SUPREME COURT OF THE UNITED STATES

No. 00–6677

JOHNNY PAUL PENRY, PETITIONER *v.* GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

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

[June 4, 2001]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring in Parts I, II, and III–A, and dissenting in Part III–B.

Two Texas juries have now deliberated and reasoned that Penry's brutal rape and murder of Pamela Carpenter warrants the death penalty under Texas law. And two opinions of this Court have now overruled those decisions on the ground that the sentencing courts should have said more about Penry's alleged mitigating evidence. Because I believe the most recent sentencing court gave the jurors an opportunity to consider the evidence Penry presented, I respectfully dissent.

As a habeas reviewing court, we are not called upon to propose what we believe to be the ideal instruction on how a jury should take into account evidence related to Penry's childhood and mental status. Our job is much simpler, and it is significantly removed from writing the instruction in the first instance. We must decide merely whether the conclusion of the Texas Court of Criminal Appeals– that the sentencing court's supplemental instruction explaining how the jury could give effect to any mitigating value it found in Penry's evidence satisfied the requirements of *Penry I*– was "objectively unreasonable." *Williams* v. *Taylor*, 529 U. S. 362, 409 (2000). See also 28

U. S. C. §2254(d)(1) (1994 ed., Supp. V).

At Penry's first sentencing, the court read to the jury Texas' three special issues for capital sentencing.[1] The court did not instruct the jury 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." 492 U. S., at 320. The prosecutor also did not offer any way for the jury to give mitigating effect to the evidence, but instead simply reiterated that the jury was to answer the three questions and follow the law. In *Penry I*, this Court concluded that, "[i]n light of the prosecutor's argument, and in the absence of appropriate jury instructions, 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." *Id.*, at 326.

At Penry's second sentencing, the court read to the jury the same three special issues. In contrast to the first sentencing, however, the court instructed the jury at length that it could consider Penry's proffered evidence as mitigating evidence and that it could give mitigating effect to that evidence. See *ante*, at 5–6. The Texas Court of Criminal Appeals concluded that this supplemental instruction "allow[ed] [the jury] to consider and give effect to" Penry's proffered mitigating evidence and therefore

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[1] The special issues are:

"'(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; 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.'" *Penry I*, 492 U. S. 302, 310 (1989) (quoting Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Supp. 1989)).

was "sufficient to meet the constitutional requirements of [*Penry I*]."[2] *Penry* v. *State,* 903 S. W. 2d 715, 765 (1995). In my view, this decision is not only objectively reasonable but also compelled by this Court's precedents and by common sense.

"In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson* v. *Texas*, 509 U. S. 350, 368 (1993) (quoting *Boyde* v. *California*, 494 U. S. 370, 381 (1990)). The Texas court's instruction, read for common sense, or, even after a technical parsing, tells jurors that they may consider the evidence Penry presented as mitigating evidence and that, if they believe the mitigating evidence makes a death sentence inappropriate, they should answer "no" to one of the special issues. Given this straightforward reading of the instructions, it is objectively reasonable, if not eminently logical, to conclude that a reasonable juror would have believed he had a "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.

It is true that Penry's proffered evidence did not fit neatly into any of the three special issues for imposing the

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[2] This Court's suggestion that the Texas court may have believed that any supplemental instruction, regardless of its substance, would satisfy *Penry I*'s requirement, see *ante*, at 12, is specious. The Texas court explained that a "jury must be given a special instruction *in order to allow it to consider and give effect to such evidence*;" it quoted the full text of the supplemental instruction; and it concluded that "a nullification instruction *such as this one* is sufficient to meet the constitutional requirements of [*Penry I*]." 903 S. W. 2d, at 765 (emphasis added). It is quite obvious that the court based its legal conclusion on the content of the supplemental instruction.

death penalty under Texas law.[3] But the sentencing court told the jury in no uncertain terms precisely how to follow this Court's directive in *Penry I*. First, the sentencing court instructed the jury that it could consider such evidence to be mitigating evidence. See App. 675 ("[W]hen you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case"). Next, the court explained to the jury how it must give effect to the evidence. *Ibid.* ("If you find that there are any mitigating circumstances in this case, 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"). And finally, the court unambiguously instructed: "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 the personal culpability of the defendant, *a negative finding should be given to one of the special issues*." *Ibid.* (emphasis added). Without performing legal acrobatics, I cannot make the instruction confusing. And I certainly cannot do the contortions necessary to find the Texas appellate court's

