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Jay E. Grenig

Marquette University Law School, [jay.grenig@marquette.edu](mailto:jay.grenig@marquette.edu)

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## How Clearly Must a Judge Instruct the Jury That It Should Consider Mitigating as Well as Aggravating Factors in Making Its Sentencing Decision?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 143-146. © 1999 American Bar Association.

Jay E. Grenig is a professor of law at Marquette University Law School in Milwaukee, Wis. 53201-1881; jgrenig@earthlink.net or (414) 288-5377. He is the co-author of *West's Federal Jury Practice and Instructions* (5th edition).

*Editor's Note:* The respondent's brief in this case was not scheduled to be filed until after *PREVIEW* went to press.

### ISSUE

When a jury in a death penalty case informs the judge that it does not understand the sentencing instructions and 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 and that the jury should consider mitigating evidence as well in making its sentencing decision?

### FACTS

In early February 1993, Lonnie Weeks, Jr., who was 20 years old and on probation for a 1992 drug conviction, participated in a burglary of a residence in Fayetteville, N.C. During the burglary, Weeks obtained a set of keys to a car parked at the residence and stole the car. Weeks later drove the car to

Washington, D.C., intending to sell it or trade it for drugs. Weeks carried a semiautomatic pistol loaded with hollow-point bullets. This type of bullet is referred to as a "man-stopper."

In the evening of Feb. 23, Weeks was riding as a passenger in the car and his uncle was driving. Weeks and his uncle were traveling from Washington to Richmond, Va. Around midnight, a state trooper in Virginia stopped the car for speeding. The trooper approached the car on foot from the driver's side. Upon the trooper's request, Weeks' uncle got out of the car and was standing toward the left rear of the car. The trooper then asked Weeks to step out of the car.

Weeks got out on the right side of the car with his pistol. He then fired at least six bullets at the officer. The officer fell to the pavement unconscious and died within minutes at

(Continued on Page 144)

WEEKS V. ANGELONE  
DOCKET NO. 99-5746

ARGUMENT DATE:  
DECEMBER 6, 1999  
FROM: THE FOURTH CIRCUIT

# Case at a Glance

The Supreme Court is asked to determine when a judge is required to explain to a jury in a death penalty case that the jury instructions do not mean that a death sentence is mandatory upon the finding of an aggravating factor, and when he must clarify that the jury should consider any mitigating evidence as well before making its sentencing decision.

the scene with his own pistol still “snapped” in its holster. Weeks, with his uncle as a passenger, then drove the car from the scene and parked it at a nearby service station. He then returned to the scene of the shooting on foot and retrieved his uncle’s driver’s license, which had been dropped on the pavement. Weeks rejoined his uncle, and they were found by the police a short time later in the parking lot of a nearby motel.

In October 1993, a Virginia jury convicted Weeks of murder. Following the jury’s findings of guilt on the capital murder charge, Weeks presented mitigating evidence as to his religious upbringing, the abrupt manner in which the events surrounding the shooting unfolded, and his feelings of remorse.

During the penalty phase of Week’s trial, the trial court gave the jury a lengthy sentencing instruction. The trial court denied Week’s proffered instruction that it had the option to give effect to the mitigating evidence and to sentence Weeks to life in prison even if it found the state had proved one or both of the aggravating factors beyond a reasonable doubt. During its deliberations, the jury asked the judge whether it was their duty to issue the death penalty if they found that Weeks was guilty of one of the aggravating factors, or whether they must decide whether or not to issue a death sentence even after finding that one of the aggravating factors had been met. Rather than issuing a clarifying instruction, the trial court instructed the jury in writing to see the second paragraph of Instruction No. 2, which read as follows:

“If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alterna-

tives, 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.”

The trial court overruled Weeks’ objection and denied his request that the jury be instructed that it could impose a life sentence upon finding one or both aggravating factors. The court reasoned that the jurors “just have to be drawn to that paragraph to find their answer.” After several more hours of deliberation, the jury found that Weeks’ conduct was outrageously or wantonly vile in that it involved depravity of mind and/or aggravated battery to the victim beyond the minimum necessary to commit the murder. After the jury recommended that Weeks be sentenced to death, the trial court sentenced Weeks to death.

Weeks also pled guilty to the use of a firearm in the commission of a murder and a related grand larceny charge, for which he was sentenced to 13 years in prison. Those charges are not at issue on appeal.

On direct appeal, the Virginia Supreme Court upheld Weeks’ conviction and death sentence. 248 Va. 460 (1994). The U.S. Supreme Court denied Weeks’ petition for a writ of certiorari. 516 U.S. 829 (1995).

After exhausting all available state remedies, Weeks petitioned the U.S. District Court for the Eastern District of Virginia for habeas corpus relief. The district court dismissed the petition. 4 F.Supp.2d 497

(E.D.Va. 1998). Weeks then filed an application for a certificate of appealability with the U.S. Court of Appeals for the Fourth Circuit, raising numerous constitutional claims of error.

Among other things, Weeks argued that the trial court’s refusal to clarify its capital sentencing instructions to the jury after they indicated confusion with the instruction prevented the consideration of relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments. The Fourth Circuit concluded that Weeks had failed to make a substantial showing of the denial of a constitutional right. It denied his application for a certificate of appealability and dismissed his petition for a writ of habeas corpus. 176 F.3d 249 (4th Cir. 1999).

On Sept. 1, 1999, the Supreme Court stayed Weeks’ execution and granted his petition for a writ of certiorari limited to the question relating to the issue of the trial court’s claimed failure to instruct the jury about mitigating factors.

## CASE ANALYSIS

A writ of habeas corpus provides a means by which the legal authority under which a person is detained can be challenged. A writ of habeas corpus may be used to reexamine federal constitutional issues even after trial and review by the state courts. *Brown v. Allen*, 344 U.S. 443 (1953). By means of a writ of habeas corpus, a federal court may order the discharge of any person held by a state in violation of the federal Constitution or laws. See 28 U.S.C. § 2241(c)(3).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sets forth the standard of review that must be applied by a federal court in a habeas corpus proceeding. Under the AEDPA, a state

court's perfunctory decision is reasonable if it is at least minimally consistent with the facts and circumstances of the case. The Fourth Circuit upheld the Virginia Supreme Court's decision.

Weeks argues that the trial court prevented the jury from considering relevant mitigating evidence in violation of *Boyde v. California*, 494 U.S. 370 (1990). Specifically, Weeks points to the failure of the trial court, in response to a specific jury request for clarification, to instruct the jury clearly that it was not required to sentence Weeks to death just because it found at least one aggravating factor.

Weeks stresses that 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 death penalty. Consequently, Weeks says that a jury cannot be precluded from considering relevant mitigating evidence in a capital case.

According to Weeks, the Supreme 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. Weeks points out that the jurors in his case advised the trial court that they were confused as to whether, if they found aggravating factors, they were duty-bound to impose a death sentence without considering mitigating factors.

Weeks asserts that instead of clarifying the instructions, the trial judge persisted in directing the jurors back to the very same jury instruction that they had just reported 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. Under these circumstances, Weeks argues that the very least that can be said is that there is a reasonable likelihood that the sentencers did not consider the evidence he had offered in mitigation. Given the jurors' questions and the court's non-response, he contends that the possibility that the jury conducted its task improperly is great enough to require resentencing.

### SIGNIFICANCE

The Eighth Amendment requires that a jury in a death penalty case be able to consider and give effect to all relevant mitigating evidence offered by the petitioner. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Evidence about the defendant's background and character is necessary for the sentencer to make an individualized assessment of the appropriateness of the death penalty. *Penry v. Lynaugh*, 492 U.S. 302 (1989). In determining the validity of a challenged instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge. *Cupp v. Naughten*, 414 U.S. 141 (1973).

In *Boyde v. California*, 494 U.S. 370 (1990), the Supreme Court held that the proper inquiry in cases in which a capital sentencing instruction allegedly prevented the consideration of mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 494 U.S. at 380. The Supreme Court concluded in *Boyde* that there was not a reasonable likelihood that the challenged instruction prevented the consideration of mitigating evidence in light of the fact that the

instruction told the jury that "you shall" consider "[a]ny other circumstance which extenuates the gravity of the crime" and that the jury was presented with four days of evidence at the penalty phase relating to Boyde's background and character." 494 U.S. at 381.

Applying *Boyde* in the case of *Buchanan v. Angelone*, 522 U.S. 269 (1998), the Supreme Court upheld the constitutionality of the Virginia pattern capital-sentencing instruction, the instruction at issue in this case, against a challenge on Eighth and Fourteenth Amendment grounds. The Supreme Court pointed out that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." 118 S.Ct. at 761. (Citations omitted.)

In *Buchanan*, the Supreme Court held that the instruction did not prevent the jury's consideration of any mitigating evidence. By directing the jury to base its decision on "all the evidence," the Court explained, the instruction afforded jurors an opportunity to consider mitigating evidence. The Court noted that while the instruction informed the jurors that if they found that an aggravating factor had been proved beyond a reasonable doubt, they "may fix" the penalty at death, it then directed that if they believed all the evidence justified a lesser sentence, they "shall" impose a life sentence. The Court concluded that this instruction permitted the jury to impose a life sentence even if it found that an aggravating factor had been proved.

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Even if it were to entertain some doubt as to the clarity of the instruction, the Supreme Court in *Buchanan* declared that the two days of testimony relating to mitigating evidence and the extensive arguments of the defense and the prosecution on the effect that such evidence should be given in the sentencing determination demonstrated that there was "not a reasonable likelihood" that the instructions had precluded the jury's consideration of the defendant's mitigating evidence in violation of *Boyde*.

In effect, Weeks is arguing that the trial court's failure to clarify a jury instruction that has been determined to be facially constitutional violated his Eighth and Fourteenth Amendment rights because the jury's question placed the trial court on notice that it was reasonably likely that the jury would apply the instruction in a way that prevented consideration of mitigating evidence.

This is not the first time that the Supreme Court has been asked to return a capital case for resentencing because of the alleged failure of the jurors to consider mitigating evidence properly. In *Mills v. Maryland*, 486 U.S. 367 (1988) (Rehnquist, C.J., O'Connor, Scalia, & Kennedy, J.J., dissenting), the Court returned a case to the state trial court for resentencing because of the substantial probability that the jurors thought they were precluded from considering any mitigating evidence unless they unanimously agreed on the existence of a particular mitigating circumstance.

The Court is now asked to determine whether a trial court's failure to provide an explanation in response to a jury's request for clarification of its facially constitutional instruction on mitigation and aggravation requires the case to be returned to the state trial court for resentencing.

#### ATTORNEYS FOR THE PARTIES

For Lonnie Weeks, Jr. (Glen A. Huff  
(757) 499-1841)

For Ronald Angelone (Robert H.  
Anderson, III, Assistant Attorney  
General, Commonwealth of Virginia  
(804) 786-4624)