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

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

When a capital sentencing jury informs the judge that it does not understand the sentencing instructions held facially constitutional in *Buchanan v. Angelone* and specifically asks whether it is free to consider a sentence less than death if it finds one or more aggravating factors, is the judge constitutionally required to clarify that a death sentence is not mandatory upon the finding of an aggravating factor but that the jury should consider mitigating evidence as well in making its sentencing decision?

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JURISDICTION

The court of appeals issued its judgment and decision on May 10, 1999. Mr. Weeks filed a timely petition for rehearing and suggestion for rehearing *en banc* on May 21, 1999. The court of appeals denied the petition for rehearing on June 4, 1999. The petition for certiorari was filed on August 16, 1999, and was granted (limited to Question Presented 1) on September 1, 1999. *Weeks v. Angelone*, 68 U.S.L.W. 3151-52 (Sept. 1, 1999). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

"[N]or [shall] cruel and unusual punishments [be] inflicted." (U.S. Const., amend. VIII.)

"No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., amend. XIV, § 1.)

STATEMENT OF THE CASE

Lonnie Weeks, Jr., was convicted in the Commonwealth of Virginia for the capital murder of State Trooper Jose M. Cavazos. There was no dispute about whether Mr. Weeks shot and killed the law enforcement officer. He did. The real issue for the jury to decide was punishment. Thus, it was critical that Lonnie Weeks' sentencers understand their duty to consider – and realize their power to give effect to – evidence in mitigation as well as evidence in aggravation of sentence.

A. The Mitigating Evidence

The evidence in mitigation was, summarily, this: The offense occurred when Lonnie Weeks, Jr., was just twenty years old. Mr. Weeks was an African-American man who had been raised in a poor, violent neighborhood. Yet in spite of his surroundings, at age eighteen, Mr. Weeks was (1) the star, captain, and leader of his high school basketball team, (2) a devout Christian and constant churchgoer, and (3) a peaceful, non-criminal, non-violent, productive member of his community. Colleges recruited Mr. Weeks with athletic scholarships.

Mr. Weeks then made a fateful decision. He turned the scholarships down because his girlfriend was pregnant and he felt an obligation to remain with her. After graduation from high school, he left his grandmother's home and moved in with his girlfriend. Thereafter, without school, church, and the support of his grandmother, Mr. Weeks entered the world of poverty and crime around him. He made a series of awful decisions, and his life quickly unraveled, culminating in his theft of a car and the shooting of the law enforcement officer who flagged it down while he was riding in it as a passenger. When it was over, Weeks looked back in horror and disgust at what he had done.

With more texture:

1. *A Promising Start in Precarious Circumstances*

The story of Lonnie Weeks' short life was told at sentencing. His family moved to Fayetteville, North Carolina, from Washington, D.C., when he was seven years old. (J.A. at 158.) His father died when he was ten. Mr. Weeks was raised by his grandmother, Evelyn Leach, because his mother had become "caught up in drugs" and was not able to care for him. (J.A. at 167, 143.)

Ms. Leach lived in a "horrible area" with "drugs, weapons, shootings, killings," (J.A. at 131-32), and she was in a "very, very hard situation economically." (J.A. at 134.) But she was a hard-working, church-going, strict "parent," and Lonnie Weeks thrived under her influence. He was polite, well-behaved, well-mannered, industrious, respectful, and religious. (J.A. at 143-47, 153, 168.) His grandmother "never got no calls from school, never

got no calls from the principal, teachers or nobody like that about Lonnie." (J.A. at 168.)

Other responsible adults also helped Lonnie Weeks to stay out of trouble, for example, his basketball coach, Bennie House. Coach House had a great deal of contact with Lonnie Weeks, almost daily, for three years. (J.A. at 130-31.) Mr. Weeks had no disciplinary record at school, and, in sports, had "[n]ever a fight; never a technical; always – always handled himself real well." (J.A. at 133.) Mr. Weeks "developed into a very fine basketball player" and "had to shoulder a lot of responsibility" as a senior, but, "unfortunately, we lost him in January with grades. That was the only thing negative I can say . . . As much as I talked and encouraged his grades, he still came up short in two courses [at mid-term]." (J.A. at 132.) But "he came back strong and, of course, he graduated in '91 at 71st High School." (J.A. at 132.)

Another person who "saw a lot of potentials in Lonnie" was Sergeant Major Bryant (retired from the Army) who was a neighbor. Bryant came to know Lonnie Weeks "after he had that traumatic moment with his father . . . so I kind of took up on him." (J.A. at 152.) Bryant was hopeful about "the potentials I saw in Lonnie going to college and his ambition for wanting to go to college, I wanted him to make his decision, his mind up which direction he wanted to go." (J.A. at 152.)

