IN THE SUPREME COURT OF THE UNITED STATES

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JEFFREY A. BEARD, SECRETARY, :

PENNSYLVANIA DEPARTMENT OF :

CORRECTIONS, ET AL., :

Petitioners :

v. : No. 02-1603

GEORGE E. BANKS. :

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Washington, D.C.

Tuesday, February 24, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:24 a.m.

APPEARANCES:

RONALD EISENBERG, ESQ., Deputy District Attorney; Philadelphia, Pennsylvania; on behalf of the Petitioners.

ALBERT J. FLORA, JR., ESQ., First Assistant Public Defender; Wilkes-Barre, Pennsylvania; on behalf of the Respondent.

Alderson Reporting Company, Inc.
1111 14th Street, N.W. Suite 400 1-800-FOR-DEPO Washington, DC 20005

C O N T E N T S

P R O C E E D I N G S

(11:24 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-1603, Jeffrey A. Beard v. George E. Banks.

Mr. Eisenberg.

ORAL ARGUMENT OF RONALD EISENBERG

ON BEHALF OF THE PETITIONERS

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

At his trial in 1983, George Banks' team of three defense lawyers presented 23 mitigation witnesses, including three forensic psychiatrists, his mother, brother, and co-workers, a priest, and two nuns. The trial court instructed the jury that it must consider any mitigating evidence unless it was unanimous in rejecting it.

Now Banks claims that Mills v. Maryland, a ruling of this Court made after the completion of his direct appeal, entitles him to re-open his death sentence for the killing of 13 people. In fact, Mills creates a new distinct rule regulating the manner of conducting a death penalty hearing that is not applicable retroactively and that in any case was reasonably applied by the State courts attempting to interpret it.

The primary issue in this case, though, is

whether the Mills rule which prohibits unanimity requirements at the mitigation stage was merely a minor application of existing law dictated by prior precedent or whether it's instead Teague-barred. Mills does cite Lockett v. Ohio for the general proposition that it's beyond dispute that the sentencer, quote/unquote, may not be precluded from considering mitigation.

But before Mills, the sentencer, quote/unquote, always referred to the judge or the jury, never to individual jurors. That was a leap made for the first time in Mills. That was new. Even with a unanimity charge, although there wasn't one in this case, as we'll address, a jury still considered the evidence in the manner that juries historically have considered evidence, that is collaboratively. Until Mills, the Constitution had never been read to forbid unanimity as to verdicts, whether general verdicts or special verdicts. And even since Mills, as this Court recently said in Jones v. United States, we have long been of the view that the very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves.

So the question of jury unanimity, we believe, remained open not only after Lockett but even within the understanding of members of this Court at the time of

Mills and thereafter. In fact, in McKoy v. North Carolina, decided 2 years after Mills, four Justices of the Court rejected Lockett as supporting, let alone compelling, a rule against jury unanimity.

Now, whether the dissenters in McKoy can be said to be right or wrong about the meaning of Mills is irrelevant in this Teague context. The question is that they believed that Mills, not to mention Lockett, did not resolve the unanimity question presented here.

QUESTION: Mr. Eisenberg, tell -- tell us exactly what you mean by jury unanimity because, you know, most States require jury unanimity in the -- in the final verdict.

MR. EISENBERG: Excuse me, Your Honor, yes. I mean only at the stage of finding whether particular mitigating circumstances are present. That is the -- the jury unanimity question that was decided in the Mills and McKoy cases, as I've said, subject to dispute, strong dispute, among the Court that continued even after Mills.

Because this is a Teague case, the question, as I've said, is not whether Mills was right or McKoy was right or which side can be better defended now, but whether State court judges reasonably could have known what the outcome would be. And since even within the Court there was such continuing controversy on the matter,

it cannot be said that State judges reasonably could have known, and therefore the case is Teague-barred.

But that uncertainty continued even beyond McKoy because in the next similar case before the Court, Walton v. Arizona, the issue was presented on essentially the same basis as the Mills case had been. The single hold-out juror scenario, that a single juror because of a unanimity requirement in Mills or because, in Walton, a preponderance of the evidence standard, could block consideration of mitigating evidence and thereby mandate a death penalty case.

QUESTION: On -- on the instructions in the red brief at page 8 and then at page 9, there are two different instructions set out. This is in the respondent's brief. And then the jury form which has to be checked is set out on pages 9 and 10. In your view is that all we should consider when we interpret these instructions, or do you have some additional instructions that you wish us to refer to?

MR. EISENBERG: Your Honor, I think that the instruction here was basically the same throughout, that the message as to unanimity regarding mitigation or not was basically the same throughout the instructions. It's in the joint appendix at page 21. It's repeated at page 26, and we think embodied in the jury form -- I'm sorry --

also at pages 66 and 67.

And in each of those cases, the jury was instructed first that it must be unanimous to find aggravation or no mitigation and then that it must unanimously find whether any -- find aggravating circumstances which outweigh any mitigating circumstances.

But, of course, the threshold question is whether the State courts could even have known that there was such a thing as a rule against unanimity, whether or not unanimity was actually required on the facts of this case. And the Walton case, as I've mentioned, is relevant to that question because in Walton the same argument was at issue, and the argument was that because of the preponderance of the evidence standard, a hold-out juror or even really 12 hold-out jurors, so to speak, could be somewhat persuaded by mitigating evidence, could think it significant, but not quite past the tipping point required by the preponderance standard and yet be precluded from considering that evidence at all in the weighing stage. And yet, the defendant lost that argument in Walton.

