstances, but some jurors think well,
13 killing a police officer in the line of duty is really not the
14 kind of thing that we should impose the death penalty for.
15 You think the Constitution requires that the jury have that
16 kind of authority to second-guess the legislature?

17 MR. GETTLEMAN: I think the Constitution would require
18 that the jury could look to that single circumstance to make a
19 determination as to whether or not that was strong enough, or
20 the facts that went into killing the police officer were such
21 --

22 QUESTION: Well, the facts are all mitigating
23 circumstances under Section 8 of the Pennsylvania code. I am
24 asking you, in my case, whether the jury could say that in
25 their view killing a police officer, as an abstract matter --

1 MR. GETTLEMAN: Okay.

2 QUESTION: -- is simply not the kind of crime that
3 calls for the death penalty.

4 MR. GETTLEMAN: Yes.

5 QUESTION: All right. That is your position. It seems
6 to me that that is exactly contrary to what we required in
7 Furman v. Georgia. And it seems to me then, then we have gone
8 absolutely full circle.

9 MR. GETTLEMAN: Well, I would only suggest, Justice
10 Kennedy, that different legislatures around the country have
11 addressed that very issue. Obviously, North Carolina has,
12 Florida has, Arkansas has, Nebraska has, and they all suggest
13 that even when an aggravating circumstance is found, that the
14 jury should still make a determination as to whether or not
15 that aggravating circumstance is substantial enough to warrant
16 death.

17 I had suggested, when I -- when I was addressing
18 Justice Stevens, that he had also suggested in certain cases
19 that even though you find an aggravating circumstance, and he
20 didn't identify that as either killing a police officer or any
21 other of the enumerated circumstances, but he did suggest that
22 there are cases where you do have aggravating circumstances
23 and no mitigating circumstances, but the aggravating
24 circumstances in and of themselves aren't so weighty, or
25 aren't so substantial that would require death sentencing. If

1 you do have --

2 QUESTION: Because of the particular case.

3 MR. GETTLEMAN: And because of the aggravating
4 circumstance and the facts that surround the aggravating
5 circumstance. Because, in the opinion that he authored, there
6 was no evidence necessarily as to what the facts were of the
7 aggravating circumstances.

8 All I am suggesting is -- what was suggested in that
9 opinion, is you can have a situation where you do have an
10 aggravating circumstance, you don't have any -- excuse me, you
11 don't have any mitigating circumstances, but the jury makes an
12 independent determination that the aggravating circumstances
13 wasn't substantial enough to warrant the death sentence. And
14 that is the only thing I was suggesting by that answer.

15 QUESTION: What was the aggravating circumstance in
16 this case?

17 MR. GETTLEMAN: Felony murder.

18 QUESTION: I mean, what -- what was the -- what was the
19 aggravating, what -- what -- this was a robbery, was it not?

20 MR. GETTLEMAN: It was a felony murder. The
21 aggravating circumstance was a felony murder.

22 QUESTION: Was the robbery --

23 MR. GETTLEMAN: The robbery.

24 QUESTION: -- a \$13 robbery from the --

25 QUESTION: It wasn't felony murder, was it? It was

1 murder in the course of committing a felony.

2 MR. GETTLEMAN: Murder -- first degree murder in the
3 course of committing a felony. When they found Mr. Blystone
4 guilty of the crime they in effect had already proven
5 aggravating circumstances. As a matter of fact, when the
6 prosecutor closed to the jury in his -- in the sentencing
7 phase, he had indicated to them that we have already
8 established that a felony murder has been committed, and then
9 he spoke about their duty to return a verdict of death.

10 QUESTION: Well, they clearly here, as I understand the
11 statute, clearly had to -- assuming they didn't find
12 mitigating circumstances, the fact that the defendant, rather
13 than one of the other occupants of the car, stole the \$13 from
14 the victim is what not only authorized the death penalty, but
15 actually mandated it. If there had been no -- if he had not
16 taken the \$13, there could not have been a death penalty in
17 this case, is that right?

18 MR. GETTLEMAN: No, I think that if he was found guilty
19 of -- well, maybe under Enmund he couldn't, but in
20 Pennsylvania -- if he had been found guilty of first degree
21 murder, as an accomplice --

22 QUESTION: But he had -- assume he had nothing to do
23 with the robbery of the \$13. Then he couldn't have gotten the
24 death penalty, could he?