Donny Dees also knew Lonnie Weeks well for over a decade. Dees testified that "from 1979 to 1991, I served as his Youth and Christian Education Director, and his sophomore, junior, and senior year in high school, I was his Sunday School teacher" at the C and Adams Street

Church of God. (J.A. at 163.) Dees was also a counselor in the Fayetteville public schools, and knew Mr. Weeks "through church, and from church through school. . . . " (J.A. at 162.) According to Dees, "[y]ou could almost count on [Mr. Weeks] being [in church] every Sunday." (J.A. at 163.) Mr. Weeks "would participate in [Sunday School] class" and was "sensitive from the standpoint, a lot of times in class he would weep and cry over – from the standpoint of – from the lesson." (J.A. at 164.) Dees encouraged Mr. Weeks to go to college. (J.A. at 163.) Upon Mr. Weeks' graduation, Dees moved to a new church and did not see Mr. Weeks anymore. (J.A. at 164.)

2. *A Support System is Dismantled*

Mr. Weeks' grandmother, school, and church had insulated him from his "horrible" neighborhood.[1] After a very short period of time he found himself without this support system in an environment that presented unfamiliar problems and bad temptations. He did not do well on his own.

First, Mr. Weeks moved out of his grandmother's house and in with his girlfriend. (J.A. at 170.) According to Mr. Weeks' grandmother, "she came up with this baby after Lonnie graduated from high school and said that it

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[1] Mr. Weeks testified that, before he graduated, "I really couldn't have gotten in trouble because I was so busy with basketball during the school time and, in the summertime, I was at basketball camp, and I was going to church and my life just felt like it was right. The trouble was – I wasn't around anyone who really got into trouble – I just wasn't around any trouble." (J.A. at 126.)

was Lonnie's baby, and that's all I knew, and Lonnie accepted the baby as his baby." (J.A. at 174.)

Second, Mr. Weeks graduated from high school and did not continue on to college. Sergeant Major Bryant explained that Mr. Weeks did not go to college because of his girlfriend's baby. "He was a kid that was from a broken home, and I guess he didn't want to see that happen to his kid." (J.A. at 153.) Mr. Weeks testified that he did not take advantage of his college athletic scholarships because "I was involved with a young lady . . . and she was pregnant and . . . I didn't want to leave her by herself." (J.A. at 109.) "My grandmother was encouraging me to go to college . . . [b]ut, at the time, I was thinking that I was doing the right thing by being by her side and waiting to go to college later." (J.A. at 109.)

Third, Mr. Weeks stopped going to church. (J.A. at 110.) He was well known as a superb athlete and people wanted to talk to him about that, but

> I was depressed about my life because everywhere I went, strangers [sic] that I knew, they always say, "Why you not in college? What are you doing?" . . . My family and friends, they used to just always tell me that I need to go to college, and I became very depressed. I felt like I let everybody down; and that I was depressed, I guess I really didn't try to focus on being back with the Lord, so I can get my life back right.

(J.A. at 127.)

Mr. Weeks worked a series of menial jobs, but never earned enough money even to have a car. (J.A. at 111-12.) Other young men in the neighborhood appeared to make a lot of money selling drugs, (J.A. at 114), and Mr. Weeks

finally started hanging out with this "bad medicine." (J.A. at 153) (Sergeant Major Bryant's testimony); *see also* (J.A. at 150) ("wrong crowd") (Juaneza Vivian, another neighbor.) Mr. Weeks testified that "[w]e was kind of struggling, so I thought I'd just take the easy way out." (J.A. at 113.) He started selling marijuana with several other persons, all of whom had criminal records. (J.A. at 90-91.) Mr. Weeks was arrested, pleaded guilty, and received a three year sentence, suspended, and five years probation. (J.A. at 113.) It was his first offense. (J.A. at 93.)

3. *Events Preceding the Murder of Trooper Cavazos*

The series of events that culminated in Trooper Cavazos' murder began with a suggestion by Luther J. Waddell. Luther J. Waddell went to high school with Lonnie Weeks but graduated first and started serving prison sentences. (J.A. at 73.) After he got out of prison in 1992, he lived in Mr. Weeks' neighborhood, and they became associates. (J.A. at 73.)

They sold marijuana together.[2] Another drug seller in the neighborhood (Dutlow) did not want them selling

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[2] The state contended that Mr. Weeks was also selling crack cocaine, but the police found none when he was arrested for his first offense. (J.A. at 92.) Mr. Weeks testified that he wanted to sell cocaine, but that he never could get enough money together to do so. (J.A. at 114.) Luther J. Waddell testified that he sold cocaine, and suggested that Mr. Weeks did also, (J.A. at 78), but Mr. Weeks testified that Waddell was lying. (J.A. at 182.) Waddell was in prison at the time of his testimony. (J.A. at 72-73.)

there so he hit Mr. Weeks in the head with a pistol and threatened to kill him – "[h]e kept saying he was going to kill me if he saw me or kill Luther if he saw him." (J.A. at 116, 77.) Mr. Weeks had agreed to "hold" a pistol for a friend,[3] and "once the threats [from Dutlow] started getting worse, I felt that I had to have it." (J.A. at 114, 116.)

