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Smith v. Texas 125 S. Ct. 400 (2004)

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I. Facts

A. Texas Capital Sentencing Scheme Background

In *Jurek v. Texas*,[1] the United States Supreme Court upheld a Texas capital sentencing scheme under which the death penalty followed automatically from the sentencing jury's affirmative answer to each of two (and in some cases three) special issues.[2] Although the Court was then engaged in the process of formulating a constitutional requirement that all relevant mitigating evidence be taken into account before the death penalty could be imposed in any given case, it nevertheless determined that the Texas scheme was constitutional.[3] The court found that one of the statutory special issues–whether the defendant would likely pose a serious danger of future violent behavior if not executed–appeared broad enough to encompass any relevant mitigating factor that a defendant might offer as a reason against imposing the death penalty.[4]

Thirteen years after *Jurek*, however, the Court re-examined its conclusion. In *Penry v. Lynaugh* ("*Penry I*"),[5] the Court concluded that the "special issues" did not provide an adquate vehicle for jury consideration of at least one specific kind of mitigating evidence–namely, the defendant's mental retardation.[6] Although retardation clearly tends to reduce a defendant's moral culpability, the Court observed that it also arguably increases, rather than decreases, his future dangerousness.[7] For this reason, *Penry I* held that *Woodson v. North Carolina*[8] and *Lockett v. Ohio*[9] required Texas sentencing juries explicitly to be allowed to give mitigating effect to such evidence, apart from the issue of future dangerousness.[10] The

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1. 428 U.S. 262 (1976).

2. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (concluding that "Texas'[s] capital-sentencing procedures . . . do not violate the Eighth and Fourteenth Amendments").

3. *Id.* at 274–75, 276.

4. *Id.*

5. 492 U.S. 302 (1989).

6. *See* Penry v. Lynaugh, 492 U.S. 302, 327–28 (1989) [hereinafter *Penry I*] (concluding that "the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense").

7. *Id.* at 323–24.

8. 428 U.S. 280 (1976).

9. 438 U.S. 586 (1978).

10. *Penry I*, 492 U.S. at 328. *see* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (determining that a death penalty scheme that precludes the consideration of mitigating factors is unconsitutional);

Texas legislature eventually amended its sentencing statute to accommodate *Penry I* by adding a final sentencing question that directly authorized the jury to decline to impose the death penalty on the basis of mitigating factors.[11] However, by the time the Supreme Court handed down its decision, a slew of pre-*Penry I* cases were working their way through the Texas state and federal courts.

In reviewing these cases, the United States Court of Appeals for the Fifth Circuit narrowly interpreted *Penry I* and developed its own restrictive gloss on what constituted constitutionally relevant mitigating evdience.[12] However, in *Tennard v. Dretke*,[13] the Court firmly rejected the Fifth Circuit's "constitutional relevance" test.[14] Most recently in *Smith v. Texas*,[15] the Supreme Court addressed the Texas courts' use of the pre-*Tennard* approach to reveiwing *Penry* claims of death-sentenced Texas inmates.[16]

B. Facts of the Case

In 1991 a Texas jury convicted LaRoyce Lathair Smith of capital murder, and he was sentenced in accordance with Texas's bifurcated capital sentencing scheme.[17] During its closing argument, the prosecution reminded the jurors of

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Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (concluding that "in capital cases the fundamental respect for humanity underlying 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").

11. *See* TEX. CRIM. PROC. CODE ANN. § 37.071(e)(1) (Vernon Supp. 2004–05) (allowing Texas capital sentencing juries to impose a sentence of life imprisonment if sufficient mitigating circumstances exist).

12. *See* Davis v. Scott, 51 F.3d 457, 460–61 (5th Cir. 1995) (concluding that to be relevant, mitigating evidence "must show (1) a uniquely severe permanent handicap[ ] with which the defendant was burdened through no fault of his own, and (2) that the criminal act was attributable to this severe permanent condition" (citations omitted) (internal quotations omitted)); Madden v. Collins, 18 F.3d 304, 308 (5th Cir. 1994) (concluding that "[t]o grant relief on a *Penry* claim, we must determine (1) that the proffered evidence was constitutionally relevant mitigating evidence, and, if so, (2) that the proffered evidence was beyond the effective reach of the juror" (emphasis omitted) (internal quotations omitted)).