And again, the relevance for Teague purposes is to leave the State courts in the position of trying to determine before Walton, before McKoy, before Mills, in this case in 1983 that the Eighth Amendment through the Lockett case somehow precluded the establishment of

unanimity.

QUESTION: Well, with Lockett -- with Lockett they -- what Lockett says is that the sentencer cannot be precluded from considering as a mitigating factor any aspect of the defendant's character or record or any circumstance.

Now, one thing that could have meant -- one thing -- is that you cannot execute a person unless 12 people think that not only that crime is unusually terrible -- that's aggravating -- but also that it outweighs in this person's life any good things he wants to bring in. That's his character. And 12 people have to come to that ultimate judgment. Now, if that's so, 12 people have to come to that ultimate judgment, 12 people have not come to that ultimate judgment when in fact 11 would let him off, but one blocks it by saying I don't agree that this is the mitigating circumstance. So if that's what Lockett means, it would be obvious that that wouldn't satisfy it.

MR. EISENBERG: Well --

QUESTION: Well, what else could Lockett mean is my question.

MR. EISENBERG: Lockett -- Lockett --

QUESTION: What else could Lockett mean that would make sense in the context of the death penalty? And

you'll have a lot of answers, but I want to know what they are.

MR. EISENBERG: Excuse me, Justice Breyer.

QUESTION: Yes.

MR. EISENBERG: It -- what it also could have made sense is that the jury as a whole in the historical manner of juries had to consider the evidence, and there's no doubt that it could have meant the interpretation that you suggest. And we know that because Mills held that and McKoy held that. So, of course, it could have meant that. But the fact that it could have meant that and was eventually held to mean that over continuing dissent by the Court is not -- does not resolve the Teague question.

QUESTION: No, it doesn't, but I want you to tell me precisely in a reasonable way -- and I'm going to wonder if that's -- if it is reasonable or not. That's going to be the issue -- what other thing it might have meant. And I -- I'll draw here on the concurrence in Penry where the statement is made it's obvious it's meant what I just said it meant because anything else would have been arbitrary in the context of our arbitrariness jurisprudence.

MR. EISENBERG: Well --

QUESTION: So -- so you tell me -- I understand the words, well, historical, et cetera, but I want to pin

you down more than that.

MR. EISENBERG: Yes, Your Honor. Let me speak first to Penry.

Penry did not involve this question of unanimity, and the reason I believe that the opinion was taken that it was obviously an application of Lockett is because it involved very much the same kind of categorical question that was presented in Lockett. In the Penry case, there were three questions before the jury, three mitigating categories given to the jury. The defendant said, I have some evidence that doesn't strictly fall within one of those three categories. In Lockett, there were three categories of mitigation given to the sentencer, and the defendant said, I have some categories of mitigation that don't fall within those three categories that my sentencer was limited to. That's why Penry is a straightforward Lockett case.

QUESTION: But I'm thinking of Penry's commentary about Mills or whatever. I may -- I may get these cases mixed up, but I thought that Mills was characterized as a case that follows obviously --

MR. EISENBERG: Your Honor, I --

QUESTION: -- from Lockett --

MR. EISENBERG: I could be wrong, but I -- I remember no such statement from any of the opinions in

Penry or really in any other case except for the -- the Mills and McKoy cases where the subject was in dispute. So that to the extent it was obvious to some members of the Court, it was far from obvious to other members of the Court, and therefore certainly couldn't have been obvious to the State court judges who were expected to know before either of those cases were decided.

QUESTION: Mr. Eisenberg, the court of appeals has changed its mind in this area, has it not?

MR. EISENBERG: That is certainly our view, Your Honor, and that is very relevant to the second question presented here, which is whether, even assuming that the Mills rule could be applied retroactively, there was a -- an unreasonable application of that rule by the State court.

Now, originally this question came before the Third Circuit Court of Appeals in 1991 in the Zettlemoyer case. It was the same type of instruction that's presented here that tracked the structure of the Pennsylvania sentencing statute. And the court of appeals, the Third Circuit Court of Appeals, said that that instruction was not inconsistent with Mills, and it said it was not inconsistent with Mills because an instruction that requires unanimity as to aggravation but doesn't mention unanimity as to mitigation is not an

instruction that requires unanimity as to both. It's the same theory that we have been presenting in this case all along.

In the next case that came up before the Third Circuit in 1997 in Frey, the Third Circuit held, no, that kind of instruction, with all the words and proximities at issue there, did violate Mills.

QUESTION: Did it -- did it treat the Frey case as overruling its earlier case?

MR. EISENBERG: It's -- it treated it as distinguishing, Your Honor, but that -- Mr. Chief Justice, but we think that that's irrelevant for our purposes because the Frey case was a pre-AEDPA case, certainly wasn't applying a deference standard. And the Frey case not only wasn't applying the deference standard, but went so far as to characterize the State court's interpretation of its instruction in these capital cases as plausible.

Now, whether or not plausible means reasonable --

QUESTION: Could I interrupt?

MR. EISENBERG: Excuse me.