Luther learned that a neighborhood house was going to be unoccupied because the occupant was in jail. (J.A. at 74.) Luther planned to burglarize the house, and asked Mr. Weeks to go with him. (J.A. at 117.) Mr. Weeks talked with his girlfriend about it, and she said, " '[T]hat's not you. Don't go.' " (J.A. at 117.) As Mr. Weeks testified, "I didn't – you know, I didn't break into houses or think about doing things like that, I guess, until – until Luther came along. I started hanging out with him, I'd say, about two months – two months. . . . I kind of felt like my life was going down the drain. I missed opportunities that I had. I was having really some problems." (J.A. at 126-27.) "But," Mr. Weeks testified, "I was being more and more tempted by Luther, you know, to get some money." (J.A. at 117.) They went to the house in Luther's girlfriend's truck. (J.A. at 74.) They broke in and took electronic equipment. (J.A. at 75.) Mr. Weeks found car keys; the keys fit a car outside, and Mr. Weeks took it. (J.A. at 76.)

Mr. Weeks said he took the car because "right then that moment I was kind of excited to have – to be able to have a car that maybe I could drive that I never had."

[3] The friend asked Mr. Weeks to keep the pistol for a while because it had been used in a shooting. (J.A. at 114.) Mr. Weeks agreed to help his friend out, and he took the pistol and hid it under the house where he stayed. (J.A. at 116.)

(J.A. at 118.) He decided to drive the car to visit some family members the next day in Washington, D.C. (J.A. at 118.) His cousin, Eric Baker, went with him as far as Richmond, Virginia, and then Mr. Weeks went on to Washington, D.C. (J.A. at 119.)

Mr. Weeks stayed several days, and then Baker telephoned him and asked him to drive down to Richmond to pick him up. (J.A. at 119-20.) Mr. Weeks protested because of the late hour but ultimately agreed. (J.A. at 120.) Mr. Weeks was going to go alone, but his uncle, Louis Dukes, said "it was kind of late and you need somebody with you." (J.A. at 120-21.) They agreed that Dukes would drive on the way to Richmond, and Mr. Weeks would drive on the way back. (J.A. at 120.)

4. *The Murder of Trooper Cavazos*

Mr. Weeks testified that Dukes was speeding on the interstate on the way to Richmond. (J.A. at 121.) A police car came up behind them, and Dukes pulled over near the ramp to Dale City, on or near an overpass or bridge. (J.A. at 121.) Mr. Weeks was very nervous because he was on probation, and because the car was stolen. (J.A. at 121.) The officer told Dukes to step out of the car, and he did. Mr. Weeks was told to step out, and he looked down and saw the pistol his friend had asked him to hold. (J.A. at 122.) He intended to grab it and throw it over the rail of the bridge as he got out of the front seat. (J.A. at 122.)

Mr. Weeks explained as best he could what happened next:

> [M]aybe a Christian or a person who believes in God and the devil will understand what I'm about to say. And, as I stepped out of the car, it was just like something had just took over me that I couldn't understand. It was like something – I felt like something – the best way I can describe it is like something – I can't say something. I knew what it – well, to me, I felt like it was evil – evil spirit or something. That's how I feel. That's the best way to describe it.
>
> In my body, I just – I mean, I couldn't hear nothing, and I just remember afterwards, not at the time, that I started firing the gun. And, once it stopped, I remember my ears popping. My hand came back and it was like something just left me, like left me just standing there, and I couldn't – I was standing there looking at the trooper, and I was just in a daze, couldn't believe what just happened.
>
> I didn't want to believe what just happened, but I knew that I had done it, because it just was in my hand. But I still couldn't believe it, so I was standing there, and I looked at my uncle, and he almost looked, maybe as a ghost or something.
>
> He had a lot of fear in his face, and I guess he figured – I mean, he knowed [sic] that I had never even attempted to do anything violent before. . . .

