

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JALIL ABDUL-KABIR, FKA :

4 CALVIN COLE, :

5 Petitioner :

6 v. : No. 05-11284

7 NATHANIEL QUARTERMAN, :

8 DIRECTOR, TEXAS :

9 DEPARTMENT OF CRIMINAL :

10 JUSTICE, CORRECTIONAL :

11 INSTITUTIONS DIVISION; :

12 and :

13 BRENT RAY BREWER, :

14 Petitioner :

15 v. : No. 05-11287

16 NATHANIEL QUARTERMAN, :

17 DIRECTOR, TEXAS :

18 DEPARTMENT OF CRIMINAL :

19 JUSTICE, CORRECTIONAL :

20 INSTITUTIONS DIVISION. :

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Washington, D.C.

Wednesday, January 17, 2006

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25 The above-entitled matter came on for oral

1 argument before the Supreme Court of the United States
2 at 11:10 a.m.

3 APPEARANCES:

4 ROBERT C. OWEN, ESQ., Austin, Tex.; on behalf of the
5 Petitioners.

6 EDWARD L. MARSHALL, ESQ., Assistant Attorney General,
7 Austin, Tex.; on behalf of the Respondent.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ROBERT C. OWEN, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF	
6	EDWARD L. MARSHALL, ESQ.	
7	On behalf of the Respondent	21
8	REBUTTAL ARGUMENT OF	
9	ROBERT C. OWEN, ESQ.	
10	On behalf of the Petitioners	44
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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4
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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 05-11284, Abdul-Kabir vs. Quarterman, and 05-11287, Brewer versus Quarterman.

Mr. Owen.

ORAL ARGUMENT OF ROBERT C. OWEN

ON BEHALF OF PETITIONERS

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

When this Court granted review in mid October in these consolidated cases, the cases exemplified the Fifth Circuit's settled approach to reviewing claims of error under this Court's 1989 decision in Penry v. Lynaugh. In both cases the court below failed to take seriously the requirement that capital jurors have a meaningful basis for giving effect to the relevant mitigating qualities of a defendant's evidence, and in both cases the court below found as a factual matter, both against common sense and this Court's holdings, that reasonable jurors would regard evidence that a defendant had experienced significant mistreatment or abuse as a child or had mental impairments as an adult as reasons to find him less dangerous rather than more dangerous.

1 But those opinions, however incorrect, no
2 longer represent the Fifth Circuit's view of Penry. In
3 mid December the Fifth Circuit decided in its en banc
4 decision in Nelson vs. Quarterman to take a sharp turn
5 away from its prior treatment of Penry claims and to
6 follow instead this Court's guidance in Tennard and
7 Smith. Under such circumstances, where the assumption
8 that we imagine underlay this Court's decision to grant
9 review in this case has been so profoundly changed by an
10 intervening decision of the court below, we respectfully
11 suggested by motion that the Court return these cases,
12 vacate the judgments, return them to the Fifth Circuit
13 for further consideration in light of the new opinion in
14 Nelson.

15 JUSTICE GINSBURG: Why, when we are told
16 that, that the State will surely challenge Nelson in
17 this Court, and we already have the issue before us, so
18 all that you would achieve is delay, just substituting
19 the Nelson case for this one?

20 MR. OWEN: I don't believe, Your Honor,
21 that, that all that would be accomplished by that would
22 be certainly not just delay. I think that if the Court
23 chooses to wait for the State's cert petition in Nelson,
24 the Court could certainly put our cases aside and hold
25 them awaiting Nelson -- Nelson's cert petition should be

1 filed by mid March -- and then could make its judgment
2 about whether to grant cert in Nelson or not.

3 If it granted cert in Nelson it could decide
4 the three cases together; if it found Nelson raised no
5 questions that were worthy of review, it could either
6 proceed to decide these cases or send them back to the
7 Fifth Circuit. I think that the State's decision,
8 though, Your Honor, is based on a, a misreading of
9 Nelson. I think that the State has suggested to the
10 Court that Nelson is in the State's phrase a narrow
11 fact-based decision and I think that's not, I think
12 that's not a fair characterization of the Nelson --

13 JUSTICE KENNEDY: Well, why can't we just
14 read Nelson and then say in these cases whether or not
15 it's correct?

16 MR. OWEN: I think the main reason, Your
17 Honor, is that these cases aren't Nelson, and that
18 Nelson if it presents issues that are worthy of the
19 Court's consideration, that would be the better vehicle,
20 rather than trying to use in effect these cases to
21 decide issues that are presented by a different set of
22 facts.

23 JUSTICE STEVENS: If these cases aren't
24 Nelson that's a reason why we should decide these cases;
25 it seems to me.

1 MR. OWEN: Well, Your Honor, I am, I am
2 confident that if the Court chooses to proceed on the
3 merits of this case that we will prevail on the merits,
4 until it finds --

5 JUSTICE STEVENS: Well, why don't you try to
6 convince us of that?

7 MR. OWEN: Then let me turn, let me turn to
8 our, our merits, Your Honor.

9 The issue before the Court in this case as
10 we said is whether the jury instructions gave the jurors
11 a meaningful basis for considering the relevant
12 mitigating qualities of these two Defendants' mitigating
13 evidence. In Mr. Brewer's case that included the fact
14 that he was hospitalized for treatment for a major
15 episode of depression about three months before the
16 murder, and the fact that the evidence indicated he had
17 suffered serious abuse, serious physical and emotional
18 abuse from his father as a teenager. In Mr. Cole's case
19 the evidence indicated that as a result of neglect and
20 deprivation that he suffered as a child, he had himself
21 emotional problems, fragmented personality, chronic
22 depression, enormous need for nurturance, a lot of
23 emotional turmoil and problems that continued into
24 adulthood.

25 And in addition to that, the expert who

1 testified at Mr. Cole's trial indicated that he had been
2 given a set of generally accepted neuropsychological
3 tests and that on those tests he had scored below normal
4 and on some of them very far below normal, under the
5 fifth percentile. And as a result that he probably
6 suffers from some sort of central nervous dysfunction
7 which limits his impulse control. We respectfully
8 suggest that under this Court's decision in Penry, those
9 are all the kinds of facts about these two Defendants
10 that could reasonably support a juror in concluding that
11 a life sentence rather than the death penalty was an
12 appropriate sentence.

13 But because the jurors were never asked
14 whether the mitigating evidence reduced the Defendant's
15 culpability in such a way as to call for a life
16 sentence, the resulting death sentences are unreliable.
17 The jurors are asked only two questions as the Court
18 well knows. But just to review, under the pre-1991
19 Texas statute jurors were only asked two questions: Was
20 the crime committed deliberately and is the Defendant
21 likely to pose a continuing threat to society? And
22 those instructions alone as has been mentioned earlier
23 this morning, don't mention mitigating evidence; the
24 verdict form doesn't mention mitigating evidence; and so
25 this Court has held repeatedly that whether that two

1 question format satisfies the Eighth Amendment's
2 individualized sentencing requirement is a matter of the
3 evidence that's presented in a particular case, how it's
4 argued to the jury, and what are the jurors told about
5 the meaning of their instruction.

6 And we believe that in this case, throughout
7 the trial -- in both of these cases, excuse me --
8 throughout the trials the jurors were emphatically told
9 that they were not entitled in deciding the future
10 dangers test question to engage in any sort of broad
11 inquiry into these Defendants' moral culpability.
12 Instead, the prosecutors in both cases made very clear
13 to the jurors during jury selection that in answering
14 the future dangerousness question you must put to one
15 side your opinion about whether the Defendant's
16 background, for example, calls for a particular sentence
17 and answer the question solely on, as the prosecutor put
18 it, the basis of the facts. And we feel that the
19 evidence in this case very strongly would have supported
20 the inference that these, both of these Defendants were
21 likely to be dangerous --

22 CHIEF JUSTICE ROBERTS: How would you
23 compare that evidence with the evidence in Penry itself?

24 MR. OWEN: I think, Your Honor --

25 CHIEF JUSTICE ROBERTS: These are closer

1 cases than Penry, I think. You'd have to concede that,
2 wouldn't you?

3 MR. OWEN: I think they are different cases,
4 Your Honor, I'm not willing to concede that they are
5 closer cases. I think that in, in the juror's mind, the
6 only conclusion that could be drawn from the evidence in
7 these cases is that the Defendants are likely to be
8 dangerous in the future. That is exactly the same
9 conclusion that would have been compelled by the
10 evidence in Penry. I think that --

11 JUSTICE GINSBURG: How does that, if the
12 evidence, suppose we think the evidence is weaker, it's
13 still evidence of childhood abuse and mental disorder of
14 some kind, and those are relevant mitigating factors.

15 MR. OWEN: Absolutely. Absolutely, Your
16 Honor, .

17 JUSTICE GINSBURG: So you -- if your case is
18 less strong than maybe the jury will decide it the other
19 way. But it doesn't mean that those factors are not
20 mitigating factors.

21 MR. OWEN: I couldn't agree more, Your
22 Honor. I think it's very clearly settled by Tennard and
23 other cases going back to 1976 that facts like a
24 deprived or abused background or mental impairment are
25 certainly mitigating. And with further response to your

1 --

2 JUSTICE SCALIA: Tennard, Tennard was
3 decided after the State decision here, wasn't it?

4 MR. OWEN: This Court's decision in Tennard
5 postdates the State court decisions in both of these
6 cases. Yes, Your Honor.

7 JUSTICE SCALIA: And where is -- this is an
8 AEDPA case, isn't it?

9 MR. OWEN: Yes, Your Honor.

10 JUSTICE SCALIA: So we're, we're asking
11 whether this State court made an unreasonable decision
12 at the time, and at the time regardless of what the
13 Fifth Circuit has now said, at the time under Johnson,
14 and -- and there is another earlier case, we said that
15 you didn't have to give full mitigating effects; as long
16 as there was some manner in which mitigating effect
17 could be given that was enough.

18 MR. OWEN: The Court has been consistent --

19 JUSTICE SCALIA: So I think Tennard is
20 utterly irrelevant even if it is right.

21 MR. OWEN: I, I -- I don't agree. And
22 here's why, Your Honor. Tennard was itself both a
23 habeas case and a case governed by the antiterrorism
24 act, like these two cases. And so in Tennard the Court
25 was called on to decide not squarely the question of

1 whether the State court decision in that case had been
2 objectively unreasonable, but whether a reasonable
3 jurist could have found it to be objectively
4 unreasonable such that a certificate of appealability
5 was warranted.

6 Mr. Tennard's case was decided by the State
7 court in 1997, so I think it is immanent in this Court's
8 ruling in Tennard that at least as of 1997, it was
9 apparent that a, a low IQ score alone implicated the
10 concerns of Penry.

11 JUSTICE SCALIA: Did Tennard purport to
12 overrule Smith, even when it came down? It simply, it
13 simply quoted language of the Justice O'Connor's
14 concurrence in an earlier case. It certainly didn't
15 purport to overrule Smith?

16 MR. OWEN: I, I see where Your Honor is --

17 JUSTICE SCALIA: I'm sorry, Johnson, not
18 Smith.

19 MR. OWEN: Yes. And I, and I -- no, it
20 didn't purport to overrule Johnson. And the reason why
21 is this: I think the concept that ties this Court's
22 cases together on Penry is this concept of meaningful
23 consideration. Because Your Honor focused on one bit of
24 language from Johnson: the jury has to be able to give
25 some effect. Elsewhere in the Johnson opinion the Court

1 said there has to be a meaningful basis for giving
2 effect to the relevant mitigating qualities of the
3 evidence. And I think neither of those two phrases can
4 be read out of the context of the other.

5 In other words, it can't just be some
6 imaginable, conceivable, strained effect. It has to be
7 some effect which speaks sensibly to the way that a
8 juror would -- would understand the evidence to relate
9 to future dangerousness. In the Johnson case, the
10 defendant's evidence was his chronological youth, and I
11 believe that it was, it is sensible for the Court to
12 find that a reasonable juror could conclude that, that
13 its relevance to culpability and its relevance to future
14 dangerousness are essentially coextensive. This case is
15 not like that.

16 CHIEF JUSTICE ROBERTS: In Brewer --

17 JUSTICE ALITO: Well, in Johnson wasn't
18 there also --

19 CHIEF JUSTICE ROBERTS: Go ahead.

20 JUSTICE ALITO: Wasn't there also mitigating
21 evidence about a troubled, about his troubled youth,
22 which is analogous to what was involved at least -- well
23 in both of these cases?