QUESTION: May I interrupt with just one question? Because I'm -- I'm a little rusty on just what the sequence of opinions was. And I -- I think you have one impression of the case if you just read the

instructions because I think you've got a very strong argument on the instructions.

I get a different impression of the case when I look at the jury form, the verdict form, which in effect requires a check to show the jury acting unanimously. And my question is at the first go-round, did the court of appeals actually focus on the -- the jury form as well as the instructions?

MR. EISENBERG: The court of appeals in the Zettlemoyer case, the first one in 1991, focused on both, Your Honor.

QUESTION: It did.

MR. EISENBERG: And the court of appeals -- it was faced with the -- the -- I believe that the page exactly is 923 F.2d at 308. It's cited in our -- in our brief. The court of appeals specifically quoted both the charge and the verdict form, and we would suggest that both were legally parallel to the charge and the form involved in this case. And the court made its comment in regard to both of those provisions.

QUESTION: Because the jury form does seem to imply a concept of unanimity because they got to require -- you know, the form definitely refers to unanimity.

MR. EISENBERG: Well, the form refers to unanimity in exactly the same way that the charge does, I

would submit, Justice Stevens, because it says, we, the jury, unanimously sentence the defendant in the above matter, and then you have two options, just as the statute in Pennsylvania and just as the judge's charge laid out. We unanimously sentence the defendant in the above matter, and it says to at least -- we -- we, the jury, unanimously sentence the defendant in the above matter to death or life imprisonment. We, the jury -- have you found unanimously, and then the two options. At least one aggravating circumstance and no mitigating circumstance or -- and there's a big or in the middle of the verdict form -- or one or more aggravating circumstances which outweigh any mitigating circumstances. So --

QUESTION: Yes, but -- but the key point is that in the mitigating circumstances are, there are one, two, three options. They just checked one.

MR. EISENBERG: Yes, Your Honor. There are blanks next to the mitigating circumstances, but frankly, we still have those blanks next to mitigating circumstances now after Mills, after it's been changed, in order to make it perfectly explicit that any one juror can vote for mitigation.

QUESTION: And see, it isn't explicit here, and the check seems to me to indicate that they were unanimous on mitigating circumstance number 1, but they were not on

the others.

MR. EISENBERG: Well --

QUESTION: And so it seems very likely that some of the jurors may have considered -- felt they could not consider mitigating circumstance 2 or 3.

MR. EISENBERG: Your Honor, two things. First of all, the reason that there are checks there is that the jury, under the Pennsylvania structure, is essentially required to give a second look at mitigation in the weighing charge, even if some of those jurors may have -- even if the jurors may have been in dispute about the existence of those mitigating circumstances. So in order to apply the first phase of the instructions, they have to decide whether all of them find no mitigation. If all of them don't find the absence of mitigation, then they go to the second stage, and at that point, they are all required to look at mitigation, even if they might have voted against it the first time. So the statute appropriately tracks the kind of mitigation that all of them are required to consider in the weighing process.

The second point I want to make, however, Your Honor, is that, of course, this is not the first time that a verdict form like this and an instruction like this have been looked at. And I must emphasize this is a deference case under section 2254.

As I explained, the Third Circuit in 1991 looked at a verdict form like this and said, no, this is not a violation of Mills. Other circuits around the United States have consistently held that this kind of instruction and verdict form are not a violation of Mills. Where the -- where the instruction and verdict form explicitly require unanimity as to aggravation but don't explicitly require unanimity as to mitigation, then there's no violation of Mills. And that's --

QUESTION: And so -- so if in fact we have 12 jurors and all 12 believe that this person was awarded the Congressional Medal of Honor and 11 of them think that means he shouldn't get death, but one of them thinks it isn't that much of an offsetting factor, on your reading of this, the -- they could conclude after Lockett that it's death because we don't have unanimity on whether that Congressional Medal offsets the horrible crime.

MR. EISENBERG: Justice Breyer, for purposes of the second question here, the deference question, our argument is that that is not the case, that the jury here was not permitted to vote for death or not required to vote for death automatically merely because they were not unanimous in failing to find a particular piece of mitigation.

QUESTION: So if they had been -- because let's

-- I -- I was reading the jury form differently, and I might be wrong. I'll go back to that.

But take my hypothetical and I want to go back to the retroactivity question. And on that, you're thinking, well, before Mills a State that came to that conclusion would not be violating the Constitution.

MR. EISENBERG: What I would say, Your Honor, is that before Mills a State that came to that conclusion would not have acted unreasonably for purposes of the Teague standard.

QUESTION: Yes, all right.

Now, suppose in Mills -- suppose you're right. And now in Mills you would say, well, that's not right, and the reason that's not right is because the role of the juror is not simply to find the facts, but also to weigh the significance of the mitigating fact against the horror of the crime. That's what Mills then on that view would have said.

Well, why isn't that terribly important? I.e., that is a radical shift in the role of the juror from what was previously viewed as simply finding facts, now to a person who is going to make the ultimate weighing question in his own mind in respect to life and death and the person's career.

MR. EISENBERG: Well, Your Honor, we think it is

a significant change and that's --

QUESTION: But amazingly enough to fall within in -- you see where I'm going?

MR. EISENBERG: Well, that's --

QUESTION: I'm -- I'm saying --

MR. EISENBERG: -- to the same exception.

