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Penry v. Johnson 121 S. Ct. 1910 (2001)

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I. Facts

On October 25, 1979, Johnny Paul Penry ("Penry") raped and murdered Pamela Carpenter ("Carpenter").[1] At the close of the penalty phase of his first Texas capital murder trial, the jury was instructed to answer three statutorily mandated "special issues."[2] Though Penry offered extensive evidence that he had mental retardation and was severely abused as a child, the jury received no instruction "that it could consider and give mitigating effect to that evidence in imposing sentence."[3] The jury convicted Penry of capital murder in 1980 and the judge sentenced him to death.[4]

Following affirmance of his conviction in Texas state court, Penry unsuccessfully sought habeas relief in the federal courts.[5] After granting certiorari, the United States Supreme Court reversed based on the absence of instructions on mitigation during the penalty phase.[6] When Penry was retried in 1990, he was again found guilty of capital murder.[7] During the penalty phase, Penry again introduced evidence regarding his mental impairments and childhood abuse and the jury was again required to answer the three special issues.[8] The court also gave the jury a "supplemental instruction" regarding mitigating circumstances.[9]

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1. Penry v. Johnson (*"Penry III"*), 121 S. Ct. 1910, 1915 (2001), *aff'g* 215 F.3d 504 (5th Cir. 2000).

2. *Id.*; TEX. CODE CRIM. PROC. ANN. § 37.071(b) (Vernon 1981 & Supp. 1989) (requiring capital juries to affirmatively answer the following questions: "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased"). *Id.*

3. *Penry III*, 121 S. Ct. at 1915.

4. *Id.*

5. *See* Penry v. Johnson (*"Penry II"*), 215 F.3d 504, 506 (5th Cir. 2000).

6. Penry v. Lynaugh (*"Penry I"*), 492 U.S. 302, 326 (1989) (holding that without "instructions informing the jury that it could consider and give effect to . . . mitigating evidence," jurors could believe that there was no means by which to avoid imposing a sentence of death if the mitigating evidence suggests that the defendant does not deserve one).

7. *Penry III*, 121 S. Ct. at 1916.

8. *Id.*; *see also* TEX. CODE CRIM. PROC. ANN. § 37.071(b) (Vernon 1981 & Supp. 1989).

9. *Penry III*, 121 S. Ct. at 1917. The "supplemental instruction" read:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence

The jury answered each special issue in the affirmative and the court sentenced Penryto death.[10] The Texas Court of Criminal Appeals affirmed his conviction.[11] Following another unsuccessful habeas petition, the Fifth Circuit denied Penry's motion for a certificate of appealability.[12] The United States Supreme Court again granted certiorari to consider Penry's constitutional challenges to the adequacy of the jury instructions.[13] The Court reversed in part and remanded in part.[14]

> presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

Id.

10. *Id.*

11. Penry v. State, 903 S.W.2d 715, 767 (Tex. Crim. App. 1995).

12. Penry v. Johnson ("*Penry II*"), 215 F.3d 504, 506 (5th Cir. 2000).

13. *Penry III*, 121 S. Ct. at 1918, *cert. granted*, Penry v. Johnson, 531 U.S. 1010 (2000).

14. *Penry III*, 121 S. Ct. at 1924. In *Penry II*, the United States Supreme Court considered two issues: (1) "whether the jury instructions at Penry's resentencing complied with the mandate in *Penry I*"; and (2) "whether the admission into evidence of statements from a psychiatric report based on an uncounseled interview with Penry ran afoul of the Fifth Amendment." *Id.* at 1915. The first question is addressed in Part III. With respect to the second question, the relevant facts and the Court's treatment of the issue are described briefly below.

During the penalty phase of his retrial in 1990, a defense clinical psychologist testified on cross-examination that he had reviewed a number of records in preparing his testimony, including a psychiatric evaluation of Penry prepared by Dr. Felix Peebles ("Peebles") in 1977. *Id.* at 1916. The Peebles report had originally been prepared at the request of Penry's then-counsel to determine whether Penry was competent to stand trial on a 1977 rape charge unrelated to and predating the rape and murder of Carpenter. *Id.* Over the objection of Penry's counsel, the prosecutor had the defense psychologist recite that it was Peebles's "professional opinion that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons." *Id.* During his closing argument, the prosecutor recited this portion of the Peebles report again. *Id.*

Penry argued that the admission into evidence of the portion of the Peebles report referring to Penry's future dangerousness violated his Fifth Amendment privilege against self-incrimination because he was not warned that what he said to Peebles might later be used against him. *Id.* at 1918. The Texas Court of Criminal Appeals concluded that "Peebles was not acting as an agent for the State in order to gather evidence that might be used against Penry" when he interviewed him. *Id.* at 1918-19. Without deciding the merits of Penry's Fifth Amendment claim, the United States Supreme Court affirmed the appellate court's decision on this matter, holding that the Texas court's decision was neither contrary to nor an unreasonable application of Supreme Court precedent. *Id.* at 1919. The Court then went on to note that even if it found a Fifth Amendment violation, Penry would still need to show that the error "had substantial and injurious effect or influence in determining the jury's verdict," and that it was unlikely that Penry could make such a showing. *Id.* at 1919-20 (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).

