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PENRY v. LYNAUGH

SUPREME COURT OF THE UNITED STATES
492 U.S. 302
June 26, 1989

OPINION: Justice O'Connor...We must decide whether Johnny Paul Penry was sentenced to death in violation of the Eighth Amendment because the jury was not instructed that it could consider and give effect to his **mitigating evidence** in imposing its sentence. We must also decide whether the Eighth Amendment categorically prohibits Penry's execution because he is **mentally retarded**.

On the morning of October 25, 1979, **Pamela Carpenter was brutally raped, beaten, and stabbed with a pair of scissors in her home in Livingston, Texas. She died a few hours later** in the course of emergency treatment. Before she died, she described her assailant. Her description led two local sheriff's deputies to suspect Penry, who had recently been **released on parole after conviction on another rape charge**. Penry subsequently gave two statements confessing to the crime and was charged with capital murder.

At a competency hearing held before trial, a clinical psychologist, Dr. Jerome Brown, testified that Penry was mentally retarded..., probably caused by trauma to the brain at birth...Dr. Brown's own testing before the trial indicated that Penry had an IQ of 54. Dr. Brown's evaluation also revealed that Penry, who was 22 years old at the time of the crime, had the mental age of a 6 1/2-year-old... [and the social maturity] of a 9- or 10-year-old. Dr. Brown testified that "there's a point at which anyone with [Penry's] IQ is always incompetent, but, you know, this man is more in the borderline range."

The jury found Penry competent to stand trial...Dr. Garcia testified that Penry suffered from organic brain damage and moderate retardation, which resulted in poor impulse control and an inability to learn from experience. Dr. Garcia indicated that Penry's brain damage was probably caused at birth, but may have been caused by beatings and multiple injuries to the brain at an early age. In Dr. Garcia's judgment, Penry was suffering from an organic brain disorder at the time of the offense which made it impossible for him to appreciate the wrongfulness of his conduct or to conform his

conduct to the law.

Penry's mother testified at trial that Penry was unable to learn in school and never finished the first grade. Penry's sister testified that their mother had frequently beaten him over the head with a belt when he was a child. Penry was also routinely locked in his room without access to a toilet for long periods of time. As a youngster, Penry was in and out of a number of state schools and hospitals, until his father removed him from state schools altogether when he was 12. Penry's aunt subsequently struggled for over a year to teach Penry how to print his name.

The State introduced the testimony of two psychiatrists to rebut the testimony of Dr. Garcia. Dr. Kenneth Vogtsberger testified that although Penry was a person of limited mental ability, he was not suffering from any mental illness or defect at the time of the crime, and that he knew the difference between right and wrong and had the potential to honor the law. In his view, Penry had characteristics consistent with an antisocial personality, including an inability to learn from experience and a tendency to be impulsive and to violate society's norms. He testified further that Penry's low IQ scores underestimated his alertness and understanding of what went on around him.

Dr. Felix Peebles also testified for the State that Penry was legally sane at the time of the offense and had a "full-blown anti-social personality." In addition, Dr. Peebles testified that he personally diagnosed Penry as being mentally retarded in 1973 and again in 1977, and that Penry "had a very bad life generally, bringing up." In Dr. Peebles' view, Penry "had been socially and emotionally deprived and he had not learned to read and write adequately." Although they disagreed with the defense psychiatrist over the extent and cause of Penry's mental limitations, both psychiatrists for the State acknowledged that Penry was a person of extremely limited mental ability, and that he seemed unable to learn from his mistakes.

The jury rejected Penry's insanity defense and found him guilty of capital murder. The following day, at the close of the penalty hearing, the jury decided the sentence to be imposed on Penry by **answering 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;
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> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
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> (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 each issue submitted, the trial court must sentence the defendant to death. Otherwise, the defendant is sentenced to life imprisonment.

...Defense counsel...objected to the charge because it failed to "authorize a discretionary grant of mercy based upon the existence of mitigating circumstances" and because it "failed to require as a condition to the assessment of the death penalty that the State show beyond a reasonable doubt that any aggravating circumstances found to exist outweigh any mitigating circumstances."...Defense counsel also objected that, in light of Penry's mental retardation, permitting the jury to assess the death penalty in this case amounted to cruel and unusual punishment prohibited by the Eighth Amendment. These objections were overruled by the trial court...The jury answered "yes" to all three special issues, and Penry was sentenced to death.

The Texas Court of Criminal Appeals affirmed...[and] this Court denied certiorari on direct review.

Penry then filed this federal habeas corpus petition challenging his death sentence. Among other claims, Penry argued that he was sentenced in violation of the Eighth Amendment because the trial court failed to instruct the jury on how to weigh mitigating factors in answering the special issues [and]...that it was cruel and unusual punishment to execute a mentally retarded person. The District Court denied relief and Penry appealed to the Court of Appeals for the Fifth Circuit.

