Capital Defense Journal

Volume 2 | Issue 1 Article 3

Fall 9-1-1989

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FACTS

Johnny Paul Penry, a mentally retarded, 22-year-old man, was convicted of the rape and murder of Pamela Carpenter and sentenced to death under the Texas capital murder scheme. In the penalty phase of the bifurcated trial, Texas juries must answer yes or no to three special issues:

(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 (i.e., future dangerousness); 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.

If the jury unanimously answers yes to all three questions, the trial court *must* sentence the defendant to death.

At Penry's penalty trial, the jury answered yes to all three questions and, accordingly, the court sentenced Penry to death. His conviction was upheld on direct appeal. On appeal of the denial of federal habeas corpus relief, however, the United States Court of Appeals for the Fifth Circuit noted that Penry's argument that the jury could not give effect to Penry's mitigating evidence regarding his mental retardation was meritorious. Nevertheless, the Fifth Circuit held that prior Circuit decisions required the court to affirm Penry's sentence.

The United States Supreme Court granted certiorari to resolve two questions: first, whether Penry's death sentence violated the Eighth Amendment because the jury was not instructed that it could consider and give effect to Penry's mitigation evidence of mental retardation, and second, whether the Eighth Amendment categorically prohibits Penry's execution because of his mental retardation. As a threshold matter, in light of it's recent decision in *Teague v. Lane*, 489 U.S. ___, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) that "new rules," that is rules of criminal procedure that break new ground or place a new obligation on the state, will not be applied or announced in cases on collateral review unless they fall into one of two exceptions, the Supreme Court considered (a) whether *Teague* applies to a capital sentencing trial and (b) if so, whether the relief Penry sought (a new jury instruction) was a "new rule." It held that the *Teague* non-retroactivity rule did apply in capital sentencing trials. The Court held that a criminal judgment necessarily includes the sentence imposed. Having decided that *Teague* applied, however, the Court determined that the rule Penry requested - that Texas juries be instructed such that they can consider *and give effect* to all of defendant's mitigating evidence - did not announce a new rule under *Teague*.

The Court stated that it was clear from *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), both decided before Penry's sentence became final, that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that a defendant proffers. The Court found that granting Penry's request would not be a new rule applied to Texas because it was a "logical extension" of the duty placed on the sentencer by *Lockett* and *Eddings*.

HOLDING

A. No Categorical Prohibition Against Executing Mentally Retarded Defendants.

The Supreme Court held that "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses [exists] for us to conclude that it is categorically prohibited by the Eighth Amendment." *Penry*, 109 S. Ct. at 2955, 106 L. Ed. 2d at 289. The Court implied that, while it may violate the Eighth Amendment to execute defendants who are "severely" or "profoundly" retarded, such as those having an I.Q. of less than 35-40, Penry was not in that category. This claim was decided using the framework created by the court for determining whether the "evolving standards of decency that mark the progress of a maturing society" render a penalty cruel and unusual under the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86 (1958). For a discussion of the constitutional framework of this type of analysis, see the discussion of *Stanford v. Kentucky*, 492 U.S. ___, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989) [this issue].

B. Jurors Must Be Able to Consider AND GIVE EFFECT to ANY Evidence Defendant May Present in Mitigation; Texas Procedure Did Not Permit This.

While the Supreme Court refused to hold that mentally retarded persons may not be executed, the Court agreed with Penry that the three special questions in the Texas penalty trial did not allow the jury to give mitigating effect to the evidence of Penry's mental retardation.

Having met the threshold question of whether the Court could render the relief Penry sought under *Teague*, the Court discussed the merits of Penry's claim. The Court concluded that none of the special jury questions Texas juries must answer provided a vehicle by which the jury could give mitigating effect to Penry's evidence of mental retardation.