QUESTION: -- a watershed rule. Is it a watershed rule?

MR. EISENBERG: Yes, yes. Yes, Your Honor, and the answer to that is --

QUESTION: If it is a watershed rule, then of course it's retroactive.

MR. EISENBERG: Then answer to that is, Your Honor, that the fact that a rule is new enough to be Teague-barred is hardly enough to make it -- render it --

QUESTION: In other words, it's not that --

MR. EISENBERG: -- a second Teague exception. In fact, Your Honor, this Court has on numerous occasions held that rules, including Lockett-based rules, are not new, and yet not a single one of them has been held to be a second exception. The Court has made clear that that category is exceedingly narrow, that such exceptions will be very rare, and surely in every other case where a -- an important Lockett-based rule has been announced that has been found new for Teague purposes, the Court has gone on

to reject second exception status here. In fact, even Banks in his brief here does not argue second exception status for the Mills rule.

In further comment on the Mills rule, however, I would -- I would like to -- on the Teague bar, Your Honor, I would like to point out, as I've mentioned, that the Court has previously considered Lockett-based claims for Teague purposes. In Simmons, for example, and in the Caldwell case, the Court established rules that were explicitly based on Lockett concerning -- concerning the jury's consideration of evidence at the -- at a capital sentencing hearing. And yet, in both of those cases, even though I would suggest they were really smaller leaps from Lockett than Mills was, the Court has held that those were new rules that were not entitled either to old rule status or to second exception status. And as in the cases holding that Simmons and Caldwell were new rules, we believe the Court should hold that Teague is a new rule.

Now, to return to the question -- to the deference question, which --

QUESTION: You mean that Teague is a new rule.

MR. EISENBERG: I'm sorry, Your Honor. That's Mills is a new rule.

QUESTION: Mills is.

MR. EISENBERG: Thank you.

To return to the deference question, the second question presented, as I was saying, the Third Circuit held that the State court's interpretation, the one that was victorious here in State court, the same interpretation based on the same State court precedents, was plausible. And whether or not plausible means reasonable, it surely does not mean unreasonable.

And yet, in the first post-AEDPA case involving Mills that came along in the Third Circuit, this one, the Third Circuit held without discussion of either its original 1991 ruling that had upheld this charge or any discussion of its 1997 ruling that had noted that the contrary construction was not unreasonable, the Third Circuit held in this case that no court could reasonably have applied Mills in the way that the State court did.

And the -- the reason that all the other circuits have disagreed with the Third Circuit on that and that the Third Circuit itself has come to a different position on that gets back to Mills itself because Mills was not the kind of charge that was involved in this case. In Mills, the charge explicitly required the jury to be unanimous in order to find the presence of mitigation.

QUESTION: Just to get back a minute, Mr. Eisenberg, this case was decided before Mills was decided. Right?

MR. EISENBERG: The direct appeal in this case --

QUESTION: Yes, the direct appeal.

MR. EISENBERG: -- was completed, including denial of certiorari by this Court, before Mills was decided. Yes, Your Honor.

And in the Mills case, the Court was faced with a verdict form which explicitly required unanimity to find -- to mark yes for mitigation and explicitly required that only those mitigating circumstances marked yes -- that is, unanimously marked yes -- could be considered at the weighing stage.

Now, contrast that in both respects with what happened here. There was no instruction on unanimity for yeses. There was no instruction that only unanimous yeses could be weighed. Instead, we have only an instruction requiring unanimity for no votes on mitigation.

And I think that there's a further important point about the Mills case.

QUESTION: But, Mr. Eisenberg, you would concede that those -- those questions are -- are certainly ambiguous. The -- Pennsylvania made the change just to clarify that it was the individual juror and not the -- the group. You can look at those and conclude that just like you had to find the aggravated unanimously, so you

had to find each mitigating unanimously. The form is certainly susceptible to that reading.

MR. EISENBERG: Well, Your Honor, I would suggest that if it is susceptible to such a reading at all, it is far from the primary meaning, and the reason for that is really just the rules of English grammar. The two stages of the process that are laid out in the instruction in question are not parallel. They are dramatically different. So the first stage says, you must be unanimous in finding aggravating circumstances or no mitigating circumstances. And there's no question, as a matter of grammar, that there's only one verb in that sentence with two objects, aggravating circumstances and no mitigating circumstances. The verb, unanimously finds, must apply to both nouns.

In the second sentence, we have a different structure. Unanimously find --

QUESTION: Mr. Eisenberg, if you -- if you were -- if you were a -- a defense lawyer and you knew that the -- the law was that each juror could individually decide the mitigators and you were confronted with a form like this, would you object?

MR. EISENBERG: Well, Your Honor, had the Mills rule already been decided, I think somebody might have raised an objection. It may or may not have succeeded but

certainly had an objection been able to be made contemporaneously, we wouldn't have to have worried about error being built into the trial and the matter could have been handled expeditiously.

That's why we have changed our verdict form, not because Pennsylvania has changed its understanding of what has always been the structure of its sentencing process, but because once Mills was decided, once the matter was constitutionalized, it became certainly wise for the court to attempt to avoid further litigation on the question by making it explicit.

QUESTION: Before it was just the law and not constitutional, it was all right to be -- to be ambiguous, but once it was constitutional, it had to be clear? I'm not following.