25 MR. GETTLEMAN: Well, he could have as a co-

1 conspirator, as a -- in other words, because he didn't
2 actually take the money --

3 QUESTION: Assume he didn't -- if somebody didn't even
4 know the 13 --

5 MR. GETTLEMAN: No, probably not.

6 QUESTION: So, not only probably not, the aggravating
7 circumstance that authorized and also required the death
8 penalty in this case was the fact that he was found guilty of
9 the \$13 robbery.

10 MR. GETTLEMAN: Correct.

11 QUESTION: And all the other facts are irrelevant to
12 the -- all the other aggravating circumstances are irrelevant
13 to the death -- to the penalty determination.

14 MR. GETTLEMAN: Right, to the penalty determination,
15 that's correct.

16 I only suggest that the courts have indicated that
17 there is a constitutional requirement that before a sentence
18 of death may be imposed, it is the sentencer that must decide
19 whether death is an appropriate sentence. In this particular
20 case the sentencer is precluded from making the determination
21 that death is an appropriate sentence in this case. Once the
22 aggravating circumstance is found and no mitigation is found,
23 then he has no say in it. It is a type of mechanical, rigid
24 process that the Court suggested was inappropriate.

25 QUESTION: I guess I am just repeating what Justice

1 Kennedy suggested, but you're -- you're -- you're sounding
2 like the opposition in Furman. Wasn't Furman directed exactly
3 against leaving it up to the jury whether in a broad category
4 of cases you want to impose the death sentence?

5 MR. GETTLEMAN: But the -- but -- Justice Scalia --

6 QUESTION: And here you're saying that that is really
7 what we ought to do, leave it up to the jury.

8 MR. GETTLEMAN: Well, what I would like to suggest is
9 that in the Furman case the reason that they spoke about
10 unbridled discretion, it was because of the broad spectrum of
11 people who were death eligible. And I think when they spoke
12 about unbridled discretion or that kind of discretion which
13 you had suggested to me, it dealt with situations where the
14 pool of death-eligible people was too broad, and it was --

15 QUESTION: That's not what they said. They didn't say
16 too many people are eligible for death. What they were
17 concerned about, quite the contrary, was like situations being
18 treated differently. And what we were trying to develop was a
19 system in which that kind of inequity, insofar as possible,
20 wouldn't occur. And here Pennsylvania has created one. It
21 says we decide what is aggravating. If you find it, and if
22 you find no mitigating circumstances, every jury should impose
23 the death sentence.

24 MR. GETTLEMAN: But the problem with that is that that
25 conflicts with the Eighth Amendment requirement that a jury

1 should make a determination that, under the facts and
2 circumstances of the case, it's -- this is the appropriate
3 decision. And in Pennsylvania there is no way to do that, and
4 there is no way to in any way measure the degree or the
5 strength of the aggravating circumstance that would justify
6 the imposition of death.

7 I understand what you're saying as it relates to the
8 unbridled discretion. I would only suggest to you that this
9 Court has held in -- in various of these -- in various cases,
10 that in considering mitigation, for instance, the jury could
11 have unbridled discretion. Mr. -- Justice Stevens had
12 suggested that also that. I think you have to make a
13 distinction between the two.

14 QUESTION: (Inaudible.)

15 MR. GETTLEMAN: I know that. So, with permission of
16 the Court I would like to reserve the rest of my time for
17 rebuttal.

18 QUESTION: Very well, Mr. Gettleman.

19 Mr. Preate, we'll hear from you now.

20 ORAL ARGUMENT OF ERNEST D. PREATE, JR.

21 ON BEHALF OF THE RESPONDENT

22 MR. PREATE: Mr. Chief Justice, and may it please the
23 Court:

24 Pennsylvania's death penalty statute is not a
25 mandatorily unconstitutional statute. It is a constitutional

1 guided discretion statute. It allows the jury to consider all
2 relevant mitigating evidence in making the decision as to
3 whether or not to impose the death penalty. It is not the
4 kind of statute that this Court addressed in Woodson and
5 Roberts, and in Sumner v. Shuman, where --

6 QUESTION: (Inaudible) doesn't it, except that they
7 require or allow mitigating evidence to be considered. Why
8 isn't it like Woodson? It's a direction to -- to have the
9 death penalty if a person commits a felony murder.