(J.A. at 122-23.) Dukes came around to the passenger side of the car and told Mr. Weeks to get in. "I still couldn't move and he had to push me." (J.A. at 124.) They drove away, and then Mr. Weeks ran back to the scene. Emergency personnel were there: "I wanted to say something, but I was just too scared to; I couldn't. I know the good in

me wanted to, but I guess the bad in me just wouldn't let me." (J.A. at 124-25.)[4]

5. *Responsibility and Remorse*

Mr. Weeks testified further in mitigation:

- "I apologize for what I have done. I feel that I took an innocent man's life." (J.A. at 127.)
- "I also know that what I have done, it was very – it's very wrong, is hurting, because I know what it feels like to lose somebody that you love." *Id.*
- "I've hurt my own family, as well as his family. Sometimes I actually feel like I can't live with myself, but that, now that I'm back with the Lord, He give me the strength." (J.A. at 128.)
- "I pray for my family and his family every night." *Id.*
- "I feel very ashamed and low. . . . Hearing those things [the victim's qualities, and the pain caused], every time I hear someone talk about Mr. Cavazos, I begin to cry because it hurts me. It hurts me so bad into my heart

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[4] Mr. Weeks' family members and friends expressed shocked disbelief when they learned that he had committed this crime. (J.A. at 147 ("shocked . . . really shocked"); 165 ("I couldn't believe it. . . . I thought she had the wrong person"); 147-48 ("[I]t was just totally out of character for Lonnie . . . I was just horrified, to tell you the truth."); 172 ("I couldn't believe this was Lonnie. . . . "))

that sometimes I actually feel like I could die from that pain." (J.A. at 128.)[5]

- "I guess I felt like I didn't need [the Lord] any more, and so, to myself I say, well, I'm paying for – by my turning my back on Him, I obviously have an indecent mind." (J.A. at 125.)

B. The Jurors' Question – What Is Their "Duty"?

Before *voir dire*, defense counsel sought permission to ask the jurors Proposed Juror Question 13, which was: "Do you promise to seek further instructions from the judge *if you do not fully understand* the meaning of any of the instructions he gives you?" (J.A. at 10, 13.) (emphasis added). Counsel also asked permission to ask the jurors Proposed Juror Question 14, which was: "Do you promise to seek further instruction from the judge *if there is a disagreement among jurors as to* the meaning of any of the instructions the judge gives you?" (J.A. at 10, 14.)

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[5] This testimony was in response to a question by defense counsel regarding how it made Mr. Weeks feel to hear the Commonwealth's evidence in aggravation which had focused on the victim's good traits, and the impact of his death on his colleagues and family. (J.A. at 102-03) (widow describing family's anguish and psychological effects); (J.A. at 94) (fellow officer testifies the victim was "very highly regarded and revered"); (J.A. at 100) (victim was "very kind person"); (J.A. at 97-99) (first officer on the scene suffers psychologically); (J.A. at 98) (officers experienced "[p]anic, disbelief, anger, helplessness," and "you sort of question your faith in people."); (J.A. at 95) (at police meeting after the victim's death an officer had "never seen the outpouring of grief, sorrow and hurt that I saw at [that] meeting.").

(emphasis added). The judge allowed Question 13, but not Question 14, finding that "thirteen covers it." (J.A. at 15.) According to the judge, "if they *understand*, there's not going to be any *disagreement*. If you have *disagreement*, that means they're not going to *understand*." *Id.* (emphasis added). All the jurors were asked the "if you do not fully understand" question. (*See*, e.g., J.A. at 24-25, 31, 40, 46, 54, 62.) The judge concluded that this instruction "covers" situations of jury disagreement or confusion and that "if they have a problem with an instruction, we've told them to come for further instructions." (J.A. at 15.)

The following pattern instruction, referenced as "Instruction No. 2," was given to the jury, orally and in writing, at sentencing:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or imprisonment for life and a fine of a specific amount, but not more than $100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> 2. That his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved depravity of mind or aggravated battery to

> the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 192-93, 199-200.) Before this instruction was given, and during a charge conference, defense counsel argued that this pattern instruction was not sufficient.

Counsel argued that "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 can still give effect to the evidence in mitigation by sentencing the defendant to life, as opposed to death." (J.A. at 178.) Counsel then referred to the "finding forms" (forms the jurors have to fill out at sentencing) and noted that "[t]here is no finding form for finding either one or both of the aggravating factors beyond a reasonable doubt, and still sentencing the Defendant to life in

prison." (J.A. at 179.)[6] "[W]e would ask that Your Honor instruct the jury that even if they find one or both [aggravating circumstances] that they still may impose a life sentence[.]" (J.A. at 223.) Counsel commented that: "[I]t is not clear to the jury that, if they find beyond a reasonable doubt that the aggravating factors have been proved, that they can still chose [sic] to sentence the Defendant to life in prison[.]" (J.A. at 179.) Weeks' attorney asked the court to instruct the jurors in such a way as to inform them that "even though they find whatever aggravating factors there are beyond a reasonable doubt, they can still sentence the defendant to life in prison." (J.A. at 180.)