The State of Texas conceded that, "if a juror concluded that Penry acted deliberately and was likely to be dangerous in the future, but also concluded that because of his mental retardation he was not sufficiently culpable to deserve the death penalty, that juror would be unable to give effect to that mitigating evidence under the instructions given in this case." *Penry*, 109 S. Ct. at 2951, 106 L. Ed. 2d at 283. Nevertheless, Texas argued that if the Supreme Court required trial courts to instruct juries that they may, in their discretion, grant the defendant mercy, the result would be the type of "unbridled discretion" which the Court renounced in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

The Supreme Court disagreed. The Court noted that language in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) made clear that, "so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant." *Penry*, 109 S. Ct. at 2951, 106 L. Ed. 2d at 283. The Supreme Court noted further that the

imposition of the death penalty must be "directly related to the culpability of the defendant..." *Id.* Accordingly, the Court held that the jury must be advised that it may consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the offense. Since Penry's jury was unable to do so, the Supreme Court remanded Penry's case for resentencing.

ANALYSIS

Virginia attorneys representing capital defendants should be aware of similarities between the Texas and Virginia capital murder statutes which may make portions of *Penry* applicable to the Virginia statute. Virginia, like Texas, has a bifurcated capital murder scheme. Both states narrow the class of murderers who may be convicted of capital murder. The critical aggravating factor in Texas is whether the defendant will be dangerous in the future. Texas, however, asks the jury to answer "yes" or "no" to three special jury issues. If the jury unanimously answers all three questions "yes", the court must sentence the defendant to death. Because none of the questions allowed the jury in *Penry* to consider and give effect to Penry's mental retardation, the Supreme Court sent Penry back to state court for resentencing, with the jury instructed that it was free to return a verdict of life imprisonment in spite of the answers to the specific questions.

In Virginia, the State attempts to prove one of two aggravating factors during the penalty phase of the capital murder trial. Va. Code Ann. § 19.2-264.2. Like Texas, if Virginia jurors find that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society," *Id.*, then the jury may sentence the defendant to death. This standard has been labeled the "future dangerousness" criterion. The second aggravating factor described by Code § 19.2-264.2 is the concept of "vileness," that the defendant's "conduct in committing the offense...was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim..." *Id.*

The Supreme Court of Virginia has explicitly recognized that evidence of a defendant's mental retardation is mitigating evidence. *Washington v. Commonwealth*, 228 Va. 535, 549, 323 S.E.2d 577, 586 (1984) (stating that defendant has a right to offer evidence of mental retardation in mitigation even if defendant does not assert an insanity defense). Although this is the *law* in Virginia, Virginia juries currently are not instructed specifically that mental retardation may be considered as mitigating evidence. Further, the Supreme Court of Virginia has held that trial courts are not required to explain to juries that they may sentence the defendant to life imprisonment even if they find *both* aggravating factors; vileness and future dangerousness. *Smith v. Commonwealth*, 219 Va. 455, 479-480, 248 S.E.2d 135, 150 (1978). Juries are told that if they find one or both of the aggravating factors in the sentencing statute, they *may* sentence the defendant to death. *Id.* According to the Supreme Court of Virginia, "What a jury 'may' do it is at liberty not to do." *Id.*

This procedure is questionable in cases where there is evidence relating to a defendant's mental retardation. The *Penry* Court noted that although evidence of mental retardation is relevant to the question of future dangerousness, it is relevant only as an *aggravating* factor. Rather than mitigating against a death sentence, mental retardation and evidence of a defendant's inability to control his actions indicates that he will be dangerous in the future. The *Penry* Court noted that evidence of mental retardation and inability to learn from his mistakes made the jury *more likely, not less likely* to answer the question of Penry's future dangerousness "yes." Accordingly, the future dangerousness question "did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse." *Id.*

Similarly, unless Virginia juries are specifically instructed that they may consider a defendant's mental retardation as a mitigating factor and may, regardless of whether they find future dangerousness or vileness, sentence the defendant to life in prison, juries may actually consider the defendant's retardation as evidence of his future dangerousness. It is critical that counsel representing defendants with special mitigating circumstances, not limited to mental retardation, be aware of the *Penry* decision.

Particularly, if there is evidence of a mitigating condition which makes the defendant less culpable but arguably dangerous in the future, counsel should prepare jury instructions to remedy the situation. The instructions should, first, specifically inform the jury that mental retardation (or other mitigating conditions) may be considered and acted upon as *mitigating* evidence. Second, the instructions should tell the jurors that they may vote for life imprisonment *even if they find one or both aggravating factors.* If the trial court refuses to give the requested instructions, counsel should object *in open court, on the record* to the failure of the trial court to so instruct the jury.

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