10 MR. PREATE: The evil, Justice White, in those cases,
11 was that the jury never got to make the individualized
12 determination that they're required by the statute to make.

13 QUESTION: Well --

14 MR. PREATE: It was simple finding --

15 QUESTION: -- they, except for the mitigating evidence
16 side, I don't know why it is different from Woodson.

17 MR. PREATE: Well, they -- they -- the statute in
18 Woodson --

19 QUESTION: Which is a big difference, I agree, but once
20 they find no mitigating evidence, their discretion is at an
21 end. Here's the crime; here's our orders.

22 MR. PREATE: Well, there are two thresholds that the
23 Pennsylvania statute requires the jury to cross before it
24 finds that this is a death penalty case. The first threshold
25 is, of course, given, is a first degree murder. And the

1 second threshold is whether or not there is a valid
2 aggravating circumstance which must be established beyond a
3 reasonable doubt, unanimously by the jury, and then it must go
4 further. The inquiry does not stop, in Pennsylvania statute,
5 by simply finding that the aggravating factor exists, and
6 that's perhaps the evil of -- of some of the cases that we had
7 heard from -- had seen before.

8 In Pennsylvania the jury must then consider, they are
9 forced to consider whether or not there are any mitigating
10 circumstances in the record. And if there are none, then they
11 are, of course, obligated at that point, constitutionally, I
12 believe, to come in with a death penalty. It is appropriate
13 that, at that particular stage, the post-consideration stage,
14 that the statute takes its effect. The mandatory feature does
15 not take effect in the beginning; it takes effect at the end
16 of the reasoning process, so that the result is a rational,
17 reasoned, moral response, rather than --

18 QUESTION: May I ask, do you have a bifurcated system
19 where the penalty hearing is separate from the trial?

20 MR. PREATE: Yes, Justice Stevens, we do.

21 QUESTION: And, if -- if you had such a hearing -- I
22 take it you have the same jury though that hears both.

23 MR. PREATE: Yes, yes, we do.

24 QUESTION: If you had a different trier of the fact in
25 the sentencing hearing here, would the evidence -- there is

1 some very bad evidence in this case, this is obviously a very
2 mean person -- and had no remorse, and that tape recorder
3 thing really makes him to be a pretty bad person. None of
4 that would have been admissible in the sentencing hearing,
5 would it, because that is all irrelevant because the death
6 really was -- was required as soon as they proved the \$13
7 robbery?

8 MR. PREATE: There was, there are two things that are -
9 - three things that are required under the valid aggravating
10 circumstance --

11 QUESTION: I understand.

12 MR. PREATE: It requires a murder.

13 QUESTION: Right.

14 MR. PREATE: It requires a robbery --

15 QUESTION: Right.

16 MR. PREATE: And then in this, the jury must --

17 QUESTION: And no mitigating circumstance.

18 MR. PREATE: Well, that this --

19 QUESTION: Say there is no -- everybody agrees there is
20 no mitigating circumstance here. Therefore, all the other
21 evidence about the real aggravation, the stuff that makes many
22 objective people think this man may well deserve the death
23 penalty, that all would have been irrelevant, wouldn't it?

24 MR. PREATE: Well, it would not be considered. It
25 could not be considered because under Pennsylvania statute the

1 only thing that the jury can consider in -- as an aggravating
2 factor, is that exclusive list. Certainly there was a lot of
3 aggravation there, but they could not consider that.

4 QUESTION: And it was all put before the jury.

5 MR. PREATE: It was put before the jury, Your Honor.
6 There is no question about that. But the statute --

7 QUESTION: And I take it, if it had been a sentencing
8 hearing as opposed to a trial -- I suppose it all went to
9 intent, and I am not suggesting it was improperly received,
10 but if you'd had a test to -- you know, a separate hearing on
11 penalty only, that evidence would have been irrelevant,
12 wouldn't it?

13 MR. PREATE: That's correct. It would have been
14 irrelevant. But the point of the matter is -- that, by having
15 the jury consider only the factors of first degree murder and
16 robbery, and then they have to add the third element of
17 whether that -- that murder occurred in the perpetration of
18 the robbery, that's not a -- that's a step that had to be
19 taken by this jury. And that's not a step that should be
20 treated lightly. So, in this particular case, the -- the
21 function of aggravating is to narrow the class of death
22 eligibles. And that -- that's -- that's good facet of
23 Pennsylvania's statute, because it helps to reduce
24 arbitrariness.