24 MR. OWEN: Very little such evidence, Your
25 Honor, in Mr. Johnson's case. And in that case moreover

1 this Court's question presented, the question on which
2 it granted review, was limited to the question of age,
3 so this Court didn't reach or decide in Johnson the
4 question of whether the other facts about Johnson's
5 background that found their way before the jury might
6 have been within the jurors' effective reach.

7 And I do think that the specific evidence in
8 Johnson again was argued as a basis for a finding of
9 nondangerousness, of rehabilitatability. That's utterly
10 untrue of evidence in Mr. Brewer's case and Mr. Cole's
11 case, where I think it's very clear that the evidence is
12 being offered to provide some kind of explanation for
13 the jurors about what caused these men to commit these
14 terrible crimes, not that --

15 CHIEF JUSTICE ROBERTS: But in, in Brewer's
16 case, it's, quoting the record, evidence of one
17 hospitalization for a single episode of nonpsychotic
18 major depression. So it was certainly opened for a jury
19 to determine that as mitigating and not aggravating in
20 assessing the likelihood that there was going to be
21 further violent behavior.

22 MR. OWEN: I don't think, Your Honor --

23 CHIEF JUSTICE ROBERTS: Quite a bit
24 different than Penry.

25 MR. OWEN: I don't think that you can

1 separate the diagnosis of depression, that, even that
2 one single episode of hospitalization for depression,
3 from what the jury knew about Mr. Brewer's upbringing,
4 from the fact that they knew he had been hit by his
5 father in the terms of, his mother said, numerous times.
6 He was struck with the butt of a pistol, he was hit with
7 a flashlight, he was hit with a stick of firewood. His
8 father told him if you ever raise your hand to me you
9 better kill me, because I'll kill you. He saw his
10 father bloody his mother, and bruise her eyes, throw
11 chairs at her.

12 CHIEF JUSTICE ROBERTS: And your submission
13 -- your submission is that every juror is, or a
14 reasonable juror is going to look at that, and the only
15 conclusion that they are going to draw is that he is
16 more likely to be violent in the future? As opposed to
17 the conclusion that there is mitigating evidence because
18 of this, that he should -- mercy should be shown to him
19 in light of all of this? And I just don't see how you
20 can speculate which way the jury is going to go.

21 MR. OWEN: I think that it's not simply
22 speculation, Your Honor, I think this Court recognized
23 in Tennard as it did in Penry, that when there is
24 evidence of mental impairment before the jury, there is
25 at least the probable inference of dangerousness. The

1 amici before the court, both the American Academy of
2 Child and Adolescent Psychiatry, on the one hand, the
3 Child Welfare League of America, on the other, their
4 amicus briefs I think really -- really detailed the fact
5 that this is a commonplace understanding in our society.

6 And the reason that we know that, Your
7 Honor, is what the prosecutor said in his closing
8 argument, where he said to the jury if you take a puppy
9 and you beat that puppy, then he is going to bite and he
10 is going to bite as long as he lives. There is nothing
11 you can do to change that. I think that where you
12 have --

13 CHIEF JUSTICE ROBERTS: So that was in, in
14 Brewer. Now --

15 MR. OWEN: Yes.

16 CHIEF JUSTICE ROBERTS: -- there was no
17 reliance or no similar statement by the prosecutor in
18 Abdul-Kabir or Mr. Cole's case.

19 MR. OWEN: There was no similar --

20 CHIEF JUSTICE ROBERTS: So do we have
21 different results in these two consolidated cases?

22 MR. OWEN: No, Your Honor. I think that
23 this Court's case in -- decision in Tennard, when it's
24 talking about the inference of probable future
25 dangerousness, this Court says: The jurors might well

1 have believed that Mr. Tennard would be dangerous in the
2 future, both as an inference to be drawn from the
3 evidence and because the prosecutor expressly told them
4 that's how they ought to regard the evidence.

5 And in this case we have the prosecutor, in
6 Mr. Brewer's case we have the prosecutor expressly
7 telling the jury, just as the prosecutor did in Mr.
8 Tennard's case, what is mitigating about the guy's
9 background --

10 CHIEF JUSTICE ROBERTS: So the, so the --
11 but my point is the absence of a similar prosecutorial
12 statement in the Cole case cuts against you.

13 MR. OWEN: It simply doesn't cut as far in
14 favor of us, Your Honor. The fact that in Tennard this
15 Court said that from mental impairment, a probable
16 inference of dangerousness may be drawn, cuts squarely
17 in our favor. And you don't even have to go to the
18 level of inference. In Mr. Cole's case his expert
19 witnesses said that the background experiences that this
20 young man had make him dangerous. And they, they could
21 not forecast exactly how long it might be before he
22 would conceivably age out of that. But they said is it
23 10 years? It could be 15 years, it could be 20 years.

24 I mean, there is just -- that doesn't give a
25 reasonable juror, as -- if all you ask the juror is,

1 after they have heard that evidence is, is there a
2 probability that this guy is going to be dangerous in
3 the future? I think they would be compelled to say yes,
4 even though they might say, if they were broadly
5 instructed --

6 CHIEF JUSTICE ROBERTS: Where is evidence of
7 abatement in that case that was before the jury? So
8 that if you ask them, was it this person's fault in some
9 moral sense, that might affect whether they wish to show
10 mercy? And if you ask them whether he is going to grow
11 out of it, they may well say, it was not his fault
12 because of this brain disorder and he is going to grow
13 out of it and that was the evidence, and so we are not
14 going to sentence him to death.

15 MR. OWEN: I think that it's not
16 unconceivable that a juror could have reasoned in that
17 fashion. But I think it's not reasonably possible. I
18 think that this Court's decisions in Penry and Tennard
19 suggest that a juror's commonsensical response to
20 evidence that a defendant has, presently poses a grave
21 danger as a result of his life experiences and the
22 enduring impacts that they have left upon him, the
23 reasonable response of a juror shown such evidence is to
24 find future dangerousness, and that that is precisely
25 the problem with the pre-1991 Texas sentencing statute.

1 If we had a broad mitigating evidence
2 issue like the one that's presently given to Texas
3 juries then we could all be confident that the jury had
4 engaged in precisely the reasoning that the Court --
5 that the Court is hypothesizing. That they looked at
6 the evidence and said yes, he's dangerous, but he's also
7 deserving of something less than death so we will
8 accomplish that by answering this issue in a certain
9 way.

10 CHIEF JUSTICE ROBERTS: But in Penry we
11 didn't establish a per se rule. We said it depends upon
12 the evidence. It depends upon the instructions. It
13 depends upon what the prosecutors say. It seems to me
14 that you're arguing for an absolute rule.

15 MR. OWEN: I don't -- no, Your Honor, and
16 don't let me, please don't let me be misunderstood. I
17 do not believe that this is a per se rule. I think
18 Johnson stands with our case. I think that Graham
19 stands with our case. I think there's no -- there's no
20 need for the Court to -- to change anything other than
21 to -- and it doesn't have to change anything about its
22 existing approach to Penry for our clients to prevail.
23 Because I think that if the Court looks at this evidence
24 and concludes that a reasonable juror approaching this,
25 there's no reasonable probability that they would have

1 felt constrained to find him to be a future danger, then
2 we lose. But I don't think you can look at this record
3 and see that.

4 CHIEF JUSTICE ROBERTS: But it's not no
5 reasonable probability, that's not the standard. The
6 standard under Smith is whether the juries can consider
7 this mitigating evidence in some manner.

8 MR. OWEN: I think, Your Honor, that again,
9 removing that language from Smith, from the language in
10 -- if you're talking about Johnson, I know you're
11 referring to Johnson, that the language in Johnson about
12 some effect can't be separated from the language about
13 meaningful effect.

14 JUSTICE SCALIA: It's absolutely one step
15 removed from that.

16 MR. OWEN: I'm sorry, Your Honor?

17 JUSTICE SCALIA: I say the actual question
18 is even one step removed. It's whether it is
19 unreasonable to conclude otherwise than what you
20 conclude, which is wrong.

21 MR. OWEN: That's correct. And I think --

22 JUSTICE SCALIA: But unreasonable.

23 MR. OWEN: That's correct, and I think that
24 it is unreasonable. I think the State court in this
25 case had essentially two lines of authority, that it was

1 trying to decide which one controlled this case. It had
2 Penry which involved evidence of mental impairment and
3 child abuse, and it had Johnson and Graham which
4 involved evidence of youth and other background. And I
5 think that the facts of these cases, given the facts of
6 these two cases, it is objectively unreasonable to say
7 they fit over here with Johnson and Graham rather than
8 they fit over here with Penry. And that's why I think
9 the decisions by the State courts are not just wrong,
10 but objectively unreasonable.

11 If the court has no further questions, I
12 will reserve the remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr. Owen.
14 Mr. Marshall.

15 ORAL ARGUMENT OF EDWARD L. MARSHALL

16 ON BEHALF OF THE RESPONDENT

17 MR. MARSHALL: Mr. Chief Justice and may it
18 please the Court:

19 When the State court considered these Penry
20 claims in 1994, 1999 and January 2001, this Court's
21 decisions in Graham and Johnson made it clear that the
22 Eighth Amendment requires only that a jury be only able
23 to consider mitigating evidence in some manner, not in
24 every conceivable manner. This is because virtually any
25 mitigating evidence may be viewed as relevant to moral

1 culpability apart from its relevance to these Texas
2 special issues.

3 Cole and Brewer with sizzling bright IQ
4 scores of 121 and 115, dysfunctional childhoods and
5 depression, are much more like the troubled childhood
6 and youth evidence in Graham and Johnson than the mental
7 retardation, brain damage and severe child abuse
8 evidence in Penry. Equating these facts to Penry --

9 JUSTICE GINSBURG: It's the same kind of
10 evidence. It may be weaker. In other words, it's not
11 evidence of good deeds in the community. It's two
12 specific kinds of evidence, the very kinds of evidence
13 that were involved in Penry. You can argue about
14 whether this was weaker, but it's certainly different
15 from youth and reputation for good character.

16 MR. MARSHALL: Well, I disagree, Your Honor.
17 In Graham in particular, the Court was not just
18 considering youth, the Court was considering a troubled
19 childhood, a difficult childhood in which Graham's
20 mother had been hospitalized with a mental illness, his
21 custody shifted from relative to relative. That's
22 exactly the same kind of evidence we have in Cole.

23 JUSTICE GINSBURG: But the evidence was that
24 he didn't react hostilely, he didn't do bad deeds. On
25 the contrary, he was gentle, kind, God fearing, and

1 that's why the jury should regard the murder as
2 aberrational. That was the Graham picture, whereas here
3 we're dealing with people who are dangerous.

4 MR. MARSHALL: Well, Your Honor, that's not
5 the way counsel argued it to the jury in either case.
6 In both of these cases defense counsel presented his
7 case to the jury during -- through his evidence and his
8 argument, that this was youthful indiscretion or it was
9 an aberration, and it wouldn't happen again, which is
10 exactly what Graham --

11 JUSTICE GINSBURG: What other choice does
12 defense counsel have, given that the jury is going to
13 get a question, is this man likely to be a danger in the
14 future? What else could counsel argue?

15 MR. MARSHALL: Well, Justice Ginsburg,
16 that's not the question before the Court. The question
17 before the Court is whether the Eighth Amendment was
18 violated and whether the jury had a reasonable
19 opportunity, and in --

20 JUSTICE GINSBURG: Yes. Well, maybe sending
21 counsel into those two questions, what violates the
22 Eighth Amendment instead of doing what Texas now does
23 and say jury mitigating evidence is for you to judge.
24 We're not going to bottle it up inside of two special
25 questions.

1 MR. MARSHALL: Respectfully, Justice
2 Ginsburg, that's not the question before the Court,
3 though. We're trying to determine in this case whether
4 the State courts unreasonably determined that these
5 juries had a fair opportunity to consider that evidence.
6 And I think looking at argument, when we're determining
7 the reasonableness of that decision, looking at
8 counsel's argument is all we have to go on in
9 determining whether the jury had a fair shot. Now I
10 think if you look back at the '90s --

11 JUSTICE GINSBURG: But realistically, a
12 defense counsel who knows that the jury is going to have
13 those two questions, he's got to fit his argument to the
14 jury into those questions.

15 MR. MARSHALL: Your Honor, that was a
16 strategic choice, though. This is not a Sixth Amendment
17 claim. We're looking at the Eighth Amendment now. And
18 so what counsel chose to do is not the question. We're
19 looking at what he did, and we've got this record to
20 work with.