The trial court concluded that the second paragraph in the pattern instruction "covers what you've [counsel] argued . . . and that it does let them know that they can sentence someone to life. . . . That is the model jury instruction. I certainly think it accomplishes what the federal law requires." (J.A. at 181.) The jurors were given a written copy of the instructions as well as the verdict finding forms to take into the jury room with them, and they retired.[7] (J.A. at 188, 219.) Eighty minutes later, the jurors sent out a written question asking whether a sentence of life imprisonment would include the possibility

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[6] The following day the trial judge asked counsel to examine the proposed verdict forms, and counsel renewed their objection to them: the jury "forms do 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. at 185-86.)

[7] All of the verdict forms provided to the jury at sentencing are included in the Joint Appendix (J.A. at 196-198.)

of parole. (J.A. at 217, 219.) The trial court refused to answer this question, instead advising the jury that it should "impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (J.A. at 219.) The jury returned to its deliberations.

After almost three more hours of deliberation, the jury sent out a second written question:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty of 1 of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(J.A. at 217, 222) (emphases in original.)

Defense counsel "ask[ed] that Your Honor instruct the jury that even if they find one or both of the mitigating factors – I'm sorry, the factors that have been proved beyond a reasonable doubt, that they still may impose a life sentence, or a life sentence plus a fine." (J.A. at 223.) The trial court denied this request. Instead, the trial judge wrote on the bottom of the jury's inquiry: "See second paragraph of Instruction #2, (Beginning with 'If you find from . . . ')."[8] (J.A. at 217, 223.) The jury then returned to its deliberations.

A little over two hours later, the jury fixed Lonnie Weeks' sentence at death based on the sole aggravating

[8] Instruction No. 2 is reprinted in full at pp. 13-14, *supra*.

factor that the crime was outrageously or wantonly vile, horrible or inhuman. (J.A. at 225, 228.) The transcript records that "a majority of the jury members [were] in tears" as they delivered their sentence. (J.A. at 225.)

C. The Direct Appeal

Mr. Weeks asserted on direct appeal that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's refusal to clarify the capital sentencing instruction after the court received a specific jury request to decipher the rule of law. (J.A. at 238, 245-46.) The Virginia Supreme Court summarily rejected this claim. *Weeks v. Commonwealth*, 450 S.E.2d at 383 ("no merit"); *id.* at 390 ("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." (emphasis added)).[9] This Court denied certiorari. *Weeks v. Virginia*, 516 U.S. 829 (1995).

[9] *See Weeks v. Angelone*, 176 F.3d at 259 ("The Supreme Court of Virginia therefore adjudicated assigned error no. 44 on the merits, allowing us to review this claim in a federal habeas proceeding.") (J.A. at 341); and *Weeks v. Angelone*, 4 F. Supp.2d at 536. Given the perfunctory manner in which the Virginia Supreme Court denied Mr. Weeks' claim, de novo review is appropriate in federal habeas corpus proceedings. *See Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 587 (1998) (When state court provides "perfunctory decision" and fails to "articulate any rationale" for rejecting claim, federal habeas corpus court "must independently ascertain whether the record reveals a violation of [federal law].")

D. The Federal Habeas Corpus Proceedings Below

After exhausting state remedies, Mr. Weeks filed a federal habeas petition alleging, *inter alia*, that the trial court had violated the Eighth and Fourteenth Amendments by not ensuring that the jurors understood their duty to consider and give effect to evidence in mitigation. The court of appeals affirmed the district court's rejection of this claim, relying upon this Court's holdings and analyses in *Buchanan v. Angelone*, 522 U.S. 269, 118 S. Ct. 757 (1998), and *Boyde v. California*, 494 U.S. 370 (1990). Because this Court had found in the *Buchanan* case that the Virginia pattern instruction was unambiguous on its face, the Fourth Circuit reasoned that "no reasonable juror would have understood the sentencing instruction to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor." (J.A. at 345.) The Fourth Circuit observed that Mr. Weeks, like Buchanan, had presented evidence about his background and character and concluded that for this reason the jury must have known that it was required to consider this evidence *after* concluding that Mr. Weeks was eligible for death. " '[W]e think it unlikely that reasonable jurors would believe the court's instructions transformed all of this favorable testimony into a virtual charade.' " (J.A. at 345) (quoting *Boyde*, 494 U.S. at 383.) And the court of appeals further observed that Mr. Weeks' jurors, like Buchanan's, had filled out a pre-printed verdict form reciting that they sentenced Mr. Weeks to death after considering mitigating evidence. (J.A. at 345.)

SUMMARY OF THE ARGUMENT

Lonnie Weeks was not sentenced to death by a hypothetical jury. He was sentenced to death by twelve real people in Virginia. His case is not controlled by what the Fourth Circuit thinks a hypothetical jury would have understood, or what it thinks Mr. Weeks' jury *should* have understood, after hearing the evidence and receiving the judge's instructions. After they heard the evidence and received the instructions, both orally and in writing[10], these jurors asked a question in which they posited two alternative understandings of their duty under the law, one of which flatly violated the most basic principles of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and they asked the judge which understanding was correct.