MR. EISENBERG: Well, our -- our argument, Your Honor, is that the fact that they changed the form in response to a new rule is not evidence that they previously read their statute in a different way. In fact, the State supreme court has always said that it has always read the statute to require unanimity only as to the absence, to the rejection of mitigation and not to the finding of any particular mitigation.

But in reference to your question concerning arguments of counsel, in fact, there was no argument of

counsel from either side here that the jury had to be unanimous about mitigation. In the same manner that Your Honor has suggested, presumably the prosecutor, had he believed that the jury had to be unanimous about mitigation, it would have been to his advantage to say so and to argue to the jury, all 12 of you have to find these before you can consider them. He didn't say anything like that.

And in fact, here's what the defense lawyer said in volume 6 of the trial transcript at pages 2300 and 2301. He wasn't, I believe, specifically referring to mitigation, but he said, quote, think individually, decide this individually. All it takes is one person to save his life.

Now, in light of the manner in which the case was argued to the jury and in light of the manner in which the judge presented the charge and laid out the verdict form, we believe that the jury would not have -- cannot be assumed to have come to the wrong conclusion here, and surely that the State court and, as I've mentioned, every Federal circuit court looking at similar instructions and verdict forms, could not be said to have acted unreasonably in finding the absence of a Mills violation.

Thank you. If there are no further questions, now I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Eisenberg.

Mr. Flora, we'll hear from you.

ORAL ARGUMENT OF ALBERT J. FLORA, JR.

ON BEHALF OF THE RESPONDENT

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

Lockett and Eddings established a fundamental principle which basically provides that a State which creates any barrier which precludes a sentencer from giving full consideration and full effect to mitigating evidence relating to a person's character, background, and circumstances of the offense is constitutionally impermissible.

When we look at Mills and take into account the decision in McKoy, the unanimity instruction in Mills, in a weighing State such as Pennsylvania, essentially was a different type of barrier which precluded jurors to give effect to mitigating evidence. In a non-weighing State, the unanimity requirement would probably be appropriate, but in a weighing State, what happens is a single juror can say to other 11 jurors, I don't believe that this particular piece of evidence satisfies a mitigating circumstance, and that single juror can preclude those other 11 jurors from giving effect.

QUESTION: That might have been, Mr. -- Mr.

Flora, the logical extension of Lockett, but to say that Lockett itself compelled or directed that extension I think is quite a stretch.

MR. FLORA: Justice Ginsburg, I think when you look back at the legal landscape over a period of time, going back from Hitchcock, to Skipper, to Eddings, in all of those cases, the Court dealt with different types of barriers. The Court dealt with different pieces of factual evidence relating to character and background and circumstances of the offense.

When the Lockett rule was initially announced by a plurality of the Court, the Court could not perceive in the future every different type of barrier that may come about, and so what happened over a period of time, when you took the Lockett rule, you were essentially applying it to a variety of factual different situations, and each time the Court would look at a particular barrier, which it had not perceived in the past, and if it precluded a juror or a jury from giving effect to mitigating evidence, it struck down that barrier. And that's where we're coming from here.

So when we say that it is a stretch of Lockett, I don't believe so. I think it is a logical consequence of Lockett. I think it is dictated by Lockett and the cases that followed after that.

QUESTION: Does it -- does it mean nothing that this Court was so sharply divided and that you really have just an opinion? The lead opinion is labeled opinion of the Court, but Justice White disassociated himself from the reading. He -- he had a much narrower view of the case.

MR. FLORA: If we look at Mills and if we look at the dissent, in looking at the dissent, my interpretation was that the issue was over how a reasonable juror would have interpreted the particular instructions in that case. I did not glean from the dissent that they thought a unanimity requirement would not constitute a barrier to a jury or jurors giving effect to mitigating evidence.

If you look at McKoy -- and I think this is a question that Justice Breyer had posed about a case -- in McKoy at 494 U.S. at 438, the Court says in the majority opinion, we reason that allowing a hold-out juror to prevent the other jurors from considering mitigating evidence violated the principle established in Lockett v. Ohio, that a sentencer may not be precluded from giving effect to all mitigating evidence.

QUESTION: Yes, but Lockett didn't put it quite that way, did it? I mean, frequently a later decision will kind of characterize an earlier decision in a way

that tends to support the later decision.

MR. FLORA: That is correct. I -- I would agree to a point. If we look at Lockett, Lockett did not say that an evidentiary ruling which precluded the consideration or giving effect to mitigating evidence was constitutionally prohibited.

QUESTION: It said that the -- it said the court had to admit any evidence dealing with the defendant's character.

MR. FLORA: That is correct, but what I'm saying is when you look back at Lockett, at the time Lockett was decided, I don't think the Court could -- could envision the various types of barriers that a State could create which would preclude a sentencer from giving effect to mitigating evidence. So each time a barrier came up, whether it was in Eddings or Skipper or Hitchcock --

QUESTION: But what happened in Lockett was quite different than what was involved in Mills. In Lockett, evidence was offered to be considered by the jury. The court said, no, that's not what we think of as mitigating evidence. And our Court said, any evidence bearing on the defendant's character is admissible for consideration by the jury. Now, that's a long step from the way you describe Mills.