25 QUESTION: Well, in answer to Justice Stevens'

1 question, I -- I assume that if the state were trying to show
2 there were no mitigating circumstances, it could introduce
3 much of this evidence, I -- i.e., to show that he was not
4 acting under extreme emotional or mental disturbance when he
5 went back and -- and told his accomplices in the car that he
6 was going to kill the victim, and -- and then discussed it
7 with the victim for a while. I assume that is all relevant to
8 show that there is no mitigating circumstance.

9 MR. PREATE: It -- it -- Justice Kennedy, that is
10 correct. At that particular time the prosecutor could argue
11 to the jury that -- that this was the product of a mind that
12 was not extremely emotionally disturbed, that -- that there
13 was some relevance to that in rebuttal to -- to an argument
14 that might have been proposed.

15 QUESTION: They could do it in rebuttal.

16 QUESTION: Does it have to be in rebuttal? Can you,
17 under this law, the state, as part of your case on direct in
18 the sentencing hearing, show no mitigating circumstances? Do
19 you attempt to do that?

20 MR. PREATE: The state would show no mitigating -- you
21 mean aggravating?

22 QUESTION: Does the state -- does the state show
23 absence of mitigating circumstances in its case in chief in
24 the sentencing hearing?

25 MR. PREATE: No, it does not, Your Honor. It does not.

1 The only -- the only thing relevant that the state can
2 establish is whether or not the facts establish a valid
3 aggravating circumstance. And the jury then makes that
4 determination whether they have been established. And the
5 jury can, and in -- in numbers of cases, say no that they
6 haven't been established. It is -- it is then up to the
7 defendant to proffer evidence of mitigation.

8 The jury must consider it; it is not precluded by this
9 statute from considering it, and is not precluded from giving
10 effect to that evidence under the Pennsylvania statute. It
11 can do that through the various eight categories that are
12 listed as part of the Pennsylvania statute, in which
13 mitigation -- mitigating factors are spelled out. And this
14 jury in particular was told what mitigation was. It said that
15 something less severe -- and these seven factors, specific
16 factors, and the eight catchall, (e)(8), give content to just
17 what mitigating is under the Pennsylvania statute. It gives
18 the kind of guidance to a jury that a state ought to give in
19 helping its citizens reach such a momentous verdict.

20 So that that verdict is the product of -- of
21 rationality and reason, rather than emotion and unguided
22 discretion, so that go -- we don't go back to the -- to the
23 arbitrariness of Furman. This is precisely why Pennsylvania's
24 statute is in the center of all -- of the spectrum of -- of --
25 of statutes that cover the landscape in the United States.

1 We're not in the extreme of unbridled discretion, as some of
2 the statutes may be, or close to that. Nor we are -- nor are
3 we in the other extreme, where a statute requires the finding
4 of death on the simple finding of first degree capital murder
5 without any consideration of mitigating. This statute
6 provides a fair balance of -- of the competing interests that
7 are involved here, of arbitrariness, and it encourages
8 individualized sentencing, and it -- and it -- it makes the --
9 jury's verdict one of appropriateness and rationality.

10 And when their final verdict is in, it's the kind of
11 case in which speaks clearly that this is -- this defendant
12 deserves the death penalty because of the aggravating factors
13 here. They are proven beyond a reasonable doubt and there are
14 no mitigating factors, or the aggravating outweighed the
15 mitigating factors that had been established.

16 I -- I would -- I would point out that the question
17 before this Court is whether or not Pennsylvania statute is
18 mandatory, and the Defendant again seems to walk away from it,
19 even here at oral argument. And -- and I would suggest to the
20 -- to this Court, that the -- that his argument on whether or
21 not there is a sufficiency of weighing of the aggravating, or
22 -- that there is insufficient consideration of degrees of
23 mitigating, has nothing to do with whether the statute is
24 mandatory.

25 If you took the "must" word out of the there, the word

1 that says that the defendant -- that the jury must find the --
2 the -- the defendant guilty -- excuse me, must impose the
3 death penalty after aggravating are found and no mitigating,
4 or aggravating outweigh mitigating, if you took that word and
5 put "may" in there, it -- the problem would still be there,
6 because it is a Lockett problem, it's an Eddings problem.
7 It's not -- it's not a mandatory sentence -- it's not a
8 mandatory statute under those circumstances.