Despite having heard Virginia's facially constitutional pattern jury instruction and the presentation of mitigating evidence, these twelve people failed to understand that the finding of an aggravating factor did *not* impose a "duty" to "issue" a death sentence and did not preclude their consideration of mitigating evidence. If they had correctly understood that they could consider mitigating evidence in determining the sentence, they would not have asked the question at all.

The jurors asked specifically – yes or no – whether they had a duty to impose a death sentence based on aggravation alone. They were denied the clarification that

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[10] The complete sentencing instruction was only one page. (J.A. at 192-93.) It is not as though the portion at issue was buried in a long document.

they sought and the easy, straightforward answer that their question called for. Instead, they were told to reread the instructions they had failed to fathom.

"Presentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence." *Boyde*, 494 U.S. at 384. On this record, where the jurors' question to the court revealed that they did *not* "feel entitled to consider that evidence" without further confirmation by the judge, and where they were refused such confirmation, it will not do to say that, as a matter of law, the instructions really were unmistakably clear all along. To do so is to tolerate a constitutionally unacceptable risk that the mitigation evidence presented on Mr. Weeks' behalf was not "within 'the effective reach of the sentencer.' " *Johnson v. Texas*, 509 U.S. 350, 367 (1993). Only a new sentencing hearing for Mr. Weeks can allay that risk.

ARGUMENT

This Court has repeated time and again that the "qualitative difference" between a death sentence and lesser sentences, together with "the fundamental respect for humanity underlying the Eighth Amendment," imposes a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *see also Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Johnson v. Mississippi*, 486 U.S. 578, 584-85 (1988). Such a determination must take account both of the nature of the crime and of the nature of the defendant –

of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson*, 428 U.S. at 304.

As a corollary principle, the Eighth Amendment " 'requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " *Lockett*, 438 U.S. at 604 (quoting *Woodson*, 428 U.S. at 304); *see also, e.g., Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (citations omitted) ("[F]ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.' "); *California v. Brown*, 479 U.S. 538, 541 (1987) ("constitutionally indispensable"). Failure to consider the mitigating circumstances of a capital offender's individual case creates the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," a risk that is "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S. at 605.

Consequently – and again the Court has repeatedly held – capital sentencers cannot be precluded from considering relevant mitigating evidence, *e.g., Mills v. Maryland*, 486 U.S. 367, 374-375 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 438 (1990), and cannot refuse to consider such evidence in the belief that they are precluded from doing so, *Eddings*, 455 U.S. at 114-15. No Eighth Amendment principle is more firmly established than this one. *See, e.g., Buchanan*, 118 S. Ct. at 761 ("[T]he sentencer . . . may not refuse to consider [ ] any constitutionally

relevant mitigating evidence."); *Harris v. Alabama*, 513 U.S. 504, 511 (1995) ("Consistent with established constitutional law, Alabama has chosen to guide the sentencing decision by requiring the jury and judge to weigh aggravating and mitigating circumstances."); *Morgan v. Illinois*, 504 U.S. 719, 736-37 (1992) (Illinois law requiring the sentencer to consider all relevant mitigating evidence is "consistent with the requirements concerning mitigating evidence described in this Court's cases."); *Parker v. Dugger*, 498 U.S. 308, 315 (1991) ("Under both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence."); *Saffle v. Parks*, 494 U.S. 484, 489 (1990) (citation omitted) (" 'neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence' "); *Burger v. Kemp*, 483 U.S. 776, 789 n.7 (1987) ("We have no doubt that this potential testimony would have been relevant mitigating evidence that the sentencer could not have refused to consider"); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) (citation omitted) ("We have held that in capital cases, 'the sentencer may not refuse to consider . . . any relevant mitigating evidence.' "); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (citation omitted) ("Equally clear is the corollary rule that the sentencer may not refuse to consider . . . 'any relevant mitigating evidence.' "); *Eddings*, 455 U.S. at 113-114 ("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. . . . [Sentencers] determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.")