21 JUSTICE GINSBURG: You're looking at what
22 Texas law forced him to do.

23 MR. MARSHALL: I don't think that's the
24 issue before the Court, Your Honor. I think what we're
25 looking at is whether he -- the jury had a fair

1 opportunity here, regardless of what counsel chose not
2 to do or what the statute forced him to do. The fact is
3 when the State courts looked at these claims in 1994 and
4 1999, this evidence was much more like Graham than it
5 was like Penry, and it was reasonable for them to decide
6 that there was no Penry error in these cases because of
7 that fact. And I think it's worth mentioning that if
8 that's not the case, then I think we've arrived at the
9 point where Penry has swallowed the rule announced in
10 Jurek 31 years ago and it -- to which it was only
11 supposed to be an exception.

12 JUSTICE GINSBURG: Jurek was a facial
13 challenge, and the Court said no, on its face we can see
14 that there are things that would fit into it. Good
15 character would fit into it. But Jurek said as applied,
16 we're not certainly not ruling on that. All we're
17 saying is it doesn't fall on its face, and then as cases
18 come up the law is filled out. But Jurek doesn't say --
19 Jurek didn't say across the board, it's enough that
20 there are these two special factors, that everything can
21 be squeezed into them, all mitigating evidence one way
22 or another can be squeezed into them.

23 MR. MARSHALL: That is correct, Your Honor.
24 Jurek was a facial challenge. But in Johnson and Graham
25 the Court made it pretty clear, I think, that as long as

1 the evidence is relevant in some way within those
2 special issues, some mitigating way --

3 JUSTICE GINSBURG: I thought in Johnson the
4 only question presented was age.

5 MR. MARSHALL: In Johnson, Your Honor?

6 JUSTICE GINSBURG: Yes.

7 MR. MARSHALL: Youth was the central point
8 of Johnson, but Graham involved youth and a distinctly
9 troubled childhood, much like we have in these cases.
10 And so if that evidence was relevant within future
11 dangerousness and did not amount to Eighth Amendment
12 error, then this evidence has to be just as relevant.
13 And in fact we have another layer of analysis on top of
14 this because we are looking at the State court's
15 decision under AEDPA.

16 JUSTICE GINSBURG: I don't see how this fits
17 in the Graham package. The Graham is, this child came
18 from a deprived background but managed to survive it,
19 and he fits right into the category, he's not dangerous.
20 Look at all the bad things that were done to him. He
21 turns out not to be dangerous. Apart from this one
22 murder, he's been a good boy. That's not the picture in
23 either of these cases.

24 MR. MARSHALL: That's essentially the
25 picture, Justice Ginsburg, in Brewer. That's exactly

1 the way counsel presented it to the jury. But not only
2 did counsel argue that he wasn't going to be dangerous
3 despite his childhood shortcomings, there was a
4 deliberateness definition submitted in the Brewer case,
5 which is what this Court suggested in Penry in 1989
6 might remedy this problem. And so the court submitted a
7 definition of deliberateness and counsel argued it to
8 the jury, that -- the definition was read to the jury,
9 counsel argued --

10 JUSTICE GINSBURG: Where is that charge?

11 MR. MARSHALL: It appears at page 90 of the
12 joint appendix, Your Honor, and that's the Brewer joint
13 appendix. Now counsel read that definition to the jury,
14 and the definition reads as follows: "A manner of doing
15 an act characterized by or resulting from careful and
16 thorough consideration characterized by awareness of the
17 consequences, willful, slow, unhurried and steady, as
18 though allowing time for a decision." Now counsel read
19 that definition to the jury during his closing argument.
20 He argued that Brewer's crime reflected poor planning
21 and execution, that he was led into it by other actors,
22 by his girlfriend Christy Nystrom, and that his
23 commitment to a mental hospital and his mental illness,
24 depression in this case, were argued specifically as
25 cause for those faults. And so counsel related the

1 evidence within that deliberateness instruction to the
2 jury, and that provided them with a significant vehicle
3 to give effect to this evidence.

4 JUSTICE GINSBURG: Is that what the Penry
5 Court was talking about, something like what you just
6 read?

7 MR. MARSHALL: I think so, Your Honor, and
8 the Penry Court was not specific about what that
9 definition should say, but this is certainly helpful to
10 the jury in this case and in taking account some of this
11 evidence that was before it.

12 JUSTICE KENNEDY: But you see, in Johnson
13 the Court was confronted with the special issues and it
14 makes the assumption based on the State's representation
15 there, that the special issues had enough latitude for a
16 jury to fully consider this. What has happened in these
17 cases is that the prosecutors tell the jury, they keep
18 reminding the jury you just must answer special issues
19 one and two as given. And in the Cole case they say,
20 even though you felt maybe he had had a rough time as a
21 kid, you still must put that out of the mind, of your
22 mind, and just go by the special issues. And that's the
23 concern in these cases.

24 MR. MARSHALL: That may be a concern,
25 Justice Kennedy, but the Cole case provides a particular

1 example of how defense counsel countered that argument.
2 75 percent of his argument, which is between pages 141
3 and 144 of the Cole joint appendix, 75 percent of that
4 argument is that Cole will burn out as he grows older,
5 and that's based on the testimony of his experts. And
6 he says that burnout, that likeliness that he will not
7 be dangerous is a reasonable one.

8 JUSTICE KENNEDY: But that's because the
9 issues confined him to that.

10 MR. MARSHALL: That's correct, Your Honor,
11 but that's a legitimate argument on the evidence here,
12 and I think that it would be, it's difficult in my mind
13 anyway to determine that the State court in reading
14 Graham and Johnson could unreasonably determine that
15 that wasn't a good vehicle for the jury when he said,
16 you have a reasonable doubt about this man's
17 dangerousness because of the testimony that we presented
18 to you from his experts that said he wouldn't be
19 dangerous in the future.

20 JUSTICE GINSBURG: He's 30 years old, and
21 the testimony is 40, 50. It says, jury, for 10 years
22 this man is going to be walking in prison corridors and
23 he's going to be a danger for at least 10 years. And
24 that's an effective --

25 MR. MARSHALL: Justice Ginsburg, that's

1 easily as effective as the -- as youth was in Graham and
2 Johnson. Youth is evidence that -- I mean, we don't
3 know how long it takes people to grow out of youth, but
4 certainly 10 years wouldn't be unreasonable under the
5 circumstances in that case. And so I don't see any
6 difference between youth and burnout in this context.
7 We are talking about a finite amount of time, we don't
8 know exactly what that amount of time is, but it's
9 certainly reasonable for a jury to give mitigating
10 effect to it under that question.

11 JUSTICE GINSBURG: Mr. Marshall, I heard
12 what you read from this charge, and I don't have the
13 exact words of what the Court was talking about in
14 Penry, but it did say a special instruction that would
15 enable the jury who believed Penry committed the crime
16 deliberately, that he committed it deliberately, not
17 slowly, whatever you just read, but also believed that
18 his background and diminished mental capacity diminished
19 his moral culpability, making the imposition of the
20 death sentence unwarranted.

21 So what Penry said very clearly is yes, it's
22 deliberate, but you give them a charge that tells them
23 even though it was deliberate, because of his abuse,
24 because of his retardation, he is not morally culpable
25 to the same extent as someone who doesn't have those

1 impairments. That's the instruction that Penry said
2 could be given and that would be okay under the
3 deliberateness. Quite different from the instruction
4 you read.

5 MR. MARSHALL: It's different, Your Honor,
6 but I don't think it's that much different, and the
7 reason is that this makes the crime a function of
8 awareness of the consequences of slow unhurried
9 consideration of those consequences. And then counsel
10 argues to the jury that Brewer is incapable of engaging
11 in that sort of premeditation because of his mental
12 problems, and so that's what reduces his culpability
13 under the circumstances. And I think if you combine the
14 argument and the definition, which we were bound to do
15 under *Boyde versus California*, we're supposed to look at
16 the entire context of the trial here, that that meets
17 that suggestion in Penry for it. It's not exactly what
18 the Court suggested.

19 JUSTICE GINSBURG: Wasn't there something
20 about moral culpability in what you read?

21 MR. MARSHALL: No, Your Honor. It's not
22 mentioned in this definition.

23 JUSTICE GINSBURG: That's what Penry makes
24 clear, makes the distinction, between these are factors
25 that don't say he is that dangerous, don't say he didn't

1 act deliberately, but they reduce or the jury may decide
2 that they reduce his moral culpability. And that's not
3 what this charge was?

4 MR. MARSHALL: This charge is different and
5 you're correct in that, Justice Ginsburg. However,
6 future dangerousness also provides that vehicle in this
7 case, just the same as it did in Graham, and so -- and
8 in Johnson. The Court said that this kind of evidence,
9 the evidence of a troubled childhood, could find effect
10 within future dangerousness in some manner. And granted
11 we can conceive of other ways it might be relevant to
12 culpability, but the Court explained -- and this was
13 what the State court was working with at the time it
14 considered this claim -- this Court explained that just
15 because we can imagine other ways in which it might be
16 relevant doesn't mean that we have got Eighth Amendment
17 error. It's just important that the jury had some way
18 of getting to it. And I don't see how this is markedly
19 different than the evidence that the Court said fit
20 within future dangerousness in Graham.

21 Now, in -- I think another thing that I need
22 to mention about Cole is, is that my colleague noted the
23 expert testimony that Cole lacked impulse control. Now,
24 I think the, the mitigating nature of that testimony in
25 this case becomes especially apparent when you realize

1 that, that Cole planned this crime 2 days in advance.
2 He planned to strangle this 66-year-old blind man 2 days
3 before he did it. And so I don't think that an impulse
4 control problem mitigates his culpability for this crime
5 in any way and I don't think any reasonable juror would
6 ever see that. So I think that the mitigating
7 significance of that evidence in this case is severely
8 diminished as opposed to the testimony that the jury
9 heard in Penry, for example, which is that he'll never
10 learn from his mistakes, he had previously committed a
11 rape, he didn't learn from it; this time he committed a
12 murder and a rape. And so the mitigating relevance of
13 that evidence was only aggravating within future
14 dangerousness.

15 CHIEF JUSTICE ROBERTS: How do we, how does
16 that factor in on the issues that are before us, the
17 weakness of the mitigating evidence? In what way are we
18 supposed to assess it? We don't have a harmless error
19 question in these cases.

20 MR. MARSHALL: There is no harmless error
21 question, correct, Mr. Chief Justice. However, I think
22 when we're looking at the Boyde standard, which is --
23 and in Johnson -- a reasonable likelihood that the jury
24 was precluded from giving effect to the evidence, the
25 reasonableness of that likelihood, the reasonableness of

1 that possibility, depends upon the way the juror, the
2 jury, heard the evidence and the relative strength of
3 that evidence.

4 And so evidence of intoxication, for
5 example, while it does mitigate culpability in some
6 manner, would not create the reasonable possibility of
7 Eighth Amendment error in that sense.

8 CHIEF JUSTICE ROBERTS: So your argument is
9 that the mitigating evidence was not precluded by,
10 reasonable consideration was not precluded by the
11 instruction; it was precluded by the fact that there
12 wasn't much mitigating evidence to begin with?

13 MR. MARSHALL: That's correct, Your Honor.
14 But in addition to all of that, the State court was
15 looking at Penry and Graham when they decided this case
16 and there was no Penry II yet. There was no Tennard or
17 Smith. And so it was reasonable for them to compare the
18 evidence, the weight of that evidence, the strength of
19 that evidence, to those cases and decide that it fell on
20 the Graham and Johnson side of the line rather than the
21 Penry side of the line. That's the only thing they
22 could do at the time.

23 JUSTICE STEVENS: Well, do you think the
24 case should have been decided differently should it have
25 been decided after those decisions?

1 MR. MARSHALL: Well, Justice Stevens, if we
2 take into account the full effect language that gets
3 quoted in Penry II, we might well have a different
4 result. But that wasn't the standard at the time and
5 under AEDPA --

6 JUSTICE STEVENS: But those decisions didn't
7 purport to change the law.

8 MR. MARSHALL: Well, under Teague they did
9 not purport to change the law. But I think AEDPA is a
10 different inquiry here. We're looking at what clearly
11 established law was at the time the State courts made
12 their decisions and not necessarily what, you know, what
13 the Teague inquiry would be. And so at that point I
14 think it's pretty clear under Graham and Johnson we're
15 looking at some effect. Whatever "full effect" means
16 now, it doesn't apply to these cases.

17 And I think that gets to the main point
18 here. We're looking at an exceedingly ordinary fact
19 pattern in a capital murder case in both of these cases:
20 Dysfunctional childhoods, a small amount of abuse in
21 Brewer, undescribed --

22 JUSTICE STEVENS: Am I correct, your
23 position essentially is that, while it may well be true
24 that these instructions did not permit the jury to give
25 full effect to this mitigating evidence, that was not

1 clearly established law at the time of these decisions?