9 So, we have, we -- we really have to focus here, I
10 think, on -- on -- on what the question is that has been asked
11 by this Court. And this statute is not mandatory because it
12 permits the jury to consider all relevant evidence in making a
13 decision. Mitigating, as mitigating factors, just as this
14 Court has required, Pennsylvania has spelled them out. This
15 statute came into being in 1978 after Lockett. Those factors
16 are -- are -- are there because this Court has indicated to
17 the states that -- that juries need to be guided. We have
18 taken the advice of this Court and the states have decided
19 that this is the way that they have gone. There are 14 states
20 that have similar statutes like Pennsylvania's. They have
21 structured the mitigating to give it content. They have --
22 they added factors in there that permit mitigation to be
23 considered.

24 In relation to the -- the argument that the Defendant
25 makes that -- that they ought, we ought to weigh the

1 sufficiency of the aggravating, I'll address that even though
2 it's -- I don't think it is relevant to the question. Because
3 there is no -- no case of this Court, neither does the
4 Constitution require that we weigh the sufficiency of
5 aggravating. For example, your Jurek case, this Court did not
6 have a -- a weighing process approved there. There was none
7 under the Texas statute.

8 But -- but the point to be made here is that
9 Pennsylvania allows the circumstances of the offense. And
10 that's all this Court requires, and that the Constitution
11 requires is. And the real question here is, does the jury get
12 to look at the circumstances of the offense. That is what the
13 question is here.

14 And in Pennsylvania statute, they are required to look
15 at the circumstances of the offense as a mitigating factor,
16 just as this Court has said in Lockett. And it lists them,
17 all of them, that -- that the major, as this Court has called
18 them, the -- the major categories of mitigating evidence, and
19 then -- then it provides an (e)(8) that the jury can consider,
20 and this is what the judge in this case termed it, a catchall,
21 that any other evidence of mitigation concerning the character
22 and the record of the defendant, and the circumstances of the
23 offense, are considered in mitigation. And that --

24 QUESTION: I think that the verdict of the jury, and
25 the way it was announced in court, was that the jury

1 unanimously found no mitigating evidence.

2 MR. PREATE: That is correct, Your Honor. We differ
3 from North Carolina in that respect. And importantly, our
4 court has interpreted our statute as not requiring a unanimity
5 of finding of mitigation. One juror finding mitigation, under
6 Pennsylvania law, causes all jurors to consider all of those
7 factors --

8 QUESTION: But the -- and the verdict here --

9 MR. PREATE: And the verdict must be unanimous.

10 QUESTION: But the verdict here was that there was --
11 they unanimously found no mitigating evidence.

12 MR. PREATE: That is correct. And the statute -- the
13 statute gives the jury the option to do that, properly so.
14 There may not be mitigating in a case. That -- that there are
15 cases in which there are no mitigating factors. The Defendant
16 seems to want the statute to say here is the evidence, and you
17 must now find it, as if the statute should do all the work for
18 him. He ignores the fact --

19 QUESTION: Well, what would the verdict have said, Mr.
20 Preate, if one juror had found mitigating circumstances and 11
21 had not? Would -- would the verdict have -- have read
22 differently than the verdict in this case?

23 MR. PREATE: Mr. Chief Justice, it certainly would. It
24 would have read, we the jury find, aggravating factor, and
25 they would, must list the aggravating factor, they just, it is

1 not -- so there is review by the (inaudible) court.

2 QUESTION: Okay, we know that, but let's --

3 MR. PREATE: Pardon me?

4 QUESTION: Aggravating or mitigating?

5 MR. PREATE: It would have to list the aggravating and
6 spell it out what they found.

7 QUESTION: But I asked you about the mitigating.

8 MR. PREATE: If they found one mitigating --

9 QUESTION: If one juror found one mitigating, and the
10 other 11 didn't.

11 MR. PREATE: That's correct.

12 QUESTION: Well, how would the verdict read as to that
13 aspect?

14 MR. PREATE: The verdict would read the aggravating
15 outweighed the mitigating, or the mitigating outweighed the
16 aggravating. That is what the verdict slip would read. We
17 are different, therefore, from North Carolina. That one
18 juror, the concern that you had, Justice Stevens, would be
19 able to give effect to his concern of the youth. He might
20 think that the youth of that -- that defendant was mitigating,
21 he would be able to give it effect, he would be able to vote
22 for the -- the finding -- the finding of youth as a mitigating
23 factor. And if he did not find that the aggravating
24 outweighed --

25 QUESTION: There was part of your brief on this subject

1 -- part of your brief on this subject puzzled me a little bit.
2 It seemed to me at one time you were arguing that an
3 aggravating circumstance can be some of them are not quite as
4 serious as others, and that a minorly aggregating is really
5 mitigating. Could the juror in this case have said that well,
6 he only stole \$13, so that's mitigating?