MR. FLORA: The way I describe Mills is

essentially again that in order to give effect to mitigating evidence, you simply cannot have a requirement which allows one juror to preclude the other 11 from giving that effect. And it's my position that that is -- that concept is dictated by the Lockett rule.

QUESTION: If there's doubt about that, I mean, one might say you would prevail on that argument in a debate, but Teague requires more, doesn't it?

MR. FLORA: There is language as to whether if there is a reasonable debate amongst the minds of the jurors. The problem with that concept, when you look at the history of capital jurisprudence since Furman on forward, I can only think of probably two cases in which this Court has been unanimous in its decision, one of which was Hitchcock v. Dugger. If we say that the rule upon which a defendant seeks to rely is a new rule, if so much as one Justice disagrees, I don't think we could ever have then a rule that would be based on precedent. That's the problem I have.

QUESTION: Does it make any difference if it's four Justices, as it was in McKoy, do you think?

MR. FLORA: I don't think you can honestly quantitate it -- put a quantitative amount to it. I just think that --

QUESTION: Does it make any difference that the

dissenters say Lockett didn't remotely support the rule that a mitigator found by only one juror controls?

MR. FLORA: I think -- that's a tough question.

QUESTION: But that is what -- what was said in McKoy by the dissenters.

MR. FLORA: That is what was said in McKoy by the dissenters, but the majority in McKoy disagreed with that.

QUESTION: Would it be all right, let's say today after Mills, for a trial judge to instruct a jury, ladies and gentlemen of the jury, this is a case of utmost gravity from the standpoint of both the defendant and -- and the families of the victims? And your verdict will be most valuable if you are unanimous as to mitigating and aggravating factors. You should not surrender your individual views. If you cannot come to that conclusion, then I'll give you further instructions. Could a judge say that? Would that serve a purpose?

MR. FLORA: A judge could not say that in light of Mills. I think, however --

QUESTION: It's too dangerous?

MR. FLORA: -- especially in a weighing State because you're talking about unanimously find aggravating circumstances. Then you also used the phrase unanimously find mitigating circumstances, and that's the problem that

I have.

I think clearly a court can give guidance to a jury in the consideration and weighing of evidence, and quite frankly, that happens all the time.

QUESTION: Because it seems to me that what I've said is right, that if they are unanimous on all factors, that that's -- that's the jury functioning at its best. And you would give further instructions in the event that the jurors cannot surrender -- should not surrender their individual views on mitigation, and if that's the way it has to come out, fine. But I want you to try to do this. You think that would be error?

MR. FLORA: If you tell the jury to try to unanimously find all of the mitigating factors, the problem I see with that is what happens if they don't. In Pennsylvania there is no remedy if there is a deadlock on the finding of a mitigating factor.

QUESTION: Well, of course, my hypothetical was half -- half completed, and then we'd have to fill in what would happen and I -- I didn't bother to do that. But it does seem to me that the instruction I suggest in the first instance is -- is valuable and also reflects the understanding at least pre-Mills that -- that many people in the legal system had as to the way the jury functions.

MR. FLORA: It was an understanding of the way

the jury functions pre-Mills. I would agree there, but in the penalty phase, in taking a look at the way the unanimity requirement would operate in that phase, it is very different --

QUESTION: Well, I -- I think for your case you -- you have to amend your statement. If you say this was the general understanding as to the way the jury functions pre-Mills, I think you should say pre-Lockett or -- or you're in danger of losing your Teague argument.

MR. FLORA: Well, when I think of a unanimity requirement in a non-capital setting, if one juror holds out, that juror cannot force a guilty verdict. In a capital case, if one juror holds out and precludes the other 11 from giving effect to mitigating evidence, that one juror essentially can effect a sentence of death.

QUESTION: That's true, but now what are you -- what do you say to a different reading of Lockett, which would be the following? A State official reads Lockett and says, this is how it's supposed to work, that the defendant can introduce evidence on anything he wants and the jurors can consider any of this mitigating evidence, and they do consider it. But when it comes time to vote, the only things that the jurors can use to offset the aggravating factors are mitigating aspects of the defendant's life, that they unanimously agree are, one, in

existence and, two, are mitigating. They look at Lockett and say, of course, the jurors considered everything. Now -- now it comes time to vote, and at this point these are the rules in our State.

Now, what I think is the hardest for you is, while that might not be the best reading of Lockett and it certainly doesn't prove to have been the true reading of Lockett after Mills, can we say it's an unreasonable reading of Lockett?

MR. FLORA: I think we can.

QUESTION: Because?

MR. FLORA: I think we can because merely giving consideration to mitigating evidence would, I think, also necessitate the ability to give effect to that evidence, and I think that's what's essential. If we're left with the fact --

QUESTION: But you -- you don't seem to mention our holding in Saffle v. Parks which was a much harder, closer case in my view about whether it was dictated by Lockett than your case. And the Court said no. And in light of Saffle, I -- I don't see what you have left going for you on that argument.

MR. FLORA: In Saffle, you were dealing with an anti-sympathy instruction. Sympathy in and of itself is a concept, but it's not evidence of character. It's not

evidence of background. It's not evidence of the circumstances of a crime.

QUESTION: Sympathy is a -- a conflict?

MR. FLORA: Is a concept.

QUESTION: Concept.

QUESTION: Oh, concept. Excuse me.