2 MR. MARSHALL: That's correct, Justice
3 Stevens.

4 JUSTICE STEVENS: That's your view.

5 JUSTICE KENNEDY: Were these decisions
6 post-Johnson.

7 MR. MARSHALL: Yes, Your Honor. In fact,
8 the Brewer case was decided the year after Johnson and
9 the, the Cole case was decided in 1999. So the Court
10 had not held forth on what Penry meant in a long time at
11 that point. Graham and Johnson were the last clear
12 statements the Court had made.

13 Now, I want to correct one misstatement by
14 my opposing counsel in Brewer. Brewer was -- there are
15 three distinct episodes of abuse that appear in the
16 record in that case: That he was struck with a pistol
17 by his father, he was struck with his fist, and struck
18 with a flashlight. He was never struck with a stick of
19 firewood, and that's on page 65 of the joint appendix.
20 That's pretty clear. This isolated abuse that occurred
21 late in life -- we don't know the exact time frame, but
22 it could be as late as age 18 or 19 -- surely has
23 different characteristics in a jury's eyes than the
24 evidence in Penry which, in which the defendant was beat
25 and beat severely from a very young age, from his

1 infancy, and that beating, that abuse, caused brain
2 damage or mental retardation. The ordinary nature of
3 this evidence in comparison to the exceptional --

4 JUSTICE GINSBURG: Are you suggesting that
5 some kind of a psychological expert would say that abuse
6 as an adolescent is not as damaging as abuse as a young
7 child?

8 MR. MARSHALL: I'm not suggesting that, Your
9 Honor. I'm just suggesting that this is a smaller
10 amount of abuse than what was in Penry.

11 JUSTICE SCALIA: I guess striking a big
12 person is not quite as bad as striking a little person.

13 MR. MARSHALL: That may be true, Your Honor.

14 JUSTICE BREYER: If the question is one of
15 the evidence was weak, why isn't that a harmless error
16 question rather than a question of whether the jury can
17 give it effect?

18 MR. MARSHALL: Well, there is, there is that
19 reasonable likelihood standard built in under Boyde.

20 JUSTICE BREYER: The likelihood of?

21 MR. MARSHALL: Of constitutional error.

22 JUSTICE BREYER: Well, constitutional error
23 is --

24 MR. MARSHALL: Is the reasonable likelihood
25 --

1 JUSTICE BREYER: Yes.

2 MR. MARSHALL: Reasonable likelihood that
3 the juror was precluded from considering the relevant
4 mitigating evidence.

5 JUSTICE BREYER: All right. So if the
6 evidence is very weak and if the instructions prevent
7 you from considering it, then it's precluded. But if
8 the evidence is very weak it didn't matter.

9 MR. MARSHALL: Well, I think it's a
10 reasonable reading of Graham and Johnson, though, Your
11 Honor, that weak evidence does fit within these special
12 issues. That's what those cases held. They said the
13 jury could consider the evidence in some manner and
14 therefore there was no reasonable likelihood that they
15 were precluded from doing so.

16 JUSTICE BREYER: So imagine you're a juror
17 and you think to yourself, I see all this stuff about
18 the childhood, frankly it doesn't move me so far as his
19 dangerousness, I think he's dangerous, and I also think
20 he did it deliberately. And then you think to yourself,
21 well, could I consider it because it shows a bad
22 childhood and that is deserving of a life term? I'm not
23 sure it shows me that, but can I consider it for that
24 purpose at all? What's my answer under Texas law?

25 MR. MARSHALL: Well, Your Honor, the State

1 court considering this case was looking at Graham, in
2 which the Court Stated that that evidence fit within
3 future dangerousness.

4 JUSTICE BREYER: No, no. I have gotten --
5 I've finished considering it for future dangerousness.
6 No, it doesn't move me; he's dangerous. Now I say to
7 myself, can I consider it for the purpose of showing a
8 bad childhood deserving of mercy, if you like? Can I
9 consider it for that purpose? What's the answer under
10 State law?

11 MR. MARSHALL: Yes.

12 JUSTICE BREYER: The answer is no.

13 MR. MARSHALL: Yes, Justice Breyer, the
14 answer is yes.

15 JUSTICE BREYER: The answer is yes?

16 MR. MARSHALL: The answer is yes because
17 this Court said it was yes. This Court said that in
18 Graham the jury was free to accept counsel's suggestion
19 that Graham's conduct was merely an aberration and that,
20 and that he wouldn't do it again. That's exactly the
21 way the case was argued to the jury by these two defense
22 lawyers.

23 JUSTICE BREYER: I'm not talking about
24 future dangerousness. I'm talking about -- I would be
25 repeating myself. You've taken that, I'm not talking

1 about future dangerousness. The jury's decided that
2 matter in your favor. I'm saying does Texas law allow
3 -- you understood what I said, didn't you?

4 MR. MARSHALL: Yes, yes.

5 JUSTICE BREYER: All right, and the answer
6 is yes, you can take it in to show mercy?

7 MR. MARSHALL: Yes, Your Honor.

8 JUSTICE KENNEDY: And what's the Texas case
9 that says that?

10 MR. MARSHALL: Your Honor, it's not a Texas
11 case. It's this court in Graham and Johnson. This
12 Court said that evidence of a troubled childhood, of the
13 particular dysfunction that comes with youth, can be
14 taken as an aberration, that the person will not repeat
15 --

16 JUSTICE KENNEDY: Well, did we say that in
17 the case of all childhood, in cases, in every case of
18 childhood abuse and so forth?

19 MR. MARSHALL: The question is --

20 JUSTICE KENNEDY: Or was it really applied
21 just in the context of the Graham evidence?

22 MR. MARSHALL: Well, Your Honor, in these
23 cases it's relevant for the same reasons it was in
24 Graham. This evidence is not enough like Penry to
25 warrant relief.

1 JUSTICE KENNEDY: Right. But the answer to
2 Justice Breyer it seems to me has to be that you can
3 only consider it in the, in the context of
4 deliberateness or future dangerousness.

5 MR. MARSHALL: That's correct, Your Honor.

6 CHIEF JUSTICE ROBERTS: And that depends on
7 the nature of the evidence, I take it? I mean, if the
8 evidence we were talking about was biological
9 predisposition to violence, that's only going to point
10 in one direction, right? I mean, if the evidence is
11 isolated incident, incidents of depression, the idea is
12 that, well, a juror might look at that and say, well,
13 that's why he did it, and that since it was isolated
14 it's not likely to come up again and therefore it can be
15 regarded as mitigating as well as aggravating.

16 MR. MARSHALL: That's correct, Mr. Chief
17 Justice.

18 CHIEF JUSTICE ROBERTS: And so when you get
19 into this evidence of child abuse, I mean, how are we
20 supposed to decide if the evidence is sufficient so that
21 anyone looking at it is going to say, he's only going to
22 do it again, or if someone who's looking at it is going
23 to say, well, there's an excuse for it and he's going to
24 outgrow it? Do we make that determination in every case
25 based on the particular evidence and the particular

1 arguments that counsel made?

2 MR. MARSHALL: I don't think there's any
3 other way to do it, Mr. Chief Justice. This Court has
4 continually engaged in a case-specific analysis on a
5 case-by-case basis in these types, when granting these
6 types of claims.

7 If the Court has no further questions --

8 JUSTICE GINSBURG: Unless you take the view
9 that Penry took, which is you have to let the jury
10 distinguish between dangerousness and deliberate conduct
11 on the one hand and mitigation for mercy purposes that
12 don't tie in at all to dangerousness.

13 MR. MARSHALL: That's because, Justice
14 Ginsburg, the Penry's evidence was relevant only in an
15 aggravating way to those issues. It suggested nothing
16 other than the fact that he would be a future danger,
17 and when the evidence is not so aggravating, when the
18 evidence suggests, suggests that there is a mitigating
19 answer to the future dangerousness question, that the
20 person won't be a future danger because they're going to
21 burn out or because this is an isolated incident, we
22 have a different situation.

23 JUSTICE KENNEDY: Can you tell me, if you
24 know, how many cases in the Texas system, capital cases,
25 are pending that were decided before the legislature

1 amended the instruction?

2 MR. MARSHALL: Justice Kennedy, there are 47
3 inmates on Texas death row that were sentenced under
4 this statute that remain there. There are nine cases
5 which have litigated Penry claims all the way to
6 conclusion in Federal court. There are 25 more that are
7 somewhere in the pipeline either in State court or
8 Federal court. I've actually looked at the cases and 17
9 of those cases, 17 of the 34 that are still in the
10 system, have evidence that's almost identical to these
11 cases.

12 JUSTICE STEVENS: But that wasn't the
13 question. Your question was how many were before or
14 after the --

15 JUSTICE KENNEDY: But I take it your answer
16 was that all these were tried before Texas amended the
17 statute. Was it 1991 when it amended the statute?

18 MR. MARSHALL: Yes, Your Honor.

19 JUSTICE KENNEDY: And all the cases you
20 mentioned were tried before 1991.

21 MR. MARSHALL: Yes. 47. 47 cases were
22 sentenced under this pre-1991 statute.

23 If the Court has no further questions, I'd
24 ask that they affirm the judgment of the court below.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Marshall.

2 You Mr. Owen, have you 12 minutes remaining.

3 REBUTTAL ARGUMENT OF ROBERT C. OWEN

4 ON BEHALF OF PETITIONERS

5 MR. OWEN: I'd like to make two points about
6 Graham since it's been a subject of some discussion.
7 First is to remind the Court that Graham was a Teague
8 case. Graham was a case about whether the law in 1984,
9 prior to Penry -- Mr. Graham's case became final on
10 direct appeal -- dictated the result that he was asking
11 for, which I think doesn't mean it has no persuasive
12 impact on these cases, but I certainly think it limits
13 its precedential value outside the scope of the question
14 of youth that Johnson later settled squarely.

15 The second thing I want to say about Graham
16 is this is the State's brief in Graham, 91-7580, and I
17 want to just note that at page 26, squarely. This is
18 the State's brief in Graham 917580 and I want to note at
19 page 26, footnote 8 the State says the insubstantiality
20 of Graham's evidence of a troubled childhood is readily
21 apparent, which certainly suggests that there is a fair
22 reading of the evidence in Graham of this background
23 evidence as not being substantial, not being evidence
24 about abuse or mistreatment. The fact that he was moved
25 from one relative to another because of the

1 circumstances in his family, in that case was not shown
2 to have any negative impact on him. Whereas I think in
3 Mr. Cole's case certainly there is expert testimony that
4 it had a very devastating negative impact on him. So
5 Graham really does not even give the Court much guidance
6 on the question of troubled background because there is
7 no indication that Graham actually had a, a background
8 of mistreatment.

9 By the same token with respect to the
10 State's comment or my brother's comment that the, the
11 record doesn't bear out that Mr. Brewer was struck by
12 his father with a stick of firewood, that is correct.
13 What the record actually says is, if I may quote from
14 the Brewer JA at page 90 -- 95 -- 65, excuse me: "He
15 tried to hit him with a stick of firewood. When he went
16 outside to grab the firewood I --" -- that's
17 Mr. Brewer's mother -- "slammed the front door and
18 locked it, and he smashed the glass out of the front
19 door with the firewood. That was the night I had him
20 arrested."

21 CHIEF JUSTICE ROBERTS: How old was Brewer
22 at that time?

23 MR. OWEN: I believe he was 15, Your Honor.
24 But I also want to, I also want to emphasize that I
25 think there, the fact is, the testimony is that

1 Mr. Brewer was hit numerous times. That's his mom's
2 word. Hit with objects only twice, but hit numerous
3 times. And I don't think the Court should also
4 underestimate the significance of the evidence that
5 Mr. Brewer saw his father brutalize his mother on many
6 occasions, because that evidence too contributes. It's
7 not just the difference between being hit and watching
8 someone else being hit. I think everyone understands
9 that there are enduring feelings of shame and guilt, and
10 that the teenage son feels --

11 CHIEF JUSTICE ROBERTS: But the argument is
12 that the jury hearing this evidence in light of all the
13 instructions will only conclude that the evidence shows
14 that he will be violent again. They will not feel that
15 they can take it into account in any way to determine
16 that it's a situation in which they should extend mercy,
17 or that, I guess it was, I get the Cole and the Brewer
18 records confused here, but that this, the cause for the
19 violence will abate with, with age.