7 MR. PREATE: Certainly, because the -- he could have --
8 he could have -- could have given effect to that evidence
9 under, for example, (e)(7), the defendant's participation in
10 the act was relatively minor. Or, without a label, without a
11 label, under (e)(8), where the statute reads any other
12 evidence of mitigation concerning the character and record of
13 the defendant and the circumstances of the case.

14 QUESTION: So, in your view, a given circumstance can
15 be both aggravating and mitigating at the same time.

16 MR. PREATE: It -- it might be. It might be. There is
17 certainly part of the same spectrum. For example, if -- I
18 refer the Court to mitigating circumstance 1, the defendant
19 had no significant history of prior convictions, and then on
20 the other side, an aggravation, there is number 9, it says the
21 defendant has a significant history of felony convictions,
22 however, it is limited to those involving the use of threat or
23 violence to the person. So they are the same spectrum, and
24 that is, whether the defendant has any record.

25 QUESTION: Even taking out those words, in one of your

1 circumstances, as I remember it, is prior conviction of
2 voluntary manslaughter. That mandates the death penalty, but
3 could you say that the defendant could say well, that's really
4 mitigating because they didn't intentionally kill, or he, it
5 wasn't deliberate, or whatever the formula is to distinguish
6 manslaughter from murder?

7 MR. PREATE: Certainly. Certainly. Under that --
8 under the Pennsylvania --

9 QUESTION: So something the legislature has determined
10 to be an aggravating circumstance that mandates the death
11 penalty then can be considered by the jury to be mitigating.

12 MR. PREATE: Certainly can, Your Honor, because he
13 could introduce --

14 QUESTION: I'm -- I'm not sure, is -- is it really the
15 same circumstance? It seems to me the aggravating
16 circumstance is that he stole money. And the mitigating is
17 that he didn't -- didn't steal more than \$13. I don't know
18 that it's the same one. I don't know -- the fact that he
19 stole \$13, as such. The fact that he stole is mitigating; the
20 fact that he didn't steal more -- I'm sorry. The fact that he
21 stole is aggravating, the fact that he didn't steal more than
22 13 is mitigating. I wouldn't -- you really want to concede
23 that --that it's the same factor being used both ways?

24 MR. PREATE: What I was responding to, Justice Scalia,
25 was Justice Stevens' point, that the prior conviction of

1 voluntary manslaughter could be talked about as a mitigating
2 factor under the Pennsylvania statute. Because, number one,
3 for example, (e)(8) says the defendant has no significant
4 history of prior criminal convictions. He could say that is
5 not a significant history, and so argue the point of his prior
6 conviction.

7 QUESTION: It is not a significant history, even though
8 it mandates the death penalty if it's found.

9 MR. PREATE: Well (inaudible), Justice Stevens, I don't
10 think that it mandates the death penalty. The jury must --

11 QUESTION: In the absence of mitigating circumstances.

12 MR. PREATE: The jury can consider -- consider whether
13 or not the aggravating statute, the aggravating factor has
14 been proven. The fact that he had a prior record of crimes of
15 violence is what the aggravating factor is.

16 QUESTION: It seems to me that the manslaughter
17 conviction would not be a mitigating factor. The mitigating
18 factor is that he didn't have any other convictions beyond the
19 manslaughter conviction.

20 MR. PREATE: That is possible.

21 QUESTION: The manslaughter conviction is an
22 aggravating one. The fact that he didn't have any others is a
23 mitigating one.

24 MR. PREATE: Well, that is possible, too, Your Honor.
25 That construction is possible too. I suggest to the Court

1 that -- the important consideration here is whether or not
2 this defendant could introduce and present to the -- to the
3 jury evidence of mitigate -- that would mitigate, concerning
4 his character, the record that he has, or the circumstances of
5 the offense. And as long as he is doing that, I think that
6 the Pennsylvania statute, the statute permits him to do that,
7 and the statute permits him to give it effect through its
8 broad categories, that that statute is constitutional. And it
9 does it -- and it does it precisely in the way that this Court
10 in Lockett and Eddings has said, and that is as a mitigating
11 factor.

