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Federal Habeas Review: The Supreme Court's Failure to Apply Williams Consistently

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FEDERAL HABEAS REVIEW: THE SUPREME COURT'S FAILURE TO APPLY *WILLIAMS* CONSISTENTLY

Penry v. Johnson, 532 U.S. 782 (2001)

I. INTRODUCTION

In *Penry v. Johnson*,[1] the Supreme Court reviewed for a second time the case of petitioner John Paul Penry, a mentally retarded man convicted of murder and sentenced to death by a Texas jury.[2] Acting as a federal habeas review court, the Supreme Court reversed in part the lower court's decision with regard to jury instructions that failed to provide jurors an opportunity to consider mitigating evidence, and affirmed in part, concluding that petitioner's Fifth Amendment rights had not been violated when a psychiatric report with statements about petitioner's future dangerousness was admitted into evidence.[3] Penry's case reached the Supreme Court after retrial by a state jury pursuant to the Court's earlier ruling in *Penry v. Lynaugh* ("*Penry I*").[4] This second Texas jury found Penry guilty of murder and again sentenced him to death.[5] After exhausting his state and federal remedies, Penry's case arose on writ of certiorari to the United States Court of Appeals for the Fifth Circuit which had affirmed the district court's denial of Penry's application for the federal writ of habeas corpus.[6]

In an opinion by Justice O'Connor, the Court first addressed the

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[1] 532 U.S. 782 (2001).

[2] The Supreme Court first reviewed Penry's capital case 1989 when it held that jurors must be allowed to "consider and give effect" to mitigating circumstances at the sentencing phase of the trial. Penry v. Lynaugh, 492 U.S. 302, 328 (1989) [hereinafter "*Penry I*"].

[3] 532 U.S. at 796.

[4] 492 U.S. at 302.

[5] Penry v. Johnson, 215 F.3d 504, 507 (5th Cir. 2000), *aff'd in part, rev'd in part*, 532 U.S. 782 (2001).

[6] *Id.*

procedural mechanism by which this case arrived in federal court and clarified the standard of review by which Penry's habeas appeal would be adjudged under the Antiterrorism and Effective Death Penalty Act (AEDPA).[7] Justice O'Connor then addressed the substantive issues, stating that the Fifth Circuit properly applied clearly established federal law in determining that admission into testimony of statements taken from a psychiatric report did not violate Penry's privilege against self-incrimination under the Fifth Amendment.[8] Finally, the Court concluded that the Fifth Circuit improperly applied federal law as determined by the Supreme Court—specifically the rule of *Penry I*—in its assertion that a supplemental jury instruction allowed jurors to "consider and give effect" to mitigating circumstances in the sentencing phase of a capital trial.[9] The Court therefore reversed with regard to the jury instructions and affirmed as to the Fifth Amendment complaint.[10]

This Note argues that the Supreme Court reached the proper conclusion with regard to the Fifth Amendment claim, but failed to apply the same skill in reasoning with regard to the adequacy of jury instructions. Justice O'Connor, guided by the strength of her convictions in the opinion she delivered eleven years earlier in *Penry I*, overlooked her own clear language in *Williams v. Taylor*[11] as to how the Supreme Court should properly review a state court's adjudication on the merits under the AEDPA.[12] By neglecting the mandate of *Williams*, the Court not only provides a mixed message to state legislatures hoping to find guidance in drafting capital sentencing guidelines, specifically with regard to jury instructions, but also provides little direction to lower federal courts as to the proper standard of review under the AEDPA for applications for the federal writ of habeas corpus.

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[7] 28 U.S.C. § 2254(d)(1) (1994), *amended by* Antiterrorism and Death Penalty Act of 1