

were convicted and sentenced to death in Tennessee before 1990, who had made their unsuccessful post-conviction appeals prior to the *Atkins* holdings in 2001 and had not been executed by the time of the *Atkins* decision. For those persons in Tennessee tried after *Atkins*, the lower standard of proof of a claim of mental retardation would have applied initially at time of trial. There are a limited number of convicts to whom this part of the *Howell* decision applies.

Of more general application is the Tennessee court's holding that it is appropriate to use a single numerical IQ score to define mental retardation and that measurement and proof of IQ can be based on any of several different IQ tests, rather than just the WAIS-III. However, the Tennessee Supreme Court gave deference to the state statute by recognizing a precise numerical IQ cut-off score of 70 as part of the definition of mental retardation. This expansive acceptance of alternative IQ measurement presages continuing "battles of the experts" as different measurement instruments wielded by defense and prosecution experts will place a defendant below or above the "bright line" cut-off score of 70 IQ. The other two components of the definition of mental retardation—age of onset and life impairment—equally invite clashes of expertise.

Also of note is the court's holding that the claim of mental retardation in postconviction hearings should be decided by a judge, not a jury, even though a jury would decide that same question if it were presented as mitigation during the original trial of a defendant.

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Mitigation in Capital Cases

Nullification Instruction Ruled Unconstitutional

In *Smith v. Texas*, 543 U.S. 37 (2004), the U.S. Supreme Court reviewed the decision of the Texas

Criminal Court of Appeals and considered the constitutionality under the Eighth Amendment prohibition against cruel and unusual punishment of the trial court's instruction to the jury. This instruction directed the jury to answer "no" to one of the special issues (deliberateness and future dangerousness), even if it believed the answers to these questions were "yes" if, after considering all the mitigating evidence, the jury believed that the defendant should not be sentenced to death. This instruction was referred to as the "nullification instruction."

Facts of the Case

In 1991, a Texas jury found LaRoyce Smith guilty of capital murder for murdering one of his former coworkers by pistol-whipping her and shooting her in the back.

At the punishment phase of the trial, the court instructed the jury to consider two special issues when it came to determining whether life imprisonment or death would be imposed:

- (1) Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
- (2) Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

The jury was instructed by the trial judge to consider also the mitigating evidence; that is, the "evidence that reduces the defendant's personal or moral culpability or blameworthiness. . . ." Furthermore, if it believed that the answers to the special issues were "yes," and if it also believed that because of the mitigating evidence the defendant should not be sentenced to death, then it had to ". . . answer at least one of the Special Issues 'No' to give effect to [its] belief that that the death penalty should not be imposed due to the mitigating evidence. . . ."

The jury considered a variety of mitigating evidence, among which were Mr. Smith's diagnosis of learning disabilities, history of placement in special education classes, and IQ of 78.

The members of the jury were given a jury verdict form that reminded them about answering "yes" or "no" to the special issues but did not mention anything about the mitigating evidence. The jury answered both questions "yes" and sentenced the defendant to death.

The defendant appealed to the Texas Court of Criminal Appeals, stating that the jury instructions were unconstitutional based on *Penry v. Lynaugh*,

492 U.S. 302 (1989) (*Penry I*), in which the U.S. Supreme Court had ruled that Texas's special issues failed to allow the jury to give effect to the mitigating evidence and thus violated the Eighth Amendment. The appellate court rejected the appeal, reasoning that the nullification instruction provided did allow the jury to consider the mitigating evidence.

The defendant then filed a writ of *habeas corpus*, and argued before the appellate court that the nullification instruction violated *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). In *Penry II*, the Supreme Court held that a similar nullification instruction was unconstitutional because it did not allow the jury to give "full consideration and full effect to mitigating circumstances." The defendant argued that as in *Penry II*, the nullification instruction in his case was unconstitutional.

The appellate court rejected this argument also, stating: (1) the nullification instruction in this case was irrelevant because the petitioner did not proffer constitutionally significant mitigating evidence and had not proven a nexus between the mitigating evidence and the crime; and (2) in any event, the nullification instruction in this case did allow the jury to give effect to the evidence.

Ruling

The U.S. Supreme Court granted *certiorari*, reversed the judgment of the Texas Court of Criminal Appeals and "remanded the case for further proceedings not inconsistent with this opinion."

Reasoning

The Supreme Court ruled that the nullification instruction given by the trial court was unconstitutional because it violated the Eighth Amendment, which requires that the jury be provided with a vehicle capable of giving effect to the mitigating evidence. Instead, the jurors were placed in a dilemma between either answering the special issues truthfully or having to answer one of them untruthfully if they found mitigation evidence. The Supreme Court also rejected the instruction that the defendant's evidence had to be constitutionally relevant to be considered mitigating, or that he had to prove that there was a nexus between his limited mental abilities and his committing the crime to have a mental disorder considered mitigating.

Regarding the first issue, the Supreme Court quoted another Texas case, *Tennard v. Dretke*, 542

U.S. 274 (2004). In *Tennard*, the Supreme Court had reversed the decision of the U.S. Court of Appeals for the Fifth Circuit that stated that an adequate instruction was required only if the mitigating evidence passed the threshold test of being constitutionally adequate. The Supreme Court held that the circuit court ruling had "no foundation in the decisions of this Court." It further commented,

The Texas Court of Criminal Appeals relied on precisely the same "screening test" we held constitutionally inadequate in *Tennard*. . . . There is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death.