13. 124 S. Ct. 2562 (2004).

14. *See* Tennard v. Dretke, 124 S. Ct. 2562, 2571–72 (2004) (concluding that evidence is relevant as mitigating evidence in capital cases if it "is of such a character that it might serve as a basis for a sentence less than death" (internal quotations omitted)). For a complete discussion and analysis of *Tennard*, see generally Mark J. Goldsmith, Case Note, 17 CAP. DEF. J. 115 (2004) (analyzing Tennard v. Dretke, 124 S. Ct. 2562 (2004)).

15. 125 S. Ct. 400 (2004).

16. *See* Smith v. Texas, 125 S. Ct. 400, 405 (2004) (discussing the Texas Criminal Court of Appeals's inappropriate reliance on *Tennard*).

17. *Id.* at 401–02. After closing time, Smith and a number of friends arrived at the Dallas County Taco Bell where he had previously been employed. *Id.* at 401. Smith convinced the two employees that were shutting down the restaurant to open the door so that Smith could use the telephone. *Id.* Once the two employees let the petitioner in, Smith commanded the employees to

their voir dire assurances that they were capable of applying the death penalty when appropriate by answering "yes" to each of the two special issues of deliberateness and future dangerousness.[18] The judge then instructed the jury.[19] His oral instructions included, as *Penry I* required, a statement that the jury could consider mitigating circumstances.[20] However, the jury was furnished with a statutory jury verdict form that made no mention of mitigation evidence and tracked the prosecution's reminders delivered during its closing argument.[21] The form simply required "yes" or "no" answers to the two special issues of deliberateness and future dangerousness.[22] The jury answered each in the affirmative, and Smith was therefore sentenced to death.[23]

The Texas Court of Criminal Appeals affirmed the verdict and sentence on direct appeal, and the Supreme Court denied certiorari in 1995.[24] The trial court then dismissed Smith's petition for writ of habeas corpus as untimely, but an amendment to the Texas criminal code allowed Smith to refile.[25] Smith claimed that evidence of his low I.Q. and attendance of special education classes required consideration as mitigation outside the special issues.[26] The Texas Court of Criminal Appeals, however, denied his claim.[27]

II. Holding

The United States Supreme Court granted certiorari and reversed.[28] The Court determined that Smith's mitigating evidence was relevant, requiring "the trial court to empower the jury with a vehicle capable of giving effect to that evidence."[29] Because the trial judge's supplemental instruction failed to provide the jury with such a vehicle, the Supreme Court determined that it violated the Eighth Amendment.[30]

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leave the building because he intended to rob the restaurant. *Id.* When both refused to leave, Smith struck and shot one of the employees. *Id.* Although he threatened the victim's co-worker, Smith left with his friends without harming the second employee. *Id.*

18. *Id.* at 403; *see* TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon Supp. 1980) (requiring the submission to the jury of the two special issues of deliberateness and future dangerousness).

19. *Smith*, 125 S. Ct. at 403.

20. *Id.* at 402.

21. *Id.* at 403.

22. *Id.*

23. *Id.*

24. *Id.* at 404; *see* Smith v. Texas, 514 U.S. 1112, 1112 (1995) (denying certiorari).

25. *Smith*, 125 S. Ct. at 404.

26. *Id.* at 404–05.

27. *Id.* at 404.

28. *Id.* at 401.

29. *Id.* at 405.

30. *Id.* at 407.

III. Analysis

A. Proper Standard of Evidence

The Court first noted that the Texas Court of Criminal Appeals announced its decision prior to *Tennard*.[31] Using a "constitutionally-relevant" screening test identical to the one rejected in *Tennard*, the Texas Court of Criminal Appeals determined that evidence of Smith's low I.Q. and history of having attended special education classes was irrelevant.[32] Quoting *Tennard*, the Supreme Court stated that " '[e]vidence of significantly impaired intellectual functioning is obviously evidence that might serve as a basis for a sentence less than death.' "[33] The Court also cited *Wiggins v. Smith*[34] to illustrate that an I.Q. higher than Smith's had been considered relevant mitigating evidence.[35]