12 Now, there may be something in the past that, or about
13 this crime, that is mitigating, and -- and he would have the
14 opportunity to present it, even about his prior record. He
15 would have the opportunity to present it under this statute.
16 He is not precluded from doing that. This is a -- this is a
17 statute that -- interpret as a catchall, a broad statute, by
18 our Supreme Court. And I would like to then turn to --

19 QUESTION: Mr. Attorney General, just a matter of
20 curiosity, how many people are on death row in Pennsylvania?

21 MR. PREATE: There are 110 at this particular time,
22 Justice Blackmun. This is the first time that this statute
23 has been before the Court for consideration. We appreciate
24 the opportunity here.

25 QUESTION: Have there been any executions up there

1 recently?

2 MR. PREATE: Not, the last execution we had was in
3 1962. This statute has been on the books since 1978. There
4 have been no executions that -- pending the outcome of this
5 case.

6 The important fact that I think also has to be
7 remembered here in considering Pennsylvania's statute, and
8 Petitioner makes the argument that the jury is precluded from
9 considering certain kinds of mitigating evidence because the
10 enumerated examples of mitigation use words like extreme and
11 substantial.

12 I suggest to this Court, in reality, this is no
13 limitation for it. It is the jury which makes the
14 determination what extreme is and what substantial is in any
15 given situation. And since these words alone -- since the
16 jury alone decides what these words mean, they do not restrict
17 the jury. These words give content, as I have indicated, to
18 what is meant by mitigating evidence. And moreover, the, any
19 evidence that does not fit precisely within the category of
20 extreme mental or emotional disturbance, for example, or that
21 the defendant acted under substantial domination, any evidence
22 that does not fit in that category is considered in the
23 catchall category, (e)(8), as referred to -- as other, as any
24 other evidence of mitigation concerning the character, the
25 record of the defendant, the circumstances of his offense.

1 I think it is important here to recognize again the
2 role of counsel in this process. This is not a superfluous
3 role, that counsel has the opportunity to present evidence
4 under Pennsylvania's statute. He is not precluded from doing
5 that. He's not precluded from having that evidence take
6 effect. He doesn't have to put it under the label of extreme
7 emotional disturbance, he could have the jury consider it in
8 his -- by presentation of the argument under any other
9 evidence, that broad category of (e)(8). And that's I think
10 what makes Pennsylvania's statute a solid statute, that --
11 that well balances the competing interests here that the
12 Eighth Amendment through the Fourteenth Amendment requires of
13 the states.

14 The Commonwealth is, in this particular case, has
15 presented a statute to this Court for consideration that we do
16 believe well balances those competing interests. It is -- it
17 is -- it fairly balances it, too.

18 QUESTION: And yet you haven't really enforced it, have
19 you?

20 MR. PREATE: Pardon me?

21 QUESTION: I say, yet you haven't really enforced it,
22 have you?

23 MR. PREATE: Well, our -- our appellate court is
24 required under this statute, Justice Blackmun, required in
25 every death penalty case, to conduct three specific reviews.

1 And those reviews take considerable amount of time. And I
2 think it is important that our Supreme Court gives
3 consideration to these cases so carefully. It requires the
4 Supreme Court to review the verdict, to determine whether it
5 is a verdict that is not based on passion or prejudice, or
6 some other arbitrary factor.

7 QUESTION: Of course there are those, I think Mr.
8 Justice Powell among others, who have said if you are going to
9 have a death penalty you ought to enforce it. You have on
10 death row the number of people equal to half of those in this
11 room.

12 MR. PREATE: There's those -- there are those who will
13 agree with that argument. However, I think it is important,
14 in my duty as the Attorney General of the state, would be to
15 see that the laws are fairly enforced, and to ensure that
16 every consideration is given to the defendant before the power
17 of the state, the vast power of the state, is -- is caused to
18 take effect to an execution.