MR. FLORA: When you introduce sympathy, as the attempt was to be done in Saffle, that by doing that you're bringing into the picture something that is totally irrelevant and from which a jury would not be able to make a reasoned moral inquiry into the culpability of the defendant to determine whether a sentence of death or life should be imposed. So when I look at Saffle and I look at what Saffle was attempting to do, I think that's very different than having a barrier which precludes giving effect to character evidence and background evidence and evidence specifically relating to the circumstances of an offense. I see it as being very different under the circumstances.

QUESTION: Is -- is -- the point I was thinking before and I'd -- it was Justice Kennedy actually. I think when he -- he wrote in concurrence. It is apparent the result in Mills fits within our line of cases forbidding the imposition of capital punishment on the basis of caprice in an arbitrary and unpredictable fashion

or through arbitrary or freakish means. That's Franklin and California v. Brown and Furman and so forth.

All right. Think back to what my -- my effort to characterize a reasonable State interpretation of Lockett different from yours. Well, can you say why would that be in your opinion, the State saying they consider everything? You remember what it was. Right? All right. Why would that be freakish or arbitrary?

MR. FLORA: It would be freakish or arbitrary again I think because mere consideration of evidence by a jury is not enough. I think you have to give that evidence effect. Without giving that evidence effect, I think you can end up with an arbitrary imposition of the death penalty.

QUESTION: No, but the question is how you give it effect. Eddings and Lockett said you cannot preclude the jury, all 12 people, categorically from giving a certain kind of mitigating evidence any consideration. The question in Mills was can you preclude one juror from giving dispositive effect to an item of evidence in such a way as to determine the verdict. Those are two very different questions. They can be placed under the umbrella of what effect must jurors be allowed to give to mitigating evidence, but they are very different questions within that umbrella. And it seems to me that because the

questions are different, there is not something irrational or capricious in someone having a question -- in someone being uncertain of the answer to the second question even though the first question has been answered in favor of admissibility. What do you say to that?

MR. FLORA: I think that it still comes back to how the unanimity requirement operates. And the mechanism that's being utilized in employing that unanimity requirement is the actual juror, and if that juror is again I think a lone, hold-out vote, then I think under the circumstances that is a clear violation of the Lockett rule.

QUESTION: Is -- a different question. Is the jury form in the record -- do we have it? I'm -- I'm looking at pages 66, 67, and 68 of the appendix where -- of the joint appendix where you have the form. And I'm trying to work out whether this is or is not ambiguous. And it seems to me it might depend on the way in which it appeared on the page because you see the word unanimously appears over here in question 2 on page 66, and depending on how this is indented, it might be whether the jury would reasonably think that that word unanimously does or does not apply to the questions that are on page 68.

MR. FLORA: It's improperly indented. When you go back and I think you could actually look at the -- at

the jury --

QUESTION: But the form itself is -- it's indented. If it were indented, it would seem that the unanimously would govern what follows thereafter, but if it's not indented, it seems to me a judge might reasonably think that that word unanimously didn't govern what -- what follows thereafter.

MR. FLORA: When you have we, the jury, have found unanimously, my recollection of the form was that it is actually not indented like that.

QUESTION: If it's not indented, then -- and this is the other part of the case. See, if -- if it's not indented, then you look at the instruction and in the instruction itself, nowhere does the judge say anything about having to find the -- the mitigating factors unanimously. He doesn't say that. And then you look at the jury form and again, if it's not indented, it really doesn't seem to say that they have to find this unanimously because the word unanimously seems to apply here on the page to the first three things that are blank. And then we get a new section. In the new section it doesn't say anything about unanimous.

So -- so that was what I want you to reply to because the question is whether a judge in that State court could reasonably have taken this form and the

instructions and said, well, it -- it doesn't say they have to be unanimous. They wouldn't have thought they did.

MR. FLORA: My understanding of the verdict form when it was developed was that we, the jury, have found unanimously basically applies to all of the check-off items.

QUESTION: All of those things.

MR. FLORA: I beg your pardon?

QUESTION: And -- and if a judge -- if a judge in the State says, well, I think it didn't, what would you point to in reply?

MR. FLORA: The only thing that I could point to is the actual verdict form itself. That's all I could point to.

I'd like to go back a minute on the -- the question on the jury question -- or the jury instructions.

Jury instructions in capital cases to begin with are very difficult to get across to jurors. Just traditionally we've had a tough time. When you look at a case like this and you have the jury going through the guilt phase of the case, that jury is already conditioned to a unanimity requirement in finding guilt. When you then carry them over to a penalty phase and you take the instruction that we have here and you give that

instruction to them, given the fact it's the way they've already been conditioned and listening to that instruction and hearing the word unanimously repeated and repeated, there is a substantial likelihood that the jury would interpret that instruction as requiring unanimity both as to the aggravating and mitigating circumstances. And that's the problem with the instruction.

And then when you take the verdict slip and put that on top of it, I think that compounds everything under the circumstances. And that's the problem here.

When we -- staying with this, when the State supreme court looked at the Mills issue -- and they decided Mills on the merits in 1995. It was not decided during the direct review process. Pennsylvania has a very unique procedure dealing with finality in capital cases. In 1995 when the State supreme court applied Mills on the merits, what they simply did was they said, we interpret our statute as not requiring unanimity. They looked at only a portion of the instruction, I believe approximately three sentences, and they say, the instruction tracks the language of our statute and therefore there is no violation of Mills. I suggest that's an unreasonable application because what they didn't do is apply the correct standard in --

QUESTION: But that was something in 1995, and

you're talking now about a case that was over on direct appeal before Mills was decided.