Contrary to *Tennard*'s subsequent holding, the Texas Court of Criminal Appeals also required a nexus between Smith's diminished mental capacity and the commission of the murder.[36] The *Tennard* Court had rejected the Fifth Circuit's nexus requirement because no existing precedent required a defendant to establish a relationship between mental capacity and capital murder " 'before the Eighth Amendment prohibition on execut[ion] . . . is triggered.' "[37] The *Smith* Court concluded that "[b]ecause petitioner's proffered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence."[38]

B. Supplemental Jury Instruction

In *Penry v. Johnson* ("*Penry II*"),[39] the trial judge provided a supplemental instruction that informed the capital sentencing jury that it could consider mitigating evidence in addition to deliberateness and future dangerousness.[40] The verdict form, however, listed the special issues without mention of mitigating evidence.[41] The Supreme Court held that although the supplemental instruction

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31. *Smith*, 125 S. Ct. at 404; *see Tennard*, 124 S. Ct. at 2570–71, 2573 (rejecting the "constitutional relevance" test used by the United States Court of Appeals for the Fifth Circuit and holding that the jury must be given an effective vehicle for which to weigh relevant mitigating evidence).

32. *Smith*, 125 S. Ct. at 405.

33. *Id.* (quoting *Tennard*, 124 S. Ct. at 2572).

34. 539 U.S. 510 (2003).

35. *Smith*, 125 S. Ct. at 405; *see* Wiggins v. Smith, 539 U.S. 510, 523, 535–38 (2003) (determining an I.Q. of 79 to be relevant mitigating evidence).

36. *Smith*, 125 S. Ct. at 405.

37. *Id.* (quoting *Tennard*, 124 S. Ct. at 2571–72).

38. *Id.*

39. 532 U.S. 782 (2001).

40. Penry v. Johnson, 532 U.S. 782, 789–90 (2001) [hereinafter *Penry II*].

41. *Id.* at 790.

informed the jury that it could consider mitigating evidence, it did not satisfy the Eighth Amendment because of its failure to provide an adequate vehicle for the jury to give effect to such evidence.[42] Specifically, the instructions permitting the jury to consider mitigating evidence contradicted the verdict form, which only provided for the consideration of the special issues.[43] Thus, the Supreme Court determined the supplemental instruction to be "an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence."[44]

The Supreme Court next evaluated the trial court's supplemental jury instruction to determine whether it adequately permitted the jury to give effect to the mitigating evidence.[45] Because the trial court told the jury both to consider all the mitigating evidence and also how to give effect to that mitigating evidence in relation to the special issues, the state appellate court determined that the supplemental instruction provided the jury with adequate means to give effect to the evidence.[46] Although the Texas court also noted specific distinctions between the faulty *Penry II* instruction and that given by the trial court in this case, the Supreme Court determined "those distinctions . . . constitutionally insignificant."[47]

The Court noted that the common error in *Smith* and *Tennard* was the creation of an ethical dilemma for the respective juries.[48] Specifically, the " 'mitigating evidence did not fit within the scope of the special issues,' " rendering the juries unable to comply simultaneously with both the jury instructions and the jury verdict forms.[49] To answer the special issues as required by the verdict form necessitated ignoring the instruction to consider mitigation; to answer the special issues as required by the instructions necessitated ignoring the verdict forms' strict focus on the two special issues.[50] Consideration of mitigating evidence was in no way included on the verdict form and the special issues "had little, if anything, to do with the mitigation evidence petitioner presented."[51] The Supreme Court concluded by noting that even had the jury adequately understood the trial court's instructions, it " 'was essentially instructed to return a false

42. *Id.* at 800.
43. *Id.*
44. *Id.*
45. *Smith*, 125 S. Ct. at 405.
46. *Id.* at 405–06.
47. *Id.* at 406.
48. *Id.*
49. *Id.* (quoting *Penry II*, 532 U.S. at 799).
50. *Id.*
51. *Smith*, 125 S. Ct. at 407.

answer to a special issue in order to avoid a death sentence.' "[52] The nullification instruction was therefore constitutionally inadequate.[53]