The Court of Appeals affirmed...[and **we] granted certiorari to resolve two questions:**

First... **Was Penry sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them?**

Second... **Is it cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry's reasoning ability?**

...Underlying *Lockett*[1] and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. **The sentencer must also be able to consider and give effect to that evidence in imposing sentence.** Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human being" and has made a reliable determination that death is the appropriate sentence. "Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime."

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[1]Case 8A-CUP-14 on this website.

Although Penry offered mitigating evidence of his mental retardation and abused childhood as the basis for a sentence of life imprisonment rather than death, the jury that sentenced him was only able to express its views on the appropriate sentence by answering three questions: Did Penry act deliberately when he murdered Pamela Carpenter? Is there a probability that he will be dangerous in the future? Did he act unreasonably in response to provocation? The jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence...Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment. We agree...

Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future. As Judge Reavley wrote for the Court of Appeals below:

> "What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as *mitigating* evidence."...

The State conceded at oral argument in this Court 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. The State contends, however, that to instruct the jury that it could render a discretionary grant of mercy, or say "no" to the death penalty, based on Penry's mitigating evidence, would be to return to the sort of unbridled discretion that led to *Furman v. Georgia*[2]. We disagree...

In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

Penry's second claim is that it would be cruel and unusual punishment, prohibited by the Eighth Amendment, to execute a mentally retarded person like himself with the reasoning capacity of a 7-year-old...

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[2]Case 8A-CUP-10 on this website.

It was well settled at common law that "idiots," together with "lunatics," were not subject to punishment for criminal acts committed under those incapacities. As Blackstone wrote: “Idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself...[A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses...” The common law prohibition against punishing "idiots" generally applied...to persons of such severe disability that they lacked the reasoning capacity to form criminal intent or to understand the difference between good and evil. In the 19th and early 20th centuries, the term "idiot" was used to describe the most retarded of persons, corresponding to what is called "profound" and "severe" retardation today...("idiots" generally had IQ of 25 or below).

The common law prohibition against punishing "idiots" for their crimes suggests that it may indeed be "cruel and unusual" punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment. Moreover, under *Ford v. Wainwright*, someone who is "unaware of the punishment they are about to suffer and why they are to suffer it" cannot be executed.

Such a case is not before us today. Penry was found competent to stand trial. In other words, he was found to have the ability to consult with his lawyer with a reasonable degree of rational understanding, and was found to have a rational as well as factual understanding of the proceedings against him. In addition, the jury rejected his insanity defense, which reflected their conclusion that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law.

Penry argues, however, that there is objective evidence today of an **emerging national consensus** against execution of the mentally retarded, **reflecting the "evolving standards of decency that mark the progress of a maturing society."** *Trop*[3]. The federal Anti-Drug Abuse Act of 1988 prohibits execution of a person who is mentally retarded. Only one State [Georgia], however, currently bans execution of retarded persons who have been found guilty of a capital offense. Maryland has enacted a similar statute which will take effect on July 1, 1989.

In contrast, in *Ford* v. *Wainwright*, which held that the Eighth Amendment prohibits execution of the insane, considerably more evidence of a national consensus was available. No State permitted the execution of the insane, and 26 States had statutes explicitly requiring suspension of the execution of a capital defendant who became insane. Other States had adopted the common law prohibition against executing the insane. Moreover, in examining the objective evidence of contemporary standards of decency in *Thompson* v. *Oklahoma*, the plurality noted that 18 States expressly established a minimum age in their death penalty statutes, and all of them required that the defendant have attained at least the age of 16 at the time of the offense. In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have

[3]Case 8A-CUP-5 on this website.

rejected capital punishment completely, **do not provide sufficient evidence at present of a national consensus**...

[Although] the sentencing body must be allowed to consider mental retardation as a mitigating circumstance in making the individualized determination whether death is the appropriate punishment in a particular case..., **I cannot conclude that all mentally retarded people of Penry's ability -- by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility -- inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.** Mentally retarded persons are individuals whose abilities and experiences can vary greatly...Accordingly, the judgment below is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

DISSENT: Justice Brennan/Marshall...[This dissent is predictable, by now, so it is not provided.]

CONCURRENCE/DISSENT: Justice Scalia/Rehnquist/White/Kennedy...The Court cannot seriously believe that rationality and predictability can be achieved, and capriciousness avoided, by "narrowing a sentencer's discretion to *impose* the death sentence," but expanding his discretion "to *decline to impose* the death sentence."...In holding that the jury had to be free to deem Penry's mental retardation and sad childhood relevant for whatever purpose it wished, the Court has come full circle, not only permitting but requiring what *Furman* once condemned. "Freakishly" and "wantonly" have been re-baptized "reasoned moral response." I do not think the Constitution forbids what the Court imposes here, but I am certain it does not require it. I respectfully dissent.