Therefore, the proffered evidence was relevant, and the Eighth Amendment required the trial court to empower the jury to give effect to that evidence.

Regarding the second issue, the Supreme Court argued that the nullification instruction given in this case was similar to that of *Penry II*, and thus, was unconstitutional.

Just as in *Penry II*, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented. . . .

There is no principled distinction, for *Eighth Amendment* purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. . . . We therefore hold that the nullification instruction was constitutionally inadequate.

Dissent

Justice Scalia, joined by Justice Thomas, dissented. He affirmed the judgment of the Texas Court of Criminal Appeals, referring to *Walton v. Arizona*, 497 U.S. 639 (1990).

Discussion

This decision, considered in the context of the *Penry* and *Tennard* decisions, demonstrates the Supreme Court's concern over the use of unconstitutional methods in capital punishment cases. Through these consistent decisions, the Supreme Court emphasizes the need for the jury to have the full opportunity to review any and all evidence to determine its significance for mitigation, even if it does not seem to be directly related to the alleged crime. By rejecting attempts to limit mitigating evidence by the test of constitutional relevance, the Supreme Court provides a rather broad interpretation of what may constitute mitigating evidence.

This has significant implication for psychiatry. For instance, as clinical knowledge regarding human behavior expands, factors may be discovered that could qualify as mitigating evidence. Forensic psychiatrists will have the opportunity to educate the courts regarding such recent discoveries in medicine and psychiatry that are pertinent to the legal system. On the other hand, as there are no predetermined criteria to define or limit mitigating evidence, it places a great responsibility on forensic psychiatrists and other evaluators for the court to be as comprehensive and exhaustive as practically possible in their assessments. This will provide the jury with as much of a complete picture of the evaluatee as can be presented and allow it to give full consideration to an array of factors that a fair carriage of justice would seem to entail.

Furthermore, as the definition of accepted mitigation evidence evolves, certain factors that currently hold a somewhat dubious place in the court system regarding their mitigating status—such as childhood abuse—may also have their status clarified. Though ultimately the courts decide what constitutes mitigating evidence and what does not, forensic psychiatrists and other evaluators for the court can advise attorneys about the importance of relevant factors and how they may be best presented. The consultative role of forensic psychiatry is also critical in cases in which evidence may be best offered in lay rather than expert testimony.

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Mitigating Factors in the Death Penalty

Jury Instructions Must Directly Address Mitigating Factors in Death Penalty Cases

In *Bigby v. Dretke*, 402 F.3d 551 (5th Cir. 2005), the U.S. Court of Appeals for the Fifth Circuit heard a case appealed from the Northern Court of Texas (trial court) on the issue of jury instruction in death penalty sentencing in light of recent U.S. Supreme Court decisions concerning the relevance of mitigating evidence.

Facts of the Case

James Bigby was charged with capital murder in the shooting death of a man and the drowning of the man's infant son on December 24, 1987. He was an acquaintance of the victims, and the mother of the murdered infant identified Mr. Bigby as having had contact with her son just prior to his death. Following a standoff with police in a Texas motel, Mr. Bigby surrendered without incident. Two days later, he gave a written statement to police confessing to the killings.

Mr. Bigby offered an insanity defense at trial. Several defense psychiatrists were called to testify regarding his mental illness, including Dr. James Grigson (the same psychiatrist whose testimony on future dangerousness at a sentencing hearing in a capital murder case was the basis for the U.S. Supreme Court ruling on the accuracy of psychiatric assessments in *Barefoot v. Estelle*, 463 U.S. 880 (1983)). At Mr. Bigby's trial, Dr. Grigson testified that the defendant had medically intractable chronic paranoid schizophrenia with paranoid delusions that rendered him unable to discriminate between right and wrong. Dr. Grigson concluded that the murders were committed as a direct result of Mr. Bigby's mental illness.

During a trial recess, Mr. Bigby took a gun from the unoccupied bench of the judge, entered the judge's chambers, pointed the gun to the judge's head, and said, "Let's go." Mr. Bigby was then subdued by the judge. Defense motions for mistrial and for the judge's recusal were denied. After the defense rested, the judge allowed the state, in rebuttal, to introduce testimony regarding Mr. Bigby's attempted escape, characterizing the event as evidence of "consciousness of guilt." The jury found Mr. Bigby guilty of capital murder and imposed the death penalty.

A direct appeal filed by Mr. Bigby in 1994 to the Texas Court of Criminal Appeals included a point of error stating that the trial court gave the jury unconstitutional instructions, in violation of the U.S. Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*). In *Penry I*, the jury was instructed to address three "special issues": whether the death of the victim was deliberate, whether there was probability that the defendant would constitute a continued threat to society, and whether the conduct was an unreasonable response to provocation by the victim. The U.S. Supreme Court determined that Mr. Penry's Eighth Amendment rights were violated because the three special issues were not broad