No. 99-5746

In The

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, Director,
Virginia Department of Corrections,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), this Court "held that 'just as the State may not by statute preclude the sentencer from considering any mitigating factor, *neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.*' " *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (quoting *Eddings*, 455 U.S. at 113-114) (emphasis added). At the time of Mr. Weeks' trial in 1993, this "sentencer may not refuse to consider mitigation" rule was "not a 'new rule' under *Teague [v. Lane*, 489 U.S. 288 (1989)] because it [was] dictated by *Eddings* and *Lockett [v. Ohio*, 438 U.S. 586 (1978)]." *Id.*, 492 U.S. at 319 (Penry's judgment was final for *Teague* purposes in 1986). In 1993, then, it would have been unreasonable (and contrary to Supreme Court law) for a court to find no " 'risk that the death penalty [was] imposed in spite of factors which may call for a less severe penalty,' " *Penry*, 492 U.S. at 328 (quoting *Lockett*, 438 U.S. at 605, and *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring)), in the face of a sentencer's suggestion that " 'in following the law . . . [it could not] consider,' " *Eddings*, 455 U.S. at 879 (O'Connor, J., concurring) (quoting sentencing judges' comments), mitigating evidence.[1] Trial counsel for Mr.

[1] As for the Respondent's professed inability to discern "what seminal case or line of authority decided by this Court supposedly constitute [sic] the 'clearly established Federal law' [that satisfies *Teague v. Lane*, 489 U.S. 288 (1989) and Section 2254(d)]," Brief of Respondent, p. 34, the case that Mr. Weeks cited to the trial court and the Virginia Supreme Court – *Penry* – is as good a representative as any of the "pedestrian rule that the sentencer in a capital case may not deem itself precluded from considering relevant mitigating evidence." *See* Brief of Petitioner at 27, n. 13; *see also id.* at 21-22 (line of cases).

Weeks were concerned that the sentencers in his case would *apply* Instruction No. 2 (J.A. 192-93),[2] in a way that violated the *Lockett*, *Eddings*, and *Penry* rule. Counsel stated that "it is not clear to the jury [from Instruction No. 2] that, if they find beyond a reasonable doubt that the aggravating factors have been proved, that they can still choose to sentence the defendant to life in prison." (J.A. 179). To satisfy the Eighth Amendment, said counsel, "the jury has to be instructed that, even if they find the aggravating factors beyond a reasonable doubt, that they have to be instructed that they still can give effect to the evidence in mitigation." (J.A. 178). Counsel told the trial court that the authority for this request was "*Penry v. Linowe* (phonetic) 492 U.S. 302." *Id.*[3] The trial court refused to instruct the jurors according to counsel's *Penry* request, and instead used Instruction No. 2.

The sentencers deliberated, and then returned with a question: if they believed that an aggravating circumstance existed, "then is it our duty to issue the death penalty?"[4] This understanding of their duty would

[2] This is the instruction later reviewed by this Court in *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757 (1998).

[3] The cite for *Penry v. Lynaugh* is 492 U.S 302 (1989). Counsel also explained that the sentencing forms which the jurors had to review and fill out were deficient "when it comes to giving effect to mitigation" (J.A. 179) in that they did "not expressly provide for a sentence of life imprisonment, upon finding beyond a reasonable doubt, on one or both of the aggravating factors." (J.A. 186). Counsel argued that this violated "*Henry v. Linum (sic)*." *Id.*

[4] Respondent argues that a string of occurrences at trial – questions and statements made by the lawyers during voir dire and in closing arguments, the nature and quality of the evidence

plainly violate *Lockett*, *Eddings*, and *Penry*. Counsel asked the trial court accurately to inform the sentencers that even if an aggravating circumstance was found, "they still may impose a life sentence" (J.A. 223), which was the same instruction counsel had earlier requested, based upon *Penry*. The Court refused.

On direct appeal, Mr. Weeks asked that the Virginia Supreme Court reverse the trial court's a.) refusal to instruct the jurors before deliberations that they could give effect to mitigation even if they found an aggravating circumstance, and b.) failure to correct the jurors' mis-impression, revealed during deliberations, that they were required to impose the death penalty upon a finding of aggravation. Respondent argues that Mr. Weeks' claim is defaulted because it was not fairly presented to the Virginia Supreme Court. *See* Brief of Respondent, pp. 21-26. Respondent's arguments ought to be rejected.

presented, instructions by the trial judge other than the pattern jury instruction upheld in *Buchanan* and relied upon by the Fourth Circuit below in rejecting Mr. Weeks' claim – demonstrate that no sensate jury at Mr. Weeks' trial could possibly have been left sufficiently in the dark to have asked the trial judge the question that Mr. Weeks' jury *did* ask about whether it could or could not consider mitigating evidence after it found an aggravating circumstance. But *all of these* occurrences preceded the jury's asking of the question; the jury undeniably *did* ask the question; and the trial judge's sole answer was to tell the jurors to reread "the second paragraph of Instruction # 2" (J.A. 222) – the pattern instruction involved in *Buchanan*. Everything in Point III of the Brief of Respondent that disregards these realities – and that is almost all of Point III – is quite beside the point.

The following excerpts from the direct appeal record show what Mr. Weeks presented to the Virginia Supreme Court:

ASSIGNMENTS OF ERROR AND DESIGNATION OF RECORD

. . . .