20 MR. OWEN: I think, Your Honor --

21 CHIEF JUSTICE ROBERTS: Or that in, I guess
22 in Brewer's case in particular, that since the violence
23 was caused by a particular bout of depression, that
24 would not necessarily recur.

25 MR. OWEN: I, I don't think that's -- that's

1 not our argument, first, Your Honor, for this reason.

2 The court's question was, as I understand
3 it, don't we have to show there is no way the jury could
4 have understood this evidence except as aggravating? I
5 don't think that's, I don't think that's the test. In
6 Tennard this Court said if the jury might well have
7 considered the evidence as aggravating, then --

8 CHIEF JUSTICE ROBERTS: -- that was after --
9 I guess the question would be under Johnson, whether or
10 not it could be considered in some manner.

11 MR. OWEN: In some manner that is reasonable
12 and that gives effect to the relevant mitigating
13 qualities of the evidence. Yes, Your Honor. And I do
14 think that the, that the fact of Mr. Brewer's -- the
15 fact that the jury knew that he had endured this
16 mistreatment as a teenager could only have been given
17 aggravating effect. I don't think there is any way to
18 reason from the premise that he was mistreated
19 physically and emotionally by his father when he was a
20 teenager, to the conclusion that therefore he will be
21 less dangerous in the future. That doesn't seem to me
22 to be a reasonable connection.

23 And I think that what the Court was calling
24 for in Johnson was that there be some sensible link
25 between the proffered mitigating evidence and these

1 narrow questions, which as has been pointed out already
2 were the only options for the jury in this case. There
3 was no, there was no mercy option. There was no
4 mitigation instruction. The jury was told solely these
5 two -- these two special issues.

6 With respect to the Brewer argument that
7 there was a deliberateness instruction, I think Justice
8 Ginsburg has it exactly right in observing that in
9 Penry, what the Court said was that to satisfy the, you
10 know, to fix the deficit in the former Texas special
11 issues, a definition of deliberateness would have to
12 direct the jury's attention to the defendant's personal
13 culpability. And I don't think this instruction does
14 that. This instruction directs them to the sort of
15 quantity of forethought, how much did he think about it,
16 how long did he think about it, did he mull it over?
17 But I don't think that that captures the moral
18 culpability aspect that Penry says is required under the
19 Eighth Amendment.

20 If the Court has further questions I'm happy
21 to entertain them. Otherwise we would ask that the
22 Court grant our motions. In the alternative we would
23 ask that the Court reverse the judgments in both cases
24 with directions to reinstate the District Court's
25 favorable judgment in Mr. Brewer's case and to grant

1 habeas relief in Mr. Cole's case.

2 Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you Mr. Owen.

4 The case is submitted.

5 (Whereupon, at 12:00 p.m., the case in the
6 above-entitled matters was submitted.)

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A	<p>affect 18:9 affirm 43:24 age 14:2 17:22 26:4 36:22,25 46:19 aggravating 14:19 33:13 41:15 42:15,17 47:4,7,17 ago 25:10 agree 10:21 11:21 ahead 13:19 ALITO 13:17 13:20 allow 40:2 allowing 27:18 alternative 48:22 amended 43:1 43:16,17 Amendment 21:22 23:17,22 24:16,17 26:11 32:16 34:7 48:19 Amendment's 9:1 America 16:3 American 16:1 amici 16:1 amicus 16:4 amount 26:11 30:7,8 35:20 37:10 analogous 13:22 analysis 26:13 42:4 announced 25:9 answer 9:17 28:18 38:24 39:9,12,14,15 39:16 40:5 41:1 42:19 43:15 answering 9:13 19:8</p>	<p>antiterrorism 11:23 anyway 29:13 apart 22:1 26:21 apparent 12:9 32:25 44:21 appeal 44:10 appealability 12:4 appear 36:15 APPEARAN... 2:3 appears 27:11 appendix 27:12 27:13 29:3 36:19 applied 25:15 40:20 apply 35:16 approach 4:13 19:22 approaching 19:24 appropriate 8:12 argue 22:13 23:14 27:2 argued 9:4 14:8 23:5 27:7,9,20 27:24 39:21 argues 31:10 arguing 19:14 argument 2:1 3:2,5,8 4:3,7 16:8 21:15 23:8 24:6,8,13 27:19 29:1,2,4 29:11 31:14 34:8 44:3 46:11 47:1 48:6 arguments 42:1 arrested 45:20 arrived 25:8 aside 5:24 asked 8:13,17 8:19</p>	<p>asking 11:10 44:10 aspect 48:18 assess 33:18 assessing 14:20 Assistant 2:6 assumption 5:7 28:14 attention 48:12 Attorney 2:6 Austin 2:4,7 authority 20:25 awaiting 5:25 awareness 27:16 31:8 a.m 2:2 4:2</p> <hr/> <p style="text-align: center;">B</p> <p>back 6:6 10:23 24:10 background 9:16 10:24 14:5 17:9,19 21:4 26:18 30:18 44:22 45:6,7 bad 22:24 26:20 37:12 38:21 39:8 banc 5:3 based 6:8 28:14 29:5 41:25 basis 4:17 7:11 9:18 13:1 14:8 42:5 bear 45:11 beat 16:9 36:24 36:25 beating 37:1 behalf 2:4,7 3:4 3:7,10 4:8 21:16 44:4 behavior 14:21 believe 5:20 9:6 13:11 19:17 45:23 believed 17:1</p>	<p> 30:15,17 better 6:19 15:9 big 37:11 biological 41:8 bit 12:23 14:23 bite 16:9,10 blind 33:2 bloody 15:10 board 25:19 bottle 23:24 bound 31:14 bout 46:23 boy 26:22 Boyde 31:15 33:22 37:19 brain 18:12 22:7 37:1 BRENT 1:13 Brewer 1:13 4:5 13:16 16:14 22:3 26:25 27:4,12 31:10 35:21 36:8,14 36:14 45:11,14 45:21 46:1,5 46:17 48:6 Brewer's 7:13 14:10,15 15:3 17:6 27:20 45:17 46:22 47:14 48:25 Breyer 37:14,20 37:22 38:1,5 38:16 39:4,12 39:13,15,23 40:5 41:2 brief 44:16,18 briefs 16:4 bright 22:3 broad 9:10 19:1 broadly 18:4 brother's 45:10 bruise 15:10 brutalize 46:5 built 37:19 burn 29:4 42:21 burnout 29:6</p>
----------	---	---	---	--

<p>30:6 butt 15:6</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:4 3:1,3,9 4:1 4:7 44:3 California 31:15 call 8:15 called 11:25 calling 47:23 calls 9:16 CALVIN 1:4 capacity 30:18 capital 4:17 35:19 42:24 captures 48:17 careful 27:15 case 5:9,19 7:3,9 7:13,18 9:3,6 9:19 10:17 11:8,14,23,23 12:1,6,14 13:9 13:14,25,25 14:10,11,16 16:18,23 17:5 17:6,8,12,18 18:7 19:18,19 20:25 21:1 23:5,7 24:3 25:8 27:4,24 28:10,19,25 30:5 32:7,25 33:7 34:15,24 35:19 36:8,9 36:16 39:1,21 40:8,11,17,17 41:24 44:8,8,9 45:1,3 46:22 48:2,25 49:1,4 49:5 cases 4:12,12,15 4:19 5:11,24 6:4,6,14,17,20 6:23,24 9:7,12 10:1,3,5,7,23 11:6,24 12:22 13:23 16:21</p>	<p>21:5,6 23:6 25:6,17 26:9 26:23 28:17,23 33:19 34:19 35:16,19 38:12 40:17,23 42:24 42:24 43:4,8,9 43:11,19,21 44:12 48:23 case-by-case 42:5 case-specific 42:4 category 26:19 cause 27:25 46:18 caused 14:13 37:1 46:23 central 8:6 26:7 cert 5:23,25 6:2 6:3 certain 19:8 certainly 5:22 5:24 10:25 12:14 14:18 22:14 25:16 28:9 30:4,9 44:12,21 45:3 certificate 12:4 chairs 15:11 challenge 5:16 25:13,24 change 16:11 19:20,21 35:7 35:9 changed 5:9 character 22:15 25:15 characteristics 36:23 characterizati... 6:12 characterized 27:15,16 charge 27:10 30:12,22 32:3 32:4</p>	<p>Chief 4:3,9 9:22 9:25 13:16,19 14:15,23 15:12 16:13,16,20 17:10 18:6 19:10 20:4 21:13,17 33:15 33:21 34:8 41:6,16,18 42:3 43:25 45:21 46:11,21 47:8 49:3 child 4:23 7:20 16:2,3 21:3 22:7 26:17 37:7 41:19 childhood 10:13 22:5,19,19 26:9 27:3 32:9 38:18,22 39:8 40:12,17,18 44:20 childhoods 22:4 35:20 choice 23:11 24:16 chooses 5:23 7:2 chose 24:18 25:1 Christy 27:22 chronic 7:21 chronological 13:10 Circuit 5:3,12 6:7 11:13 Circuit's 4:13 5:2 circumstances 5:7 30:5 31:13 45:1 claim 24:17 32:14 claims 4:14 5:5 21:20 25:3 42:6 43:5 clear 9:12 14:11 21:21 25:25 31:24 35:14</p>	<p>36:11,20 clearly 10:22 30:21 35:10 36:1 clients 19:22 closer 9:25 10:5 closing 16:7 27:19 coextensive 13:14 Cole 1:4 17:12 22:3,22 28:19 28:25 29:3,4 32:22,23 33:1 36:9 46:17 Cole's 7:18 8:1 14:10 16:18 17:18 45:3 49:1 colleague 32:22 combine 31:13 come 25:18 41:14 comes 40:13 comment 45:10 45:10 commit 14:13 commitment 27:23 committed 8:20 30:15,16 33:10 33:11 common 4:20 commonplace 16:5 commonsensi... 18:19 community 22:11 compare 9:23 34:17 comparison 37:3 compelled 10:9 18:3 concede 10:1,4 conceivable</p>	<p>13:6 21:24 conceivably 17:22 conceive 32:11 concept 12:21 12:22 concern 28:23 28:24 concerns 12:10 conclude 13:12 20:19,20 46:13 concludes 19:24 concluding 8:10 conclusion 10:6 10:9 15:15,17 43:6 47:20 concurrence 12:14 conduct 39:19 42:10 confident 7:2 19:3 confined 29:9 confronted 28:13 confused 46:18 connection 47:22 consequences 27:17 31:8,9 consider 20:6 21:23 24:5 28:16 38:13,21 38:23 39:7,9 41:3 consideration 5:13 6:19 12:23 27:16 31:9 34:10 considered 21:19 32:14 47:7,10 considering 7:11 22:18,18 38:3,7 39:1,5 consistent 11:18 consolidated</p>
--	---	---	--	---