MR. FLORA: That is correct, but in 1995, when the case was decided, the Pennsylvania supreme court had the benefit of Mills. And that's what's different about this case.

Pennsylvania has a very different and unique procedure which essentially leaves open the direct review process because in capital proceedings in Pennsylvania prior to 1996, the State court on collateral review would apply any existing constitutional precedents to a claim, even though it was not considered first on direct review and even though the decision came up or was decided by this Court after the direct review process. It's a very different concept there. So there's a question here as to when finality I think occurred.

QUESTION: But wouldn't that undercut this Court's remand the first time around? I mean, if it were -- if it was still on direct review, then there wouldn't be any question about applying Teague and yet we sent it back.

MR. FLORA: And I understand that, and when you sent it back, one of the questions we had in our own mind is whether in fact this Court was fully aware of Pennsylvania's unique process dealing with finality in

capital cases.

In looking at Teague, one of the very first things you have to do is determine when the judgment is final. Teague itself speaks in terms of conventional notions of finality, but that doesn't mean a State can't develop its own concept of finality to which the Federal courts should give respect. After all, States have the primary responsibility for establishing rules of criminal procedure and protecting the rights of an accused.

With that in mind, concepts of federalism and comity which underline the basic precepts of Teague are not offended if a State court decides to keep open its direct review process and on collateral review say, look, here's a decision that came down from the United States Supreme Court. We are going to apply it to the facts of this case because we want to be absolutely certain that execution of an individual is beyond constitutional reproach.

QUESTION: Yes, but that's the State making a policy that its State court judges will do that, and that's different from a Federal intrusion.

MR. FLORA: I think the States have a right to do that.

May I finish the question?

QUESTION: I think you've answered it, Mr.

Flora. Thank you.

Mr. Eisenberg, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF RONALD EISENBERG

ON BEHALF OF THE PETITIONER

MR. EISENBERG: Thank you, Mr. Chief Justice.

As to the last point concerning finality, Your Honor, and the argument that the -- Pennsylvania has created a unique form of collateral review, which is really just direct review, that would be news to the State supreme court which declared this very case to have become final at the conclusion of direct appeal in 1987.

Moreover, the Pennsylvania Supreme Court has on numerous occasions applied the Teague rule in cases arising on collateral review to hold that the claim at issue was a new rule. Obviously they couldn't have done that if they didn't think that their own collateral review occurred after the point of finality.

And -- and furthermore, in -- in response to the argument that this Court may not have been fully aware of the supposedly unique nature of Pennsylvania's procedure, Mr. Flora made exactly that argument in the brief in opposition to certiorari that preceded this Court's previous summary disposition in this case.

Concerning the general argument that Lockett is not a new rule because it forbids any barrier to the

consideration of mitigation, of course the whole question of what's a barrier that qualifies for Lockett protection or not -- and that question has by no means been clear, as I mentioned. That was the exact argument that was at issue in Walton, and the majority of the Court held that to the extent the preponderance standard is a barrier, it's an acceptable barrier. But, of course, even in those cases where the Court has held that Lockett applies, to create a rule against a barrier to consideration such as Simmons and such as Caldwell, the Court has, nonetheless, held that that rule is new.

Saffle is certainly additional support for that proposition, although in Saffle the Court declined to create a rule. In Simmons and Caldwell, the Court did find that the rule was required by Lockett, and yet in later cases found that the rule was new.

Now, one of the reasons I think that the alternative view or the -- the failure to see Lockett immediately as a case that precluded unanimity is because we must consider what the nature of consideration of mitigating circumstances is, Your Honor. It's not merely a fact finding. It is really a mixed question of law, in fact. The jury is not required to find fact A, fact B, or fact C. It is required to find a mitigating circumstance.

And given that that is the nature of mitigating

circumstances, it was all the more reasonable for the States not to understand Lockett as precluding unanimity for the purposes of making that mixed fact -- mixed fact and law determination at the mitigating stage. But in any case, as I've said, given the dispute even on this Court, it was certainly reasonable for the -- for the State courts not to know.

And given the dispute among the other courts about the -- the nature of the application of the Mills rule to verdict forms and instructions like this one, it was certainly reasonable for the State courts to --

QUESTION: See, this mixed question of fact of law that I think makes it more difficult for you in the sense that if it's a mixed question, it's really asking the jurors to decide should this person die, does he deserve to die. And then the pre-Mills statute in the State becomes a situation where he will die even though 11 jurors think he shouldn't.

MR. EISENBERG: But, Your Honor, those --

QUESTION: And that -- that --

MR. EISENBERG: -- those difficult mixed questions are exactly the kinds of questions that we always ask juries to decide and in every context outside of this one, to decide unanimously, even for example, not just in the case of the commonwealth meeting its burden of

proof, but the defendant meeting his burden of proof where that burden of proof is on him in the situation of a -- of an affirmative defense.

Of course, my argument is not that Lockett can't possibly be read to require the result that you suggest.

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Eisenberg.

The case is submitted.

(Whereupon, at 12:24 p.m., the case in the above-entitled matter was submitted.)