IV. Application in Virginia

A. Proper Standard of Evidence

Smith reiterates much of the *Tennard* decision, and the case further solidifies the Supreme Court's invalidation of any heightened requirement of relevance for mitigating evidence. This position, however, does not directly alter Virginia capital procedure because the relevant state statute provides in part that "evidence may be presented as to any matter which the court deems relevant to sentence."[54] *Smith* serves as a reminder that state courts must find mitigating evidence relevant if it " 'tends logically to prove or disprove some fact or circumstance that a fact-finder could reasonably deem to have mitigating value.' "[55] Accordingly, defense counsel should continue to object to the exclusion of any mitigating evidence meeting this liberal threshold of relevance.

B. Supplemental Jury Instruction

In *Smith*, the Supreme Court determined that the jury must be given "a vehicle capable of giving effect to" the mitigating evidence proffered by the defense.[56] Virginia Code section 19.2-264.4(D) provides the two alternative jury verdict forms for a capital sentencing proceeding, and these statutory forms are coupled with a jury instruction from the bench.[57] However, Virginia does not have statutory jury instructions. Suggested instructions are supplied by Virginia Practice Series Jury Instructions.[58] Although the instructions provide jurors with

52. *Id.* (quoting *Penry II*, 532 U.S. at 801).

53. *Id.*

54. VA. CODE ANN. § 19.2-264.4(B) (Michie 2004).

55. *Smith*, 125 S. Ct. at 404 (quoting McKoy v. North Carolina, 494 U.S. 433, 440 (1990)).

56. *Id.* at 406.

57. *See* VA. CODE ANN. § 19.2-264.4(D) (providing one form for a sentence of death and another form with the options of "imprisonment for life" or "imprisonment for life and a fine of $ _____").

58. *See* VA. PRAC. J.I.S. § 122:04 (2005) (providing jury instructions that contain the appropriate vehicle for giving effect to mitigating evidence). The instructions also include an illustrative list of mitigating factors for the jury's consideration:

> When determining the punishment to be imposed for a commission of capital murder, you shall consider the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation, if proven by the evidence, may include, but shall not be limited to the following: (i) the defendant has no significant history of prior criminal activity; or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or (iii) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (iv)

the necessary vehicle for giving effect to mitigating evidence, the lack of lucidity may easily confuse the lay juror.[59] Contrary to the Virginia Model Jury Instructions, such sources as Leonard Sand et al., *Modern Federal Jury Instructions*, provide comprehensive yet clearly stated explanations of mitigating evidence and its role in capital sentencing.[60] Although the *Modern Federal Jury Instructions* provisions for mitigating factors conform to the Federal Death Penalty Act (18 U.S.C. § 3591 et. seq.), the instruction can easily be adjusted to accommodate Virginia law. Furthermore Virginia Code section 19.2-263.2 states that "[a] proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with model jury instructions."[61] Because both model instructions comply with section 19.2-263.2, defense counsel should always proffer such an instruction in a case involving the presentation of mitigating evidence at the sentencing proceeding.[62]

V. Conclusion

Smith serves as a reminder that mitigation evidence need only meet a bare minimum standard for relevance, and the Supreme Court will not hesitate to strike down any additional requirements.[63] Moreover, the Court reiterated that impaired intellectual functioning may serve as mitigation evidence in a capital sentencing proceeding.[64] Lastly, because the Virginia Code allows a defendant to suggest a jury instruction that accurately states the law, defense counsel should take advantage of model instructions such as those referenced in this case note.

Mark J. Goldsmith

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the age of the defendant at the time of the commission of the capital offense; or (v) mental retardation of the defendant.

Id.

59. *Id.*

60. *See* LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS, § 9A-18 (2002) (providing jury instructions for the appropriate consideration of mitigating evidence).

61. VA. CODE ANN. § 19.2-263.2 (Michie 2004); *see* Federal Death Penalty Act, 18 U.S.C. §§ 3591–3598 (2000) (stating the procedure for the institution of the death penalty in a federal capital case).

62. 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 jury instructions).

63. *Smith*, 125 S. Ct. at 404.

64. *Id.* at 405.

CASE NOTES:

United States Court of Appeals for the Fourth Circuit