For this reason this Court has repeatedly reversed death sentences imposed on a record that created genuine doubt that the sentencer had understood its right and responsibility to consider mitigating circumstances as well as aggravating ones. *Eddings*; *Hitchcock*; *Parker*; *see also Clemons v. Mississippi*, 494 U.S. 738, 752 (1990) (vacating the affirmance of Clemons' death sentence and explaining that "because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented . . . to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence"). "*Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity," *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring), as to whether a sentencer understood its duty to "consider[,] and [its ability to] give effect to" such mitigating evidence. *Penry*, 492 U.S. at 319. If there is a "reasonable likelihood" that a capital sentencer applied "the challenged instructions in a way that prevent[ed] the consideration of constitutionally relevant [*i.e*, mitigating] evidence," *Boyde*, 494 U.S. at 380, then the Eighth and Fourteenth Amendments are violated. *See Calderon v. Coleman*, 525 U.S. 141 (1998); *see also Estelle v. McGuire*, 502 U.S. 62, 74-75 (1991); *Mills*, 486 U.S. at 374-375; *Hitchcock*, 481 U.S. at 398-399.

The jurors in Mr. Weeks' case candidly advised the trial court that they were confused as to whether, if they found aggravation, they were duty-bound to impose a death sentence *without* considering mitigation or, on the other hand, were then supposed to consider mitigation. This was a jury that had been specifically told to request

further instruction from the judge if it did not fully understand the meaning of any of the instructions that it had been given. (J.A. at 24-25, 31, 40, 46, 54, 62.) After deliberating on the sentence for several hours, the jurors asked:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty of 1 of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(J.A. at 217) (emphases in original.) Unmistakably, then, the jurors (or at least some of them) believed – despite the instructions they had received and which were facially sufficient under *Buchanan* – that they might have a *duty* to disregard mitigation if the state proved aggravation.

Of course, as *Buchanan* plainly recognized, there is no "duty as a jury to issue the death penalty" upon finding aggravation. Under both Virginia law and the Eighth and Fourteenth Amendments, the "duty as a jury" upon finding aggravation is to consider mitigation. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of other factors to determine whether or not death is the appropriate punishment." *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (citing *California v. Ramos*, 463 U.S. 992, 1008 (1983).)

But Mr. Weeks' jurors did not understand this, and so they asked: "What is the rule? Please clarify." Instead of clarifying – a simple enough task, since the jury itself had

posed its question in straightforward either/or terms – the trial judge persisted in directing the jurors back to the very same jury instruction which they had just reported that they did not understand and which, under one of the two alternative readings that they posed for the court's resolution, unconstitutionally forbade them to consider mitigation. Mr. Weeks' jurors then retired to resume their task and returned after two hours with a tear-filled pronouncement of a sentence of death.

Under these circumstances, the very *least* that can be said is that "there is a reasonable likelihood" (*Estelle*; *Boyde*) that the sentencers did not consider the evidence that was offered in mitigation.[11] Given the jurors' question, and the court's non-response, "[t]he possibility that petitioner's jury conducted its task improperly certainly is great enough to require re-sentencing." *Mills*, 486 U.S. at 384. The "reasonable likelihood" test of *Boyde* must mean at least this much. If relief is required when jurors are silent about their probably unconstitutional understandings, *see Mills*, 486 U.S. at 381 (relief granted despite "no extrinsic evidence of what the jury . . . actually thought"); *Penry*, 492 U.S. at 326 ("[A] reasonable juror could well have believed [although none said so] that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence"), then, *a fortiori*, relief is required when they say explicitly that they are entertaining an

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[11] The Virginia Supreme Court's summary denial of relief on this claim was contrary to the controlling *Lockett* and *Boyde* veins of this Court's "consideration of mitigation" jurisprudence, and was unreasonable. *See* note 9 *supra*.

unconstitutional understanding and want to be advised whether it is right or wrong.[12]

The judge at Mr. Weeks' trial was handed a simple right-or-wrong question. What the question *said* was that the sentencing jurors were harboring a misapprehension of the governing law, which, if not corrected, would produce an unconstitutional death-sentencing process. What the question *asked* was easily answered. But the judge refused to answer the question except by referring the jurors to the original sentencing instructions which, after hours of deliberation, they had found insufficient to provide an answer. This was unjustifiable. "[W]henever there is a reasonable likelihood that a juror will misunderstand a sentencing term [as here], a defendant may demand instruction on its meaning [as here], and a death sentence following the refusal of such a request should be vacated as having been 'arbitrarily or capriciously' and 'wantonly and . . . freakishly imposed.' " *Simmons*, 512 U.S. at 172-73 (Souter, J., concurring) (citation omitted). And when a jury "makes explicit its difficulties [as here]

[12] *Cf. Simmons v. South Carolina*, 512 U.S. 154, 170, n.10 (1994) ("It almost goes without saying that if the jury in this case understood . . . the 'plain meaning' [of the terms in the instruction], there would have been no reason for the jury to inquire [as to their meaning]"); *id.* at 173 (Souter, J., concurring) ("It is . . . clear that at least one of these particular jurors did not understand the meaning of the term, since the jury sent a note to the judge asking [the court to define the term]."); *id.* at 178 (O'Connor, J., concurring) ("[T]hat the jury in this case felt compelled to ask" about the meaning of the terms in the instruction "shows that the jurors did not know" what the terms meant.).