19 And so I support our Supreme Court in its careful
20 review, and I support the process of appellate review. And I
21 think it is important, too, that our Supreme Court looks at
22 the aggravating circumstance, it's forced to look at the
23 aggravating circumstances written down on the jury verdict.
24 And it is forced to see if that aggravating circumstance has
25 validity in the record, there is evidence to support that

1 finding. So that we also have another review on the
2 rationality of the jury's verdict.

3 And thirdly, and lastly, -- I am sorry?

4 QUESTION: When did this crime take place?

5 MR. PREATE: This crime took place in 1983. The
6 defendant was tried in 1984.

7 QUESTION: So that it -- it's comparatively recent
8 compared to a lot of other cases that are pending across the
9 country.

10 MR. PREATE: That -- that is correct, Your Honor.

11 And finally, under Pennsylvania's statute, a
12 comparative proportionality review takes place. And I think
13 that the Pennsylvania statute has tried, the legislature has
14 tried, given the exit -- given its sovereignty under the
15 Constitution, to take the kind of guidance that this Court
16 over the years has set -- set forth that should be taken. And
17 we have implemented in a fair way the -- the --

18 If there are no further questions --

19 QUESTION: Mr. Attorney, I can't resist saying I think
20 the state is to be commended for not carrying out executions
21 until the constitutionality of the statute has been determined
22 in the first case.

23 MR. PREATE: Thank you, Your Honor. Thank you.

24 QUESTION: Thank you, General Preate.

25 Mr. Gettleman, do you have rebuttal? You have nine

1 minutes remaining.

2 REBUTTAL ARGUMENT OF PAUL R. GETTLEMAN

3 ON BEHALF OF THE PETITIONER

4 MR. GETTLEMAN: My rebuttal will be very brief, Judge -
5 - Mr. Chief Justice, and it would only be in response to just
6 a couple of points that the Respondent made.

7 The Respondent seems to suggest that it is all right
8 for the jury to weigh the strength of the aggravation, but the
9 way it is done is it comes in through the catchall mitigating
10 situation.

11 In this particular case, before the trial judge charged
12 the jury, he said to them that he was going to list everything
13 that they could consider as mitigation. And then he went down
14 the list and he suggested all the factors, the seven specific
15 factors and the one catchall factor. But a jury would have no
16 way of knowing that if they found a specific aggravating
17 circumstance, a felony murder by proof beyond a reasonable
18 doubt, that they could then turn around and weigh that as a
19 mitigating circumstance by a preponderance of the evidence
20 under the mitigation.

21 There is no instruction whatsoever, and there is no way
22 a jury could even have intuitively known that it was
23 permissible for them to flip-flop on a particular aggravating
24 circumstance, turn it into a mitigating circumstance, create a
25 straw man and weigh the two against each other, and then come

1 up with a -- a determination as -- as to whether an
2 aggravating circumstance outweighed itself, or whether a
3 mitigating circumstance outweighed itself.

4 Another thing that the Commonwealth had, or the
5 Respondent had suggested, that it's all right for a jury in
6 Pennsylvania to consider just mental illness or substantial
7 impairment, that that can be considered under the catchall
8 phrase. But, in a similar vein as California v. Brown, when
9 the Court spoke about mere sympathy, well, you can't take out
10 that word mere, and in Pennsylvania you can't take out the
11 word other, as in other factors. And other factors would be
12 other than the first seven. And if a jury who was going to
13 listen to its instructions felt that the -- the severity of
14 the illness wasn't extreme or wasn't substantial, then they
15 would be precluded from what this Court has suggested that
16 they have every right to do, in Lockett and Jurek and those
17 other cases, is to consider any mitigating evidence and give
18 it the weight that it believes it deserves in arriving at the
19 formula as to whether one outweighs the other.

20 And in conclusion, I think this Court has alluded to,
21 and has specifically said through Justice Stevens, that there
22 is a constitutional right to have the defendant -- have the
23 jury weigh the weight or the strength of the aggravating
24 circumstance, even if it is weighed against itself, to make a
25 determination that that's the type and the strength of the

1 kind of circumstance that would justify a death sentence as
2 opposed to a lesser included sentence.

3 If there are no other questions, I have none.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gettleman.

5 The case is submitted.

6 (Whereupon, at 2:48 p.m., the case in the above-
7 entitled matter was submitted.)

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CERTIFICATION

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

No. 88-6222 - SCOTT WAYNE BLYSTONE, Petitioner V. PENNSYLVANIA

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BY

Lena M. May

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