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[3] I am still bewildered as to why this Court finds it unconstitutional for Texas to limit consideration of mitigating evidence to those factors relevant to the three special issues. See *Graham* v. *Collins,* 506 U. S. 461, 478 (1993) (THOMAS, J., concurring). But we need not address this broader issue to uphold Penry's sentence.

decision "objectively unreasonable."[4] I simply do not share the Court's confusion as to how a juror could consider mitigating evidence, decide whether it makes a death sentence inappropriate, and respond with a "yes" or "no" depending on the answer.

Curiously, this Court concludes that the supplemental instruction "inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependent on their willingness' to elevate the supplemental instruction over the verdict form instructions." *Ante*, at 16 (quoting *Roberts* v. *Louisiana*, 428 U. S. 325, 335 (1976) (plurality opinion)). Any reference to *Roberts*, however, is wholly misplaced. *Roberts*

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[4] I think we need not look beyond the court's instructions in evaluating the Texas appellate court's decision. But even if there were any doubt as to whether the instruction led the jurors to believe there was a vehicle for giving mitigating effect to Penry's evidence, the instruction was made clear "'in the light of all that ha[d] taken place at the trial.'" *Johnson* v. *Texas,* 509 U. S. 350, 368 (1993). The judge and prosecutor fully explained how to give effect to mitigating evidence during the *voir dire* process, and defense counsel made the instruction clear in closing: "[i]f, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, . . . then, you get to answer one of . . . those questions no," App. 640. Even if the jurors had forgotten what they had been told at *voir dire,* see *ante*, at 17–18, an assumption that I find questionable given our presumptions about jurors' ability to remember and follow instructions, see, *e.g., Weeks* v. *Angelone,* 528 U. S. 225, 234 (2000), the defense counsel's explanation from closing arguments would have been fresh on their minds.

Despite the Court's assertion that defense counsel told the jurors to answer the questions dishonestly, *ante*, at 18, it seems to me that the jurors reasonably could have believed that they could honestly answer any question "no" if they found that the death sentence would be inappropriate given the mitigating evidence. They could follow their "'oath, the evidence and the law,'" *ibid.,* (quoting the prosecutor's statement, App. 616), by truthfully concluding that the evidence of Penry's childhood and mental status did not warrant the death penalty and by writing "no" next to one of the special issues.

involved a situation in which the jury was told to find the defendant guilty of a lesser included offense, unsupported by any evidence, if the jury did not want him to be sentenced to death. *Id.*, at 334–335. In Penry's case there was no suggestion, express or implied, made to the jury that it could *disregard* the evidence. On the contrary, it was instructed on how to *give effect to* Penry's proffered evidence, as required by this Court in *Penry I*. Tellingly, the *Roberts* plurality stated in full that "[t]here is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to *disregard the trial judge's instructions*." 428 U. S., at 335 (emphasis added). In Penry's case, the judge's instructions included an explanation of how to answer the three special issues and how to give effect to the mitigating evidence.

Finally, contrary to the Court's claim that the jury received "mixed signals," *ante*, at 18, it appears that it is the Texas courts that have received the mixed signals. In *Jurek* v. *Texas*, 428 U. S. 262 (1976), this Court upheld the Texas sentencing statute at issue here against attack under the Eighth and Fourteenth Amendments. The joint opinion in *Jurek* concluded that the statute permits the jury "to consider whatever evidence of mitigating circumstances the defense can bring before it" and "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.*, at 273–274 (opinion of Stewart, Powell, and STEVENS, JJ.). Then, while purporting to distinguish, rather than to overrule, *Jurek*, this Court in *Penry I* determined that the same Texas statute was constitutionally insufficient by not permitting jurors to give effect to mitigating evidence. 492 U. S., at 328. See also *id.*, at 355–356 (SCALIA, J., dissenting) (explaining how *Penry I* contradicts *Jurek*'s conclusions). According to the Court, an

instruction informing the jury that it could give effect to the mitigating evidence was necessary. 492 U. S., at 328. And in today's decision, this Court yet again has second-guessed itself and decided that even this supplemental instruction is not constitutionally sufficient.