II. Holding

The United States Supreme Court held that the trial court's instructions on mitigating circumstances failed to provide the jury with a vehicle to give effect to mitigating circumstances of mental retardation and childhood abuse, as required by the Eighth and Fourteenth Amendments.[15]

III. Analysis / Application in Virginia

Because of their wording, the "supplemental instructions" in *Penry II* placed the jurors in an impossible situation in which they were essentially made to choose between honoring their oaths to render a true verdict and giving effect to Penry's mitigating evidence.[16] The "supplemental instructions" told the jurors that despite their belief that each of the three "special issues" should be answered in the affirmative, they could sentence the defendant to life in prison.[17] However, in order to do this the jurors were required to answer negatively to one of the "special issues," even if they found the true answer to be yes.[18] Thus, it would have been neither logically nor ethically possible for a juror to follow both sets of instructions.[19] For this reason the Court found that the instructions provided an "ineffective and illogical" mechanism by which to give effect to Penry's mitigating evidence.[20]

Penry I and *Penry III* stand for the proposition that a jury must be able to consider and give meaningful effect to a defendant's mitigating evidence in imposing a sentence.[21] A jury cannot give meaningful effect to evidence covered by an instruction that does not fully convey the concept that it is intended to convey. Like Texas, Virginia has no model jury instruction specifically dealing with mental retardation. The mitigation instruction for capital murder cases functions in concert with the Capital Murder Form Finding.[22] With respect to

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15. *Penry III*, 121 S. Ct. at 1924.
16. *Id.* at 1922.
17. *See id.* at 1917.
18. *See id.*
19. *Penry III*, 121 S. Ct. at 1922.
20. *Id.* at 1924.
21. *Id.* at 1920; Penry v. Lynaugh ("*Penry I*"), 492 U.S. 302, 319 (1989).
22. *See* VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.127 (Lexis Law Publishing 2000). The mitigation instruction reads as follows:

> If you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you shall consider any mitigation evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.

Id.; *see also* VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.130 (Lexis Law Publishing 2000). The Capital Murder Form Finding consists of five alternative findings. *Id.* Each finding begins by

evidence of mental retardation (a statutory mitigating factor in Virginia),[23] and indeed to any evidence in mitigation of the offense, the Virginia mitigation instruction does not make clear how a juror may *give effect* to such evidence.

In light of this deficiency, suggested amendments to the Virginia Model Jury Instruction 33.127 are set forth in italics as follows:

> If you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you shall consider any mitigation evidence presented of circumstances [that] do not justify or excuse the offence but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment. *If you find, after consideration of the mitigation evidence presented, that a sentence of imprisonment for life is appropriate, you shall give effect to such a finding by imposing that penalty.*[24]

This proposed instruction unambiguously provides the jurors with a vehicle for giving effect to evidence presented in mitigation. Defense counsel should proffer such an instruction in any capital case in which it presents evidence in mitigation.[25]

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stating that the jury finds the defendant guilty of the offense charged. *Id.* The three death sentence findings, which consist of a finding of two aggravators, and two findings of one aggravator each, finish with the language, "and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death." *Id.* The two life-in-prison findings finish with the language, "and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life." *Id.* All of the above quoted language originates in Section 19.2-264.4(D) of the Virginia Code. *See* VA. CODE ANN. § 19.2-264.4(D) (Michie 2000). These statutory forms were disapproved in Powell v. Commonwealth, 552 S.E.2d 344 (Va. 2001). *See* Kathryn Roe Eldridge, Case Note, 14 CAP. DEF. J. 175 (2001) (analyzing Powell v. Commonwealth, 552 S.E.2d 344, 359 (Va. 2001)). The Model Jury Instructions Committee has revised the forms found at Criminal Instruction Nos. P33.130A-P33.130G. The new forms as well as forms recommended by the Virginia Capital Case Clearinghouse can be found at 14 CAP. DEF. J. 233 (2001). The revised model forms for death verdicts still refer simply to "having considered the evidence in mitigation."

23. *See* VA. CODE ANN. § 19.2-264.4(B)(vi) (Michie 2000).

24. *See* VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.127 (Lexis Law Publishing 2000).

25. For a discussion of the consequences of proffering jury instructions, see Melissa A. Ray, *"Meaningful Guidance": Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness*, 13 CAP. DEF. J. 85, 100-01 (2000) (analyzing the consequences to defendants of proposing hand-crafted jury instructions).