<p>4:12 16:21 constitutional 37:21,22 constrained 20:1 context 13:4 30:6 31:16 40:21 41:3 continually 42:4 continued 7:23 continuing 8:21 contrary 22:25 contributes 46:6 control 8:7 32:23 33:4 controlled 21:1 convince 7:6 correct 6:15 20:21,23 25:23 29:10 32:5 33:21 34:13 35:22 36:2,13 41:5,16 45:12 CORRECTI... 1:10,19 corridors 29:22 counsel 23:5,6 23:12,14,21 24:12,18 25:1 27:1,2,7,9,13 27:18,25 29:1 31:9 36:14 42:1 counsel's 24:8 39:18 countered 29:1 court 1:1 2:1 4:10,11,15,19 5:10,11,17,22 5:24 6:10 7:2,9 8:17,25 11:5 11:11,18,24 12:1,7,25 13:11 14:3 15:22 16:1,25 17:15 19:4,5 19:20,23 20:24</p>	<p>21:11,18,19 22:17,18 23:16 23:17 24:2,24 25:13,25 27:5 27:6 28:5,8,13 29:13 30:13 31:18 32:8,12 32:13,14,19 34:14 36:9,12 39:1,2,17,17 40:11,12 42:3 42:7 43:6,7,8 43:23,24 44:7 45:5 46:3 47:6 47:23 48:9,20 48:22,23 courts 21:9 24:4 25:3 35:11 court's 4:14,21 5:6,8 6:19 8:8 11:4 12:7,21 14:1 16:23 18:18 21:20 26:14 47:2 48:24 create 34:6 crime 8:20 27:20 30:15 31:7 33:1,4 crimes 14:14 CRIMINAL 1:9 1:18 culpability 8:15 9:11 13:13 22:1 30:19 31:12,20 32:2 32:12 33:4 34:5 48:13,18 culpable 30:24 custody 22:21 cut 17:13 cuts 17:12,16</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 4:1 damage 22:7 37:2</p>	<p>damaging 37:6 danger 18:21 20:1 23:13 29:23 42:16,20 dangerous 4:25 4:25 9:21 10:8 17:1,20 18:2 19:6 23:3 26:19,21 27:2 29:7,19 31:25 38:19 39:6 47:21 dangerousness 9:14 13:9,14 15:25 16:25 17:16 18:24 26:11 29:17 32:6,10,20 33:14 38:19 39:3,5,24 40:1 41:4 42:10,12 42:19 dangers 9:10 days 33:1,2 dealing 23:3 death 8:11,16 18:14 19:7 30:20 43:3 December 5:3 decide 6:3,6,21 6:24 10:18 11:25 14:3 21:1 25:5 32:1 34:19 41:20 decided 5:3 11:3 12:6 34:15,24 34:25 36:8,9 40:1 42:25 deciding 9:9 decision 4:15 5:4,8,10 6:7,11 8:8 11:3,4,11 12:1 16:23 24:7 26:15 27:18 decisions 11:5 18:18 21:9,21</p>	<p>34:25 35:6,12 36:1,5 deeds 22:11,24 defendant 4:22 8:20 18:20 36:24 Defendants 7:12 8:9 9:11,20 10:7 defendant's 4:18 8:14 9:15 13:10 48:12 defense 23:6,12 24:12 29:1 39:21 deficit 48:10 definition 27:4,7 27:8,13,14,19 28:9 31:14,22 48:11 delay 5:18,22 deliberate 30:22 30:23 42:10 deliberately 8:20 30:16,16 32:1 38:20 deliberateness 27:4,7 28:1 31:3 41:4 48:7 48:11 DEPARTME... 1:9,18 depends 19:11 19:12,13 34:1 41:6 depression 7:15 7:22 14:18 15:1,2 22:5 27:24 41:11 46:23 deprivation 7:20 deprived 10:24 26:18 deserving 19:7 38:22 39:8 despite 27:3</p>	<p>detailed 16:4 determination 41:24 determine 14:19 24:3 29:13,14 46:15 determined 24:4 determining 24:6,9 devastating 45:4 diagnosis 15:1 dictated 44:10 difference 30:6 46:7 different 6:21 10:3 14:24 16:21 22:14 31:3,5,6 32:4 32:19 35:3,10 36:23 42:22 differently 34:24 difficult 22:19 29:12 diminished 30:18,18 33:8 direct 44:10 48:12 direction 41:10 directions 48:24 DIRECTOR 1:8 1:17 directs 48:14 disagree 22:16 discussion 44:6 disorder 10:13 18:12 distinct 36:15 distinction 31:24 distinctly 26:8 distinguish 42:10 District 48:24 DIVISION 1:11 1:20 doing 23:22</p>
---	---	--	--	--

<p>door 45:17,19 doubt 29:16 draw 15:15 drawn 10:6 17:2 17:16 dysfunction 8:6 40:13 dysfunctional 22:4 35:20 D.C 1:22</p> <hr/> <p style="text-align: center;">E</p> <p>E 3:1 4:1,1 earlier 8:22 11:14 12:14 easily 30:1 EDWARD 2:6 3:6 21:15 effect 4:17 6:20 11:16 12:25 13:2,6,7 20:12 20:13 28:3 30:10 32:9 33:24 35:2,15 35:15,25 37:17 47:12,17 effective 14:6 29:24 30:1 effects 11:15 Eighth 9:1 21:22 23:17,22 24:17 26:11 32:16 34:7 48:19 either 6:5 23:5 26:23 43:7 emotional 7:17 7:21,23 emotionally 47:19 emphasize 45:24 emphatically 9:8 en 5:3 enable 30:15 endured 47:15 enduring 18:22</p>	<p>46:9 engage 9:10 engaged 19:4 42:4 engaging 31:10 enormous 7:22 entertain 48:21 entire 31:16 entitled 9:9 episode 7:15 14:17 15:2 episodes 36:15 Equating 22:8 error 4:14 25:6 26:12 32:17 33:18,20 34:7 37:15,21,22 especially 32:25 ESQ 2:4,6 3:3,6 3:9 essentially 13:14 20:25 26:24 35:23 establish 19:11 established 35:11 36:1 evidence 4:19,22 7:13,16,19 8:14,23,24 9:3 9:19,23,23 10:6,10,12,12 10:13 13:3,8 13:10,21,24 14:7,10,11,16 15:17,24 17:3 17:4 18:1,6,13 18:20,23 19:1 19:6,12,23 20:7 21:2,4,23 21:25 22:6,8 22:10,11,12,12 22:22,23 23:7 23:23 24:5 25:4,21 26:1 26:10,12 28:1 28:3,11 29:11 30:2 32:8,9,19</p>	<p>33:7,13,17,24 34:2,3,4,9,12 34:18,18,19 35:25 36:24 37:3,15 38:4,6 38:8,11,13 39:2 40:12,21 40:24 41:7,8 41:10,19,20,25 42:14,17,18 43:10 44:20,22 44:23,23 46:4 46:6,12,13 47:4,7,13,25 exact 30:13 36:21 exactly 10:8 17:21 22:22 23:10 26:25 30:8 31:17 39:20 48:8 example 9:16 29:1 33:9 34:5 exceedingly 35:18 exception 25:11 exceptional 37:3 excuse 9:7 41:23 45:14 execution 27:21 exemplified 4:13 existing 19:22 experienced 4:22 experiences 17:19 18:21 expert 7:25 17:18 32:23 37:5 45:3 experts 29:5,18 explained 32:12 32:14 explanation 14:12 expressly 17:3,6 extend 46:16</p>	<p>extent 30:25 eyes 15:10 36:23</p> <hr/> <p style="text-align: center;">F</p> <p>face 25:13,17 facial 25:12,24 fact 7:13,16 15:4 16:4 17:14 25:2,7 26:13 34:11 35:18 36:7 42:16 44:24 45:25 47:14,15 factor 33:16 factors 10:14,19 10:20 25:20 31:24 facts 6:22 8:9 9:18 10:23 14:4 21:5,5 22:8 factual 4:20 fact-based 6:11 failed 4:16 fair 6:12 24:5,9 24:25 44:21 fall 25:17 family 45:1 far 8:4 17:13 38:18 fashion 18:17 father 7:18 15:5 15:8,10 36:17 45:12 46:5 47:19 fault 18:8,11 faults 27:25 favor 17:14,17 40:2 favorable 48:25 fearing 22:25 Federal 43:6,8 feel 9:18 46:14 feelings 46:9 feels 46:10 fell 34:19 felt 20:1 28:20</p>	<p>fifth 4:13 5:2,3 5:12 6:7 8:5 11:13 filed 6:1 filled 25:18 final 44:9 find 4:24 13:12 18:24 20:1 32:9 finding 14:8 finds 7:4 finished 39:5 finite 30:7 firewood 15:7 36:19 45:12,15 45:16,19 first 44:7 47:1 fist 36:17 fit 21:7,8 24:13 25:14,15 32:19 38:11 39:2 fits 26:16,19 fix 48:10 FKA 1:3 flashlight 15:7 36:18 focused 12:23 follow 5:6 follows 27:14 footnote 44:19 forced 24:22 25:2 forecast 17:21 forethought 48:15 form 8:24 format 9:1 former 48:10 forth 36:10 40:18 found 4:19 6:4 12:3 14:5 fragmented 7:21 frame 36:21 frankly 38:18 free 39:18</p>
--	---	---	---	---

<p>front 45:17,18 full 11:15 35:2 35:15,25 fully 28:16 function 31:7 further 5:13 10:25 14:21 21:11 42:7 43:23 48:20 future 9:9,14 10:8 13:9,13 15:16 16:24 17:2 18:3,24 20:1 23:14 26:10 29:19 32:6,10,20 33:13 39:3,5 39:24 40:1 41:4 42:16,19 42:20 47:21</p> <hr/> <p style="text-align: center;">G</p> <p>G 4:1 General 2:6 generally 8:2 gentle 22:25 getting 32:18 Ginsburg 5:15 10:11,17 22:9 22:23 23:11,15 23:20 24:2,11 24:21 25:12 26:3,6,16,25 27:10 28:4 29:20,25 30:11 31:19,23 32:5 37:4 42:8,14 48:8 girlfriend 27:22 give 11:15 12:24 17:24 28:3 30:9,22 35:24 37:17 45:5 given 8:2 11:17 19:2 21:5 23:12 28:19 31:2 47:16</p>	<p>gives 47:12 giving 4:17 13:1 33:24 glass 45:18 go 13:19 15:20 17:17 24:8 28:22 God 22:25 going 10:23 14:20 15:14,15 15:20 16:9,10 18:2,10,12,14 23:12,24 24:12 27:2 29:22,23 41:9,21,21,22 41:23 42:20 good 22:11,15 25:14 26:22 29:15 gotten 39:4 governed 11:23 grab 45:16 Graham 19:18 21:3,7,21 22:6 22:17 23:2,10 25:4,24 26:8 26:17,17 29:14 30:1 32:7,20 34:15,20 35:14 36:11 38:10 39:1,18 40:11 40:21,24 44:6 44:7,8,15,16 44:18,22 45:5 45:7 Graham's 22:19 39:19 44:9,20 grant 5:8 6:2 48:22,25 granted 4:11 6:3 14:2 32:10 granting 42:5 grave 18:20 grow 18:10,12 30:3 grows 29:4 guess 37:11</p>	<p>46:17,21 47:9 guidance 5:6 45:5 guilt 46:9 guy 18:2 guy's 17:8</p> <hr/> <p style="text-align: center;">H</p> <p>habeas 11:23 49:1 hand 15:8 16:2 42:11 happen 23:9 happened 28:16 happy 48:20 harmless 33:18 33:20 37:15 hear 4:3 heard 18:1 30:11 33:9 34:2 hearing 46:12 held 8:25 36:10 38:12 helpful 28:9 he'll 33:9 hit 15:4,6,7 45:15 46:1,2,2 46:7,8 hold 5:24 holdings 4:21 Honor 5:20 6:8 6:17 7:1,8 9:24 10:4,16,22 11:6,9,22 12:16,23 13:25 14:22 15:22 16:7,22 17:14 19:15 20:8,16 22:16 23:4 24:15,24 25:23 26:5 27:12 28:7 29:10 31:5,21 34:13 36:7 37:9,13 38:11,25 40:7 40:10,22 41:5</p>	<p>43:18 45:23 46:20 47:1,13 49:2 hospital 27:23 hospitalization 14:17 15:2 hospitalized 7:14 22:20 hostilely 22:24 hypothesizing 19:5</p> <hr/> <p style="text-align: center;">I</p> <p>idea 41:11 identical 43:10 II 34:16 35:3 illness 22:20 27:23 imaginable 13:6 imagine 5:8 32:15 38:16 immanent 12:7 impact 44:12 45:2,4 impacts 18:22 impairment 10:24 15:24 17:15 21:2 impairments 4:24 31:1 implicated 12:9 important 32:17 imposition 30:19 impulse 8:7 32:23 33:3 incident 41:11 42:21 incidents 41:11 included 7:13 incorrect 5:1 indicated 7:16 7:19 8:1 indication 45:7 indiscretion 23:8 individualized</p>	<p>9:2 infancy 37:1 inference 9:20 15:25 16:24 17:2,16,18 inmates 43:3 inquiry 9:11 35:10,13 inside 23:24 INSTITUTIO... 1:11,20 instructed 18:5 instruction 9:5 28:1 30:14 31:1,3 34:11 43:1 48:4,7,13 48:14 instructions 7:10 8:22 19:12 35:24 38:6 46:13 insubstantiality 44:19 intervening 5:10 intoxication 34:4 involved 13:22 21:2,4 22:13 26:8 IQ 12:9 22:3 irrelevant 11:20 isolated 36:20 41:11,13 42:21 issue 5:17 7:9 19:2,8 24:24 issues 6:18,21 22:2 26:2 28:13,15,18,22 29:9 33:16 38:12 42:15 48:5,11</p> <hr/> <p style="text-align: center;">J</p> <p>JA 45:14 JALIL 1:3 January 1:23 21:20</p>
---	--	---	---	---

