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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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PENRY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00–6677. Argued March 27, 2001– Decided June 4, 2001

In 1989, this Court held that petitioner Penry had been sentenced to death in violation of the Eighth Amendment. At the close of the penalty hearing during Penry's first Texas capital murder trial, the jury was instructed to answer three statutorily mandated "special issues": (1) whether Penry's conduct was committed deliberately and with the reasonable expectation that death would result; (2) whether it was probable that he would be a continuing threat to society; and (3) whether the killing was unreasonable in response to any provocation by the deceased. Although Penry had offered extensive evidence that he was mentally retarded and had been severely abused as a child, the jury was never told it could consider and give mitigating effect to that evidence in imposing sentence. In holding that the jury had not been adequately instructed with respect to the mitigating evidence, the Court found, among other things, that none of the special issues was broad enough to allow the jury to consider and give effect to that evidence. *Penry* v. *Lynaugh,* 492 U. S. 302 (1989) *(Penry I).* When Texas retried Penry in 1990, he was again found guilty of capital murder. During the penalty phase, the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse. On direct examination by the defense, a clinical neuropsychologist, Dr. Price, testified that he believed Penry suffered from organic brain impairment and mental retardation. During cross-examination, Price cited as one of the records he had reviewed in preparing his testimony a psychiatric evaluation prepared by Dr. Peebles in 1977 at the request of Penry's then-counsel to determine Penry's competency to stand trial on an earlier charge unrelated to

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the murder at issue. Over a defense objection, Price recited a portion of that evaluation which stated that it was Peebles' professional opinion that if Penry were released, he would be dangerous to others. When it came time to submit the case to the jury, the trial court instructed the jury to determine Penry's sentence by answering the same three special issues that were at issue in *Penry I.* The trial court then gave a "supplemental instruction": "[W]hen you deliberate on the . . . special issues, you are to consider mitigating circumstances, if any, supported by the evidence . . . . If you find [such] circumstances . . . , 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 [Penry's] personal culpability . . . , a negative finding should be given to one of the special issues." The verdict form itself, however, contained only the text of the three special issues, and gave the jury two choices with respect to each: "Yes" or "No." Because the jury unanimously answered "yes" to each special issue, the court sentenced Penry to death in accordance with state law. In affirming, the Texas Court of Criminal Appeals rejected Penry's claims that the admission of language from the Peebles report violated Penry's Fifth Amendment privilege against self-incrimination, and that the jury instructions were constitutionally inadequate because they did not permit the jury to consider and give effect to his particular mitigating evidence. With respect to the latter, the court held that the supplemental instruction met *Penry I*'s constitutional requirements. After his petition for state habeas corpus relief was denied, Penry petitioned for federal habeas relief under 28 U. S. C. §2254. The District Court found that the state appellate court's conclusions on both of Penry's claims were neither contrary to, nor an unreasonable application of, clearly established federal law. The Fifth Circuit denied a certificate of appealability.

Held:

1. Penry's argument is unavailing that the admission into evidence of the portion of the Peebles report referring to his future dangerousness violated his Fifth Amendment privilege against self-incrimination. This case is distinguishable from *Estelle* v. *Smith,* 451 U. S. 454, in which the Court held that the admission of a psychiatrist's testimony on the topic of future dangerousness, based on a defendant's uncounseled statements, violated the Fifth Amendment. The Court need not and does not decide whether the several respects in which this case differs from *Estelle* affect the merits of Penry's claim.

Rather, the question is whether the Texas court's decision was "contrary to" or an "unreasonable application" of this Court's precedent. 28 U. S. C. §2254(d)(1); see *Williams* v. *Taylor,* 529 U. S. 362. It was not. The differences between this case and *Estelle* are substantial, and the Court's *Estelle* opinion suggested that its holding was limited to the "distinct circumstances" presented there. 451 U. S., at 466. It also indicated that the Fifth Amendment analysis might be different where a defendant introduces psychiatric evidence at the penalty phase. *Id.,* at 472. Indeed, the Court has never extended *Estelle*'s Fifth Amendment holding beyond its particular facts. Cf., *e.g., Buchanan* v. *Kentucky,* 483 U. S. 402. It therefore cannot be said that it was objectively unreasonable for the Texas court to conclude that Penry is not entitled to relief on his Fifth Amendment claim. See *Williams, supra,* at 409. Even if the Court's precedent were to establish squarely that use of the Peebles report violated the Fifth Amendment, that error would justify overturning Penry's sentence only if he could establish that the error had a substantial and injurious effect or influence in determining the jury's verdict. *E.g., Brecht* v. *Abrahamson,* 507 U. S. 619, 637. There is considerable doubt that Penry could make such a showing. The excerpt from the Peebles report was neither the first nor the last expert opinion the jury heard to the effect that Penry posed a future danger and was by no means the key to the State's case on future dangerousness. Pp. 9–12.

2. The jury instructions at Penry's resentencing, however, did not comply with the Court's mandate in *Penry I.* To the extent the Texas appellate court believed that *Penry I* was satisfied merely because a supplemental instruction was given, the court clearly misapprehended that prior decision. The key under *Penry I* is that the jury be able to "consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence." 492 U. S., at 319. To the extent the state court concluded that the substance of the jury instructions given at Penry's resentencing satisfied *Penry I,* that determination was objectively unreasonable. The three special issues submitted to the jury were identical to the ones found inadequate in *Penry I.* Although the supplemental instruction mentioned mitigating evidence, the mechanism it purported to create for the jurors to give effect to that evidence was ineffective and illogical. The jury was clearly instructed that a "yes" answer to a special issue was appropriate only when supported by the evidence beyond a reasonable doubt, and that a "no" answer was appropriate only when there was a reasonable doubt as to whether the answer to a special issue should be "yes. " The verdict form listed the three special issues and, with no mention of mitigating circumstances, confirmed and clarified the jury's two choices with respect to each special issue. In the State's view, however, the jury was also

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told that it could ignore these clear guidelines and– even if there was in fact no reasonable doubt as to the matter inquired about– answer any special issue in the negative if the mitigating circumstances warranted a life sentence. In other words, the jury could change one or more truthful "yes" answers to an untruthful "no" answer in order to avoid a death sentence for Penry. The supplemental instruction thereby made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation. The comments of the prosecutor and defense counsel, as well as the comments of the court during *voir dire,* did little to clarify the confusion caused by the instructions themselves. Any realistic assessment of the manner in which the supplemental instruction operated would therefore lead to the same conclusion the Court reached in *Penry I:* "[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." 492 U. S., at 326. Pp. 12–20.

215 F. 3d 504, affirmed in part, reversed in part, and remanded.

O'CONNOR, J., delivered the opinion of the Court, Parts I, II, and III–A of which were unanimous, and Part III–B of which was joined by STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined.