

STEVENS, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 99–5746

LONNIE WEEKS, JR., PETITIONER v. RONALD J. ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[January 19, 2000]

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, and with whom JUSTICE SOUTER joins with respect to all but Part I, dissenting.

Congress has directed us to apply “clearly established Federal law” in the exercise of our habeas corpus jurisdiction.<sup>1</sup> The clearly established rule that should govern the disposition of this case also emphasizes the importance of clarity—clarity in the judge’s instructions when there is a reasonable likelihood that the jury may misunderstand the governing rule of law. In this case, as in *Boyd v. California*, 494 U. S. 370, 380 (1990), we are confronted with a claim that an instruction, though not erroneous, is sufficiently ambiguous to be “subject to an erroneous interpretation.” In *Boyd*, we held that “the proper inquiry in such a case 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.” *Ibid*.

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<sup>1</sup>The habeas statute, as amended in 1996, authorizes the issuance of the writ if a state-court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U. S. C. §2254(d)(1) (1994 ed., Supp. III).

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The record in this case establishes, not just a “reasonable likelihood” of jury confusion, but a virtual certainty that the jury did not realize that there were two distinct legal bases for concluding that a death sentence was not “justified.” The jurors understood that such a sentence would not be justified unless they found at least one of the two alleged aggravating circumstances. Despite their specific request for enlightenment, however, the judge refused to tell them that *even if* they found one of those circumstances, they did not have a “duty as a jury to issue the death penalty.” App. 217.

Because the Court creatively suggests that petitioner’s claim has “the earmarks of an afterthought,” *ante*, at 10, it is appropriate to note that his trial counsel specifically and repeatedly argued that both the instructions and the verdict forms were inadequate because “the jury has to be instructed that . . . even if they find aggravating factors beyond a reasonable doubt, . . . they can still give effect to the evidence in mitigation by sentencing the defendant to life, as opposed to death.’” App. 178. See also *id.*, at 179, 180, 185-186, 223.

Four different aspects of the record cumulatively provide compelling support for the conclusion that this jury did not understand that the law authorized it “not to issue the death penalty” even though it found petitioner “guilty of at least 1” aggravating circumstance. *Id.*, at 217. Each of these points merits separate comment: (1) the text of the instructions; (2) the judge’s responses to the jury’s inquiries; (3) the verdict forms given to the jury; and (4) the court reporter’s transcription of the polling of the jury.

## I

Because the prosecutor in this case relied on two separate aggravating circumstances, the critical instruction given in this case differed from that given and upheld by this Court in *Buchanan v. Angelone*, 522 U. S. 269 (1998).

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The Weeks instructions contain a longer description of the ways in which the jury would be justified in imposing the death penalty; this made it especially unlikely that the jury would understand that it could lawfully impose a life sentence by either (1) refusing to find an aggravator, or (2) concluding that even if it found an aggravator, the mitigating evidence warranted a life sentence. The point is best made by quoting the instruction itself:

“Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt, at least one of the following two alternatives: one, 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 two; that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhumane, in that it involved depravity of mind and 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 life and a fine of a specific amount, but not more than \$100,000.” App. 199–200.

The first paragraph and the first half of the second are perfectly clear. They unambiguously tell the jury: “In order to justify the death penalty, you must find an aggra-

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vating circumstance.”<sup>2</sup> The second clause in the second paragraph is, however, ambiguous. It could mean either:

- (1) “even if you find one of the two aggravating alternatives, if you believe from all the evidence that the death penalty is not justified because the mitigating evidence outweighs the aggravating evidence, then you shall fix the punishment [at life];” or
- (2) “if you believe from all the evidence that the death penalty is not justified because neither of the aggravating circumstances has been proven beyond a reasonable doubt, then you shall fix the punishment [at life].”

It is not necessary to reiterate JUSTICE BREYER’s reasons for believing that the latter message is the one a non-lawyer would be most likely to receive. See *Buchanan*, 522 U. S., at 281–284 (dissenting opinion). Nor is it necessary to disagree with the Court’s view in *Buchanan* that trained lawyers and logicians could create a “simple decisional tree” that would enable them to decipher the intended meaning of the instruction, see *id.*, at 277–278, n. 4, to identify a serious risk that this jury failed to do so.

That risk was magnified by the fact that the instructions did not explain that there were two reasons why mitigating evidence was relevant to its penalty determination. The instructions did make it clear that mitigating evidence concerning the history and background of the defendant should be considered when deciding *whether* either aggravating circumstance had been proved. The instructions did not, however, explain that mitigating evidence could serve another purpose— to provide a lawful justification for a life sentence *even if* the jury found at

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<sup>2</sup>That message was reiterated later in the instructions, see *ante*, at 4, n. 1, *ante*, at 8, n. 3. Reiterating what has already been clearly stated does not serve to clarify an ambiguous statement.

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least one aggravating circumstance. Indeed, given the fact that the first task assigned to the jury was to decide whether “*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,” App. 192–193 (emphasis added), it would have been reasonable for the jury to infer that his history and background were only relevant to the threshold question whether an aggravator had been proved. It is of critical importance in understanding the jury’s confusion that the instructions failed to inform the jury that mitigating evidence serves this dual purpose.

## II

The jurors had a written copy of the judge’s instructions with them in the jury room during their deliberations. The fact that the jurors submitted the following written inquiry to the trial judge after they had been deliberating for several hours demonstrates both that they were uncertain about the meaning of the ambiguous clause that I have identified, and that their uncertainty had not been dissipated by their recollection of anything said by counsel.

“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 one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify.” *Id.*, at 217.

The only portion of the written instructions that could possibly have prompted this inquiry is the second half of the second paragraph of the instruction quoted above. The fact that the jurors asked this question about that instruction demonstrates beyond peradventure that the instruction had confused them. There would have been no reason to ask the question if they had understood the instruction

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to authorize a life sentence even though they found that an aggravator had been proved.

Although it would have been easy to do so, the judge did not give the jurors a straightforward categorical answer to their simple question; he merely told them to re-examine the portion of the instructions that they, in effect, had already said they did not understand. The text of their question indicates that they believed that they had a duty “to issue the death penalty” if they believed that “Weeks is guilty of at least 1 of the alternatives.” *Ibid.* Without a simple, clear-cut statement from the judge that that belief was incorrect, there was surely a reasonable likelihood that they would act on that belief.<sup>3</sup>

Instead of accepting a commonsense interpretation of the colloquy between the jury and the judge, the Court first relies on a presumption that the jury understood the instruction (a presumption surely rebutted by the question itself), *ante*, at 7, and then presumes that the jury must have understood the judge’s answer because it did not repeat its question after re-reading the relevant paragraph, and continued to deliberate for another two hours. But if the jurors found it necessary to ask the judge what that paragraph meant in the first place, why should we

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<sup>3</sup>The Court suggests this likelihood is impossible in part because, even if the jury were confused by the judge’s response, it had not only the text of the instruction but also the benefit of defense counsel’s oral argument, in which counsel averred that the jury could award a life sentence even if it found an aggravating factor. See *ante*, at 9–10. But this statement by counsel, coming as it did, of course, before the jury began deliberations, apparently did not prevent the jury from asking the question in the first place. Moreover, as this Court wisely noted in *Boyd*, “arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.” 494 U. S. at 384 (citing cases) (citation omitted).

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presume that they would find it any less ambiguous just because the judge told them to read it again? It seems to me far more likely that the reason they did not ask the same question a second time is that the jury believed that it would be disrespectful to repeat a simple, unambiguous question that the judge had already refused to answer directly. The fact that it had previously asked the judge a different question— also related to the effect of a sentencing decision, App. 217— that he had also refused to answer would surely have tended to discourage a repetition of the question about the meaning of his instructions.<sup>4</sup>

By the Court's logic, a rather exceptionally assertive jury would have to question the judge at least twice and maybe more on precisely the same topic before one could find it no more than "reasonably likely" that the jury was confused.<sup>5</sup> But given the Court's apt recognition that we cannot, of course, actually know what occupied the jury

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<sup>4</sup>The Court relies on Chief Justice Marshall's opinion in *Armstrong v. Toler*, 11 Wheat. 258, 279 (1826), as support for its presumption that the jury's failure to repeat its question indicates that it understood the judge's answer. In that case, however, it was the jury's question that was arguably unclear; the Court merely assumed that "the jury could not have intended to put a question which had been already answered." In this case, in contrast, there is no mystery about what the jury wanted to know; the mystery is why the trial judge was unable or unwilling to give it a direct answer.

<sup>5</sup>The Court seeks to justify its reliance on the improbable presumption that the jury correctly deciphered the judge's ambiguous answer to its straightforward question by pronouncing: "To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer." *Ante*, at 8. For two obvious reasons that is not so. First, a simple, direct answer to the jury's question would have avoided the error. Second, clearly established law requires that the issue be resolved, not on the basis of a presumption that flows from the posing of any single question, but by deciding whether, under all of the circumstances, there was a "reasonable likelihood" that the jury was confused as to the relevance of mitigating evidence in its decision. The Court's fear of constant reversal in this regard is thus vastly overstated.

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during its final deliberations, *ante*, at 9, and in light of the explanation I have just offered, it is at the very least equally likely that the two hours of deliberation following the judge's answer were devoted to continuing debate about the *same* instruction, as they were to weighing aggravating and mitigating evidence (having been magically satisfied by the repetition of the instruction that had not theretofore answered its question).

When it comes to the imposition of the death penalty, we have held repeatedly that justice and "the fundamental respect for humanity underlying the Eighth Amendment" require jurors to give full effect to their assessment of the defendant's character, circumstances, and individual worth. *Eddings v. Oklahoma*, 455 U. S. 104, 112 (1982). In this context, even if one finds the explanations of the jury's conduct here in equipoise, a 50–50 chance that the jury has not carried out this mandate seems to me overwhelming grounds for reversal.

Other than the Court's reliance on inapplicable presumptions and speculation, there is no reason to believe that the jury understood the judge's answer to its question. As we squarely held in *Boyde*, the "defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction," to satisfy the clearly established "reasonable likelihood" standard. 494 U. S., at 380. The Court's application of that standard in this case effectively drains it of meaning.

### III

The judge provided the jury with five verdict forms, three of which provided for the death penalty and two for a life sentence. Three death forms were appropriate because the death penalty might be justified by a finding that the first, the second, or both aggravating circumstances had been proved. One would expect the two life forms to cover the two alternatives, first that no aggravator had been proved, and second that despite proof of at

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least one aggravator, the mitigating circumstances warranted a life sentence. But that is not why there were two forms; neither referred to the possibility of a life sentence if an aggravator had been proved. Rather, the two life alternatives merely presented the jury with a choice between life plus a fine and a life sentence without a fine.

The first form read as follows:

“We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.” App. 196.

The jury ultimately refused to select this first form, which would have indicated a finding that there was a probability that petitioner would commit additional crimes that would constitute a serious threat to society. In doing so, it unquestionably gave weight to the unusually persuasive mitigating evidence offered by the defense—evidence that included not only petitioner’s personal history but his own testimony describing the relevant events and his extreme remorse. As I explained above, the fact that the jury recognized the relevance of the mitigating “history and background” evidence to the question whether the aggravator had been proved, sheds no light on the question whether it understood that such evidence would also be relevant on the separate question whether a life sentence would be appropriate even if Weeks was “guilty of at least 1 of the alternatives.” *Id.*, at 217.

The jury’s refusal to find that petitioner would constitute a continuing threat to society also explains why it did not use the second form, which covered the option of a

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death penalty supported by both aggravators.<sup>6</sup> The choice then, was between the third alternative, which included a finding that the second aggravator had been proved,<sup>7</sup> and the fourth or fifth alternatives, neither of which included any such finding.<sup>8</sup> Despite the fact that trial counsel had expressly objected to the verdict forms because they “do not expressly provide for a sentence of life imprisonment, upon finding beyond a reasonable doubt, on one or both of the aggravating factors,” *id.*, at 185–186, the judge failed to use forms that would have answered the question that the jury asked during its deliberations.

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<sup>6</sup>That form read as follows: “We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious treat [*sic*] to society,  
and

having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and/or aggravated battery and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.” App. 197–198.

<sup>7</sup>This form, the one ultimately filed by the jury, read: “We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and/or aggravated battery and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.” *Id.*, at 228.

<sup>8</sup>The fourth form read: “We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.” *Id.*, at 197–198. The fifth form was identical except for providing that Weeks’ punishment was to be fixed “at imprisonment for life and a fine” for an amount to be filled in by the jury. *Id.*, at 198.

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The ambiguity of the forms also helps further explain why the Court is wrong in its speculation as to the jury's final hours of deliberation following the judge's response to its question. The Court postulates that before the jury asked whether it had a duty to issue the death penalty "[i]f we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives," the jury had already so decided. Thus, the remaining hours of deliberation must have been spent weighing the mitigating circumstances against the aggravating circumstance. *Ante*, at 8. Of course, the text of the question, which used the word "if" rather than the word "since," does not itself support that speculation. More important, however— inasmuch as we cannot know for certain what transpired during those deliberations— is the fact that after it eliminated the first two verdict options, the remaining forms identified a choice between a death sentence based on a guilty finding on "1 of the alternatives" and a life sentence without any such finding. In my judgment, it is thus far more likely that the conscientious jurors were struggling with the question whether the mitigating evidence not only precluded a finding that petitioner was a continuing threat to society, but also precluded a finding "that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and/or aggravated battery." App. 228. And that question was answered neither by the instruction itself, nor by the judge's reference to the instruction again, nor, we now see, by the text of the jury forms with which the jury was finally faced.

#### IV

The Court repeatedly emphasizes the facts that the jury was told to consider the mitigating evidence and that the verdict forms expressly recite that the jury had given consideration to such evidence. As its refusal to find the first aggravator indicates, the jury surely did consider that

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evidence and presumably credited the testimony of petitioner and the other defense witnesses. But, as I have explained, see *supra*, at 4, there is a vast difference between considering that evidence as relevant to the question whether either aggravator had been established, and assuming that the jurors were sufficiently sophisticated to understand that it would be lawful for them to rely on that evidence as a basis for a life sentence even if they found the defendant “guilty of at least 1 of the alternatives.” For that reason, the Court’s reliance, *ante*, at 8, on the fact that the jurors affirmed their verdict when polled in open court is misplaced.

The most significant aspect of the polling of the jury is a notation by the court reporter that is unique. (At least I do not recall seeing a comparable notation in any of the transcripts of capital sentencing proceedings that I have reviewed during the past 24-plus years.) The transcript states that, as they were polled, “a majority of the jury members [were] in tears.” App. 225. Given the unusually persuasive character of the mitigating evidence including petitioner’s own testimony,<sup>9</sup> it is at least “reasonable” to infer that the conscientious jury members performed what they regarded as their duty under the law, notwithstanding a strong desire to spare the life of Lonnie Weeks. Tragically, there is a “reasonable likelihood” that they acted on the basis of a misunderstanding of that duty.

I respectfully dissent.

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<sup>9</sup>The evidence showed, among other things, that before this incident Weeks had been a well-behaved student and a star high school athlete, *id.*, at 130–133, who lived in a poor community, *id.*, at 131–132, and who was raised by a well-meaning grandmother because of his mother’s drug addiction, *id.*, at 143, 167; that Weeks fell in with a bad crowd, *id.*, at 150, 153, missing his chance for college when his girlfriend became pregnant and when he decided to stay and help her raise the child, *id.*, at 109; and, as the jury learned in Weeks’ own words, that he was extremely remorseful, *id.*, at 127–128.