<p>Johnson 11:13 12:17,20,24,25 13:9,17 14:3,8 19:18 20:10,11 20:11 21:3,7 21:21 22:6 25:24 26:3,5,8 28:12 29:14 30:2 32:8 33:23 34:20 35:14 36:8,11 38:10 40:11 44:14 47:9,24</p> <p>Johnson's 13:25 14:4</p> <p>joint 27:12,12 29:3 36:19</p> <p>judge 23:23</p> <p>judgment 6:1 43:24 48:25</p> <p>judgments 5:12 48:23</p> <p>Jurek 25:10,12 25:15,18,19,24</p> <p>juries 19:3 20:6 24:5</p> <p>jurist 12:3</p> <p>juror 8:10 13:8 13:12 15:13,14 17:25,25 18:16 18:23 19:24 33:5 34:1 38:3 38:16 41:12</p> <p>jurors 4:17,21 7:10 8:13,17 8:19 9:4,8,13 14:6,13 16:25</p> <p>juror's 10:5 18:19</p> <p>jury 7:10 9:4,13 10:18 12:24 14:5,18 15:3 15:20,24 16:8 17:7 18:7 19:3 21:22 23:1,5,7 23:12,18,23 24:9,12,14,25</p>	<p>27:1,8,8,13,19 28:2,10,16,17 28:18 29:15,21 30:9,15 31:10 32:1,17 33:8 33:23 34:2 35:24 37:16 38:13 39:18,21 42:9 46:12 47:3,6,15 48:2 48:4</p> <p>jury's 36:23 40:1 48:12</p> <p>Justice 1:10,19 4:3,9 5:15 6:13 6:23 7:5 9:22 9:25 10:11,17 11:2,7,10,19 12:11,13,17 13:16,17,19,20 14:15,23 15:12 16:13,16,20 17:10 18:6 19:10 20:4,14 20:17,22 21:13 21:17 22:9,23 23:11,15,20 24:1,11,21 25:12 26:3,6 26:16,25 27:10 28:4,12,25 29:8,20,25 30:11 31:19,23 32:5 33:15,21 34:8,23 35:1,6 35:22 36:2,4,5 37:4,11,14,20 37:22 38:1,5 38:16 39:4,12 39:13,15,23 40:5,8,16,20 41:1,2,6,17,18 42:3,8,13,23 43:2,12,15,19 43:25 45:21 46:11,21 47:8 48:7 49:3</p>	<hr/> <p>K</p> <hr/> <p>keep 28:17</p> <p>Kennedy 6:13 28:12,25 29:8 36:5 40:8,16 40:20 41:1 42:23 43:2,15 43:19</p> <p>kid 28:21</p> <p>kill 15:9,9</p> <p>kind 10:14 14:12 22:9,22 22:25 32:8 37:5</p> <p>kinds 8:9 22:12 22:12</p> <p>knew 15:3,4 47:15</p> <p>know 16:6 20:10 30:3,8 35:12 36:21 42:24 48:10</p> <p>knows 8:18 24:12</p> <hr/> <p>L</p> <hr/> <p>L 2:6 3:6 21:15</p> <p>lacked 32:23</p> <p>language 12:13 12:24 20:9,9 20:11,12 35:2</p> <p>late 36:21,22</p> <p>latitude 28:15</p> <p>law 24:22 25:18 35:7,9,11 36:1 38:24 39:10 40:2 44:8</p> <p>lawyers 39:22</p> <p>layer 26:13</p> <p>League 16:3</p> <p>learn 33:10,11</p> <p>led 27:21</p> <p>left 18:22</p> <p>legislature 42:25</p> <p>legitimate 29:11</p> <p>level 17:18</p>	<p>life 8:11,15 18:21 36:21 38:22</p> <p>light 5:13 15:19 46:12</p> <p>likelihood 14:20 33:23,25 37:19 37:20,24 38:2 38:14</p> <p>likeliness 29:6</p> <p>limited 14:2</p> <p>limits 8:7 44:12</p> <p>line 34:20,21</p> <p>lines 20:25</p> <p>link 47:24</p> <p>litigated 43:5</p> <p>little 13:24 37:12</p> <p>lives 16:10</p> <p>locked 45:18</p> <p>long 11:15 16:10 17:21 25:25 30:3 36:10 48:16</p> <p>longer 5:2</p> <p>look 15:14 20:2 24:10 26:20 31:15 41:12</p> <p>looked 19:5 25:3 43:8</p> <p>looking 24:6,7 24:17,19,21,25 26:14 33:22 34:15 35:10,15 35:18 39:1 41:21,22</p> <p>looks 19:23</p> <p>lose 20:2</p> <p>lot 7:22</p> <p>low 12:9</p> <p>Lynaugh 4:15</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>main 6:16 35:17</p> <p>major 7:14 14:18</p> <p>making 30:19</p>	<p>man 17:20 23:13 29:22 33:2</p> <p>managed 26:18</p> <p>manner 11:16 20:7 21:23,24 27:14 32:10 34:6 38:13 47:10,11</p> <p>man's 29:16</p> <p>March 6:1</p> <p>markedly 32:18</p> <p>Marshall 2:6 3:6 21:14,15,17 22:16 23:4,15 24:1,15,23 25:23 26:5,7 26:24 27:11 28:7,24 29:10 29:25 30:11 31:5,21 32:4 33:20 34:13 35:1,8 36:2,7 37:8,13,18,21 37:24 38:2,9 38:25 39:11,13 39:16 40:4,7 40:10,19,22 41:5,16 42:2 42:13 43:2,18 43:21 44:1</p> <p>matter 1:25 4:20 9:2 38:8 40:2</p> <p>matters 49:6</p> <p>mean 10:19 17:24 30:2 32:16 41:7,10 41:19 44:11</p> <p>meaning 9:5</p> <p>meaningful 4:17 7:11 12:22 13:1 20:13</p> <p>means 35:15</p> <p>meant 36:10</p> <p>meets 31:16</p> <p>men 14:13</p> <p>mental 4:23 10:13,24 15:24</p>
--	---	--	--	--

<p>17:15 21:2 22:6,20 27:23 27:23 30:18 31:11 37:2 mention 8:23,24 32:22 mentioned 8:22 31:22 43:20 mentioning 25:7 mercy 15:18 18:10 39:8 40:6 42:11 46:16 48:3 merely 39:19 merits 7:3,3,8 mid 4:11 5:3 6:1 mind 10:5 28:21 28:22 29:12 minutes 44:2 misreading 6:8 misstatement 36:13 mistakes 33:10 mistreated 47:18 mistreatment 4:23 44:24 45:8 47:16 misunderstood 19:16 mitigate 34:5 mitigates 33:4 mitigating 4:18 7:12,12 8:14 8:23,24 10:14 10:20,25 11:15 11:16 13:2,20 14:19 15:17 17:8 19:1 20:7 21:23,25 23:23 25:21 26:2 30:9 32:24 33:6,12,17 34:9,12 35:25 38:4 41:15 42:18 47:12,25 mitigation 42:11</p>	<p>48:4 mom's 46:1 months 7:15 moral 9:11 18:9 21:25 30:19 31:20 32:2 48:17 morally 30:24 morning 8:23 mother 15:5,10 22:20 45:17 46:5 motion 5:11 motions 48:22 move 38:18 39:6 moved 44:24 mull 48:16 murder 7:16 23:1 26:22 33:12 35:19</p> <hr/> <p style="text-align: center;">N</p> <p>N 3:1,1 4:1 narrow 6:10 48:1 NATHANIEL 1:7,16 nature 32:24 37:2 41:7 necessarily 35:12 46:24 need 7:22 19:20 32:21 negative 45:2,4 neglect 7:19 neither 13:3 Nelson 5:4,14,16 5:19,23,25 6:2 6:3,4,9,10,12 6:14,17,18,24 Nelson's 5:25 nervous 8:6 neuropsychol... 8:2 never 8:13 33:9 36:18 new 5:13</p>	<p>night 45:19 nine 43:4 nondangerous... 14:9 nonpsychotic 14:17 normal 8:3,4 note 44:17,18 noted 32:22 numerous 15:5 46:1,2 nurturance 7:22 Nystrom 27:22</p> <hr/> <p style="text-align: center;">O</p> <p>O 3:1 4:1 objectively 12:2 12:3 21:6,10 objects 46:2 observing 48:8 occasions 46:6 occurred 36:20 October 4:12 offered 14:12 okay 31:2 old 29:20 45:21 older 29:4 opened 14:18 opinion 5:13 9:15 12:25 opinions 5:1 opportunity 23:19 24:5 25:1 opposed 15:16 33:8 opposing 36:14 option 48:3 options 48:2 oral 1:25 3:2,5 4:7 21:15 ordinary 35:18 37:2 ought 17:4 outgrow 41:24 outside 44:13 45:16</p>	<p>overrule 12:12 12:15,20 Owen 2:4 3:3,9 4:6,7,9 5:20 6:16 7:1,7 9:24 10:3,15,21 11:4,9,18,21 12:16,19 13:24 14:22,25 15:21 16:15,19,22 17:13 18:15 19:15 20:8,16 20:21,23 21:13 44:2,3,5 45:23 46:20,25 47:11 49:3 O'Connor's 12:13</p> <hr/> <p style="text-align: center;">P</p> <p>P 4:1 package 26:17 page 3:2 27:11 36:19 44:17,19 45:14 pages 29:2 particular 9:3 9:16 22:17 28:25 40:13 41:25,25 46:22 46:23 pattern 35:19 penalty 8:11 pending 42:25 Penry 4:15 5:2,5 8:8 9:23 10:1 10:10 12:10,22 14:24 15:23 18:18 19:10,22 21:2,8,19 22:8 22:8,13 25:5,6 25:9 27:5 28:4 28:8 30:14,15 30:21 31:1,17 31:23 33:9 34:15,16,21 35:3 36:10,24</p>	<p>37:10 40:24 42:9 43:5 44:9 48:9,18 Penry's 42:14 people 23:3 30:3 percent 29:2,3 percentile 8:5 permit 35:24 person 37:12,12 40:14 42:20 personal 48:12 personality 7:21 person's 18:8 persuasive 44:11 petition 5:23,25 Petitioner 1:5 1:14 Petitioners 2:5 3:4,10 4:8 44:4 phrase 6:10 phrases 13:3 physical 7:17 physically 47:19 picture 23:2 26:22,25 pipeline 43:7 pistol 15:6 36:16 planned 33:1,2 planning 27:20 please 4:10 19:16 21:18 point 17:11 25:9 26:7 35:13,17 36:11 41:9 pointed 48:1 points 44:5 poor 27:20 pose 8:21 poses 18:20 position 35:23 possibility 34:1 34:6 possible 18:17 postdates 11:5 post-Johnson 36:6</p>
---	--	---	--	--