41. The trial court erred by refusing to give the jury defendant's proposed instruction C1[5] or to otherwise fully and properly instruct the jury regarding their option to give effect to mitigating evidence by sentencing the defendant to life in prison even if they found one or all of the statutory aggravating factors beyond a reasonable doubt . . .

(J.A. 237).

[BRIEF ON DIRECT APPEAL]

41st Assigned Error

In a capital murder case, consideration of the character and record of the individual offender is indispensable in meeting the requirements of the Eighth Amendment. *Woodson v. North Carlina*, [428 U.S. 280 (1976)] *supra*. In *Penry v. Lynaugh* the Supreme Court stated that " . . . it is precisely because the punishment should be directly related to the personal culpability of the defendat [sic] that the jury must

[5] Proposed instruction C1 reads as follows:

Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.

(J.A. 190).

be allowed to consider and *give effect to* mitigation evidence relevant to a defendant's character or record or the circumstances of the offense." 492 U.S. 302, 327-328, 106 L.Ed.2d 256, 109 S.Ct 2943 (1989) (emphasis added). The Court further stated, " . . . in the absence of instructions informing the jury that it could consider *and give effect to mitigating evidence . . . by declining to impose the death penalty*, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to the evidence in rendering its sentencing decision. *Id.*, (emphasis added), quoting *California v. Brown*, 479 U.S. 538, 545, 93 L.Ed. 2d 934, 101 S.Ct. 837 (1987) (O'Connor, J., concurring).

Instruction C1 was a correct statement of the law under Penry, was not needlessly redundant, and was materially vital to the defendant; it should therefore have been given to the jury by the court.

(J.A. 243-243).

ASSIGNMENTS OF ERROR AND DESIGNATION OF THE RECORD

44. The trial court erred in refusing, in response to a specific jury request for clarification, to specifically instruct the jury that if they found one or more aggravating factors beyond a reasonable doubt, they could sentence the defendant to life in prison or to death.

(J.A. 238).

[APPELLANTS BRIEF ON DIRECT APPEAL]

44th Assigned Error

[Statement of Facts]

Regarding assigned error 44, during their deliberations in the penalty phase of the trial,

the jury sent out a written question asking the court to "clarify" whether or not they had a "duty" to impose the death penalty if they found one of the aggravating factors beyond a reasonable doubt, or whether they could choose between the death penalty and a life sentence. *Appendix*, 896, 2717-2718. The court refused the defendant's request that the jury be instructed that they could impose a life sentence even if they found one or both of the aggravating factors beyond a reasonable doubt. *Appendix*, 2718-2719, instead instructing them to reread the second paragraph of the finding instruction. *Id.*

(J.A. 265-266).

44th Assigned Error

The defendant relies upon the argument set forth under the *41st Assigned Error, supra*, in response to the question presented on this error.

(J.A. 245).

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, sections 8, 9 and 11 of the Constitution of Virginia.

(J.A. 245-246).

In response to these facts, assignments of error, and briefs, the Virginia Supreme Court held as follows:

On appeal, defendant assigns 47 alleged errors committed by the trial court. The defendant has not briefed or argued ten of those assigned errors (Nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39); hence, we will not consider them. *Jenkins v. Commonwealth*, 244 Va. 445, 451, 423 S.E.2d 360, 364 (1992), *cert. denied*, ___ U.S. ___,

113 S.Ct 1862, 123 L.Ed. 2d 483 (1993).[6] In addition, defendant effectively presents no argument in support of five of those alleged errors (Nos. 16, 34, 44, 45, and 46). . . . We have *considered* these so-called arguments and *find no merit* in any of them.

(J.A. 275) (emphasis added).[7]

In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. *We have considered all the arguments* in support of those issues and conclude that *none has any merit.*

(J.A. 292) (emphasis added).

Thus, Mr. Weeks advised the Virginia Supreme Court that the Eighth Amendment was violated because his capital sentencers believed that they could not consider mitigating circumstances upon finding aggravation. He asked that this constitutional violation be corrected on the basis of *Woodson*, *Penry*, and *Brown*, *supra*, and the Virginia Supreme Court "considered all the arguments in

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[6] The Virginia Supreme Court "defaulted" other issues as well. (J.A. 287, 288).

[7] Respondent urged the Virginia Supreme Court to find that assignment of error 44 was defaulted: "Weeks effectively presents no argument in support of Assignment[ ] of Error . . . 44 . . . Accordingly, he has defaulted on th[is] issue." Brief of the Commonwealth, *Weeks v. Virginia*, No. 940335, p. 16, n.3. The Virginia Supreme Court, by "considering" and "find[ing] no merit" to assignment of error 44, obviously rejected Respondent's default argument. Respondent presented no argument at all regarding assignment of error number 44 on direct appeal.

support of those [and other] issues and conclude[d] that *none has any merit.*" (J.A. 292) (emphasis added).[8] There was no procedural default, *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal review that might otherwise be available."); *Harris v. Reed*, 489 U.S 255, 262 (1989), and Mr. Weeks' presentation to the Virginia Supreme Court was perfectly sufficient to identify his contention and the specific rule of federal constitutional law on which it rested. *James v. Kentucky*, 466 U.S. 341, 351 (1984) ("inescapable that the defendant sought to invoke the substance of his federal right").

[8] Respondent's argument that on direct appeal Petitioner "did not present the claim at all, fairly or otherwise," Brief of Respondent, p. 23, cannot be reconciled with this record.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the lower court and vacate Petitioner's sentence of death.

Respectfully submitted,

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