a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). Simply telling the jury to go back and read the instruction again does not remove the "reasonable likelihood that [Mr. Weeks'] jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character." *Boyde*, 494 U.S. at 381.[13]

The Fourth Circuit held otherwise because it apparently believed that *Buchanan* had decreed a rule of destiny about human understanding rather than a rule of law about the facial sufficiency of Virginia's pattern jury instructions. In the Fourth Circuit's view, a Virginia capital sentencing jury *cannot* fail to comprehend – and therefore cannot unconstitutionally interpret – the instructions

[13] Virginia asserted in its Brief in Opposition that Mr. Weeks' claim calls for this Court to establish a "new rule" under "*Teague* and its progeny." (Br. in Opp'n at 12.) The crux of this *Teague* argument appears to be that because the instructions and circumstances of Mr. Weeks' trial were similar to those later considered by this Court in *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757 (1998), only a "new rule" would entitle Mr. Weeks to relief. But Mr. Weeks seeks only the obvious application of the pedestrian rule that the sentencer in a capital trial may not deem itself precluded from considering relevant mitigating evidence. This Court's approval of Virginia's pattern capital sentencing instructions in *Buchanan* did not involve the situation in which those instructions failed in a particular case to get across to the jury that it has no "duty as a jury" to disregard mitigation if it finds an aggravating factor. *Compare Jurek v. Texas*, 428 U.S. 262 (1976) (Texas statute constitutional) *with Penry*, 492 U.S. at 315 (claim that assurances of *Lockett* and *Eddings* were not fulfilled under particular circumstances of Penry's Texas case not a "new rule" under *Teague*).

held facially acceptable in *Buchanan*, even when the jurors confess their incomprehension. (J.A. at 345.) This "we won't hear of it" approach blinks reality.[14]

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[14] Other courts have been less unworldly. *See United States v. Nunez*, 889 F.2d 1564, 1568-1569 (6th Cir. 1989) (abuse of discretion to refer jurors back to instructions that had already caused confusion); *United States v. Zimmermann*, 943 F.2d 1204, 1213-1214 (10th Cir. 1991) (plain error to fail to provide additional instructions in response to jury's questions). In *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1575 (1998), the jury was given technically flawless instructions regarding the process for determining whether the defendant should be sentenced to death. During the penalty phase deliberations, McDowell's jury sent out a note revealing confusion and disagreement about whether it was permitted to consider the mitigating evidence presented by the defense. *Id.* at 835. McDowell's trial court did not directly answer the jurors' questions; it merely referred the jurors back to the original instructions. The en banc court in *McDowell* acknowledged this Court's consistent refusal to tolerate any barrier to the sentencer's consideration of mitigating evidence, then concluded:

> The jury's mistake and confusion in the instant case communicated to the judge in its note fit squarely within the teaching of *Lockett* and *Eddings*. Although the jurors had been properly instructed, the understanding of eleven of them – shades of *Eddings* – was "as if the trial judge had instructed [them] to disregard the mitigating evidence [McDowell] proffered on his behalf."

Id. at 837 (citations omitted). Referring to the trial court's direction of the jurors back to the original instruction, the *McDowell* court recognized that when a jury has failed to understand the instructions in the first instance, "it would be folly to presume . . . that in the end they got it right and followed the law." *Id.* at 839.

Buchanan is about what *should* happen, not what *will*. *Buchanan* is not the first time this Court has approved a capital sentencing procedure as facially sufficient, then has had to correct misapplications of the procedures. *Compare Gregg v. Georgia*, 428 U.S. 153 (1976), *with Godfrey v. Georgia*, 446 U.S. 420 (1980); *compare Proffit v. Florida*, 428 U.S. 242 (1976), *with Parker, supra*; and *compare Jurek, supra, with Penry, supra* (*see* note 13 *supra*). The Court's rule that controls Lonnie Weeks' case in mitigation is not *Buchanan*; it is that

> [u]nder our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio, supra*; *Hitchcock v. Dugger* . . . ; by the sentencing court, *Eddings v. Oklahoma, supra*; or by an evidentiary ruling, *Skipper v. South Carolina, supra*. . . . *Whatever the cause* . . . the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Eddings v. Oklahoma*, 455 U.S. at 117 (O'Connor, J., concurring).

Mills, 486 U.S. at 375 (emphasis added).

Whatever the cause, there is more than a reasonable likelihood that Mr. Weeks' jurors did not consider his substantial evidence in mitigation. The lower court's duty was to set aside his death sentence and permit re-sentencing.

CONCLUSION

This Court should reverse the decision of the court of appeals and remand with directions to vacate Mr. Weeks's sentence of death.

Respectfully submitted,

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