<p>precedential 44:13 precisely 18:24 19:4 precluded 33:24 34:9,10,11 38:3,7,15 predisposition 41:9 premeditation 31:11 premise 47:18 presented 6:21 9:3 14:1 23:6 26:4 27:1 29:17 presently 18:20 19:2 presents 6:18 pretty 25:25 35:14 36:20 prevail 7:3 19:22 prevent 38:6 previously 33:10 pre-1991 8:18 18:25 43:22 prior 5:5 44:9 prison 29:22 probability 18:2 19:25 20:5 probable 15:25 16:24 17:15 probably 8:5 problem 18:25 27:6 33:4 problems 7:21 7:23 31:12 proceed 6:6 7:2 proffered 47:25 profoundly 5:9 prosecutor 9:17 16:7,17 17:3,5 17:6,7 prosecutorial 17:11</p>	<p>prosecutors 9:12 19:13 28:17 provide 14:12 provided 28:2 provides 28:25 32:6 Psychiatry 16:2 psychological 37:5 puppy 16:8,9 purport 12:11 12:15,20 35:7 35:9 purpose 38:24 39:7,9 purposes 42:11 put 5:24 9:14,17 28:21 p.m 49:5</p> <hr/> <p style="text-align: center;">Q</p> <p>qualities 4:18 7:12 13:2 47:13 quantity 48:15 Quarterman 1:7 1:16 4:4,5 5:4 question 9:1,10 9:14,17 11:25 14:1,1,2,4 20:17 23:13,16 23:16 24:2,18 26:4 30:10 33:19,21 37:14 37:16,16 40:19 42:19 43:13,13 44:13 45:6 47:2,9 questions 6:5 8:17,19 21:11 23:21,25 24:13 24:14 42:7 43:23 48:1,20 quite 14:23 31:3 37:12 quote 45:13</p>	<p>quoted 12:13 35:3 quoting 14:16</p> <hr/> <p style="text-align: center;">R</p> <p>R 4:1 raise 15:8 raised 6:4 rape 33:11,12 RAY 1:13 reach 14:3,6 react 22:24 read 6:14 13:4 27:8,13,18 28:6 30:12,17 31:4,20 readily 44:20 reading 29:13 38:10 44:22 reads 27:14 realistically 24:11 realize 32:25 really 16:4,4 40:20 45:5 reason 6:16,24 12:20 16:6 31:7 47:1,18 reasonable 4:21 12:2 13:12 15:14 17:25 18:23 19:24,25 20:5 23:18 25:5 29:7,16 30:9 33:5,23 34:6,10,17 37:19,24 38:2 38:10,14 47:11 47:22 reasonableness 24:7 33:25,25 reasonably 8:10 18:17 reasoned 18:16 reasoning 19:4 reasons 4:24 40:23</p>	<p>REBUTTAL 3:8 44:3 recognized 15:22 record 14:16 20:2 24:19 36:16 45:11,13 records 46:18 recur 46:24 reduce 32:1,2 reduced 8:14 reduces 31:12 referring 20:11 reflected 27:20 regard 4:21 17:4 23:1 regarded 41:15 regardless 11:12 25:1 rehabilitabil... 14:9 reinstate 48:24 relate 13:8 related 27:25 relative 22:21 22:21 34:2 44:25 relevance 13:13 13:13 22:1 33:12 relevant 4:18 7:11 10:14 13:2 21:25 26:1,10,12 32:11,16 38:3 40:23 42:14 47:12 reliance 16:17 relief 40:25 49:1 remain 43:4 remainder 21:12 remaining 44:2 remedy 27:6 remind 44:7 reminding 28:18</p>	<p>removed 20:15 20:18 removing 20:9 repeat 40:14 repeatedly 8:25 repeating 39:25 represent 5:2 representation 28:14 reputation 22:15 required 48:18 requirement 4:16 9:2 requires 21:22 reserve 21:12 respect 45:9 48:6 respectfully 5:10 8:7 24:1 Respondent 2:7 3:7 21:16 response 10:25 18:19,23 result 7:19 8:5 18:21 35:4 44:10 resulting 8:16 27:15 results 16:21 retardation 22:7 30:24 37:2 return 5:11,12 reverse 48:23 review 4:11 5:9 6:5 8:18 14:2 reviewing 4:14 right 11:20 26:19 38:5 40:5 41:1,10 48:8 ROBERT 2:4 3:3,9 4:7 44:3 ROBERTS 4:3 9:22,25 13:16 13:19 14:15,23 15:12 16:13,16</p>
---	--	--	---	--

16:20 17:10 18:6 19:10 20:4 21:13 33:15 34:8 41:6,18 43:25 45:21 46:11,21 47:8 49:3 rough 28:20 row 43:3 rule 19:11,14,17 25:9 ruling 12:8 25:16	sensibly 13:7 sentence 8:11,12 8:16 9:16 18:14 30:20 sentenced 43:3 43:22 sentences 8:16 sentencing 9:2 18:25 separate 15:1 separated 20:12 serious 7:17,17 seriously 4:16 set 6:21 8:2 settled 4:13 10:22 44:14 severe 22:7 severely 33:7 36:25 shame 46:9 sharp 5:4 shifted 22:21 shortcomings 27:3 shot 24:9 show 18:9 40:6 47:3 showing 39:7 shown 15:18 18:23 45:1 shows 38:21,23 46:13 side 9:15 34:20 34:21 significance 33:7 46:4 significant 4:22 28:2 similar 16:17,19 17:11 simply 12:12,13 15:21 17:13 single 14:17 15:2 situation 42:22 46:16 Sixth 24:16	sizzling 22:3 slammed 45:17 slow 27:17 31:8 slowly 30:17 small 35:20 smaller 37:9 smashed 45:18 Smith 5:7 12:12 12:15,18 20:6 20:9 34:17 society 8:21 16:5 solely 9:17 48:4 son 46:10 sorry 12:17 20:16 sort 8:6 9:10 31:11 48:14 speaks 13:7 special 22:2 23:24 25:20 26:2 28:13,15 28:18,22 30:14 38:11 48:5,10 specific 14:7 22:12 28:8 specifically 27:24 speculate 15:20 speculation 15:22 squarely 11:25 17:16 44:14,17 squeezed 25:21 25:22 standard 20:5,6 33:22 35:4 37:19 stands 19:18,19 State 5:16 6:9 11:3,5,11 12:1 12:6 20:24 21:9,19 24:4 25:3 26:14 29:13 32:13 34:14 35:11 38:25 39:10 43:7 44:19	Stated 39:2 statement 16:17 17:12 statements 36:12 States 1:1 2:1 State's 5:23 6:7 6:10 28:14 44:16,18 45:10 statute 8:19 18:25 25:2 43:4,17,17,22 steady 27:17 step 20:14,18 Stevens 6:23 7:5 34:23 35:1,6 35:22 36:3,4 43:12 stick 15:7 36:18 45:12,15 strained 13:6 strangle 33:2 strategic 24:16 strength 34:2,18 striking 37:11 37:12 strong 10:18 strongly 9:19 struck 15:6 36:16,17,17,18 45:11 stuff 38:17 subject 44:6 submission 15:12,13 submitted 27:4 27:6 49:4,6 substantial 44:23 substituting 5:18 suffered 7:17,20 suffers 8:6 sufficient 41:20 suggest 8:8 18:19 suggested 5:11	6:9 27:5 31:18 42:15 suggesting 37:4 37:8,9 suggestion 31:17 39:18 suggests 42:18 42:18 44:21 support 8:10 supported 9:19 suppose 10:12 supposed 25:11 31:15 33:18 41:20 Supreme 1:1 2:1 sure 38:23 surely 5:16 36:22 survive 26:18 swallowed 25:9 system 42:24 43:10
S				T
S 3:1 4:1 satisfies 9:1 satisfy 48:9 saw 15:9 46:5 saying 25:17 40:2 says 16:25 29:6 29:21 40:9 44:19 45:13 48:18 SCALIA 11:2,7 11:10,19 12:11 12:17 20:14,17 20:22 37:11 scope 44:13 score 12:9 scored 8:3 scores 22:4 se 19:11,17 second 44:15 see 12:16 15:19 20:3 25:13 26:16 28:12 30:5 32:18 33:6 38:17 selection 9:13 send 6:6 sending 23:20 sense 4:20 18:9 34:7 sensible 13:11 47:24			T 3:1,1 take 4:16 5:4 16:8 35:2 40:6 41:7 42:8 43:15 46:15 taken 39:25 40:14 takes 30:3 talking 16:24 20:10 28:5 30:7,13 39:23 39:24,25 41:8 Teague 35:8,13 44:7 teenage 46:10 teenager 7:18 47:16,20 tell 28:17 42:23 telling 17:7 tells 30:22 Tennard 5:6 10:22 11:2,2,4 11:19,22,24	

12:8,11 15:23 16:23 17:1,14 18:18 34:16 47:6 Tennard's 12:6 17:8 term 38:22 terms 15:5 terrible 14:14 test 9:10 47:5 testified 8:1 testimony 29:5 29:17,21 32:23 32:24 33:8 45:3,25 tests 8:3,3 Tex 2:4,7 Texas 1:8,17 8:19 18:25 19:2 22:1 23:22 24:22 38:24 40:2,8 40:10 42:24 43:3,16 48:10 Thank 21:13 43:25 49:2,3 thing 32:21 34:21 44:15 things 25:14 26:20 think 5:22 6:7,9 6:11,11,16 9:24 10:1,3,5 10:10,12,22 11:19 12:7,21 13:3 14:7,11 14:22,25 15:21 15:22 16:4,11 16:22 18:3,15 18:17,18 19:17 19:18,19,23 20:2,8,21,23 20:24 21:5,8 24:6,10,23,24 25:7,8,25 28:7 29:12 31:6,13 32:21,24 33:3	33:5,6,21 34:23 35:9,14 35:17 38:9,17 38:19,19,20 42:2 44:11,12 45:2,25 46:3,8 46:20,25 47:5 47:5,14,17,23 48:7,13,15,16 48:17 thorough 27:16 thought 26:3 threat 8:21 three 6:4 7:15 36:15 throw 15:10 tie 42:12 ties 12:21 time 11:12,12,13 21:12 27:18 28:20 30:7,8 32:13 33:11 34:22 35:4,11 36:1,10,21 45:22 times 15:5 46:1 46:3 token 45:9 told 5:15 9:4,8 15:8 17:3 48:4 top 26:13 treatment 5:5 7:14 trial 8:1 9:7 31:16 trials 9:8 tried 43:16,20 45:15 troubled 13:21 13:21 22:5,18 26:9 32:9 40:12 44:20 45:6 true 35:23 37:13 try 7:5 trying 6:20 21:1 24:3	turmoil 7:23 turn 5:4 7:7,7 turns 26:21 twice 46:2 two 7:12 8:9,17 8:19,25 11:24 13:3 16:21 20:25 21:6 22:11 23:21,24 24:13 25:20 28:19 39:21 44:5 48:5,5 types 42:5,6	14:9 <hr/> V <hr/> v 1:6,15 4:15 vacate 5:12 value 44:13 vehicle 6:19 28:2 29:15 32:6 verdict 8:24 versus 4:5 31:15 view 5:2 36:4 42:8 viewed 21:25 violated 23:18 violates 23:21 violence 41:9 46:19,22 violent 14:21 15:16 46:14 virtually 21:24 vs 4:4 5:4	ways 32:11,15 weak 37:15 38:6 38:8,11 weaker 10:12 22:10,14 weakness 33:17 Wednesday 1:23 weight 34:18 Welfare 16:3 went 45:15 We'll 4:3 we're 11:10,10 23:3,24 24:3,6 24:17,18,24 25:16,16 31:15 33:22 35:10,14 35:18 we've 24:19 25:8 willful 27:17 willing 10:4 wish 18:9 witnesses 17:19 word 46:2 words 13:5 22:10 30:13 work 24:20 working 32:13 worth 25:7 worthy 6:5,18 wouldn't 10:2 23:9 29:18 30:4 39:20 wrong 20:20 21:9
		<hr/> U <hr/> unable 31:10 unconceivable 18:16 underestimate 46:4 underlay 5:8 understand 13:8 47:2 understanding 16:5 understands 46:8 understood 40:3 47:4 undescribed 35:21 unhurried 27:17 31:8 United 1:1 2:1 unreasonable 11:11 12:2,4 20:19,22,24 21:6,10 30:4 unreasonably 24:4 29:14 unreliable 8:16 untrue 14:10 unwarranted 30:20 upbringing 15:3 use 6:20 utterly 11:20	<hr/> W <hr/> wait 5:23 walking 29:22 want 36:13 44:15,17,18 45:24,24 warrant 40:25 warranted 12:5 Washington 1:22 wasn't 11:3 13:17,20 27:2 29:15 31:19 34:12 35:4 43:12 watching 46:7 way 8:15 10:19 13:7 14:5 15:20 19:9 23:5 25:21 26:1,2 27:1 32:17 33:5,17 34:1 39:21 42:3,15 43:5 46:15 47:3,17	<hr/> X <hr/> x 1:2,21 <hr/> Y <hr/> year 36:8 years 17:23,23 17:23 25:10 29:20,21,23 30:4 young 17:20 36:25 37:6 youth 13:10,21

21:4 22:6,15 22:18 26:7,8 30:1,2,3,6 40:13 44:14 youthful 23:8	<hr/> 4 <hr/> 4 3:4 40 29:21 44 3:10 47 43:2,21,21			
<hr/> 0 <hr/> 05-11284 1:6 4:4 05-11287 1:15 4:5	<hr/> 5 <hr/> 50 29:21			
<hr/> 1 <hr/> 10 17:23 29:21 29:23 30:4 11:10 2:2 4:2 115 22:4 12 44:2 12:00 49:5 121 22:4 141 29:2 144 29:3 15 17:23 45:23 17 1:23 43:8,9 18 36:22 19 36:22 1976 10:23 1984 44:8 1989 4:14 27:5 1991 43:17,20 1994 21:20 25:3 1997 12:7,8 1999 21:20 25:4 36:9	<hr/> 6 <hr/> 65 36:19 45:14 66-year-old 33:2			
	<hr/> 7 <hr/> 75 29:2,3			
	<hr/> 8 <hr/> 8 44:19			
	<hr/> 9 <hr/> 90 27:11 45:14 90s 24:10 91-7580 44:16 917580 44:18 95 45:14			
<hr/> 2 <hr/> 2 33:1,2 20 17:23 2001 21:20 2006 1:23 21 3:7 25 43:6 26 44:17,19				
<hr/> 3 <hr/> 30 29:20 31 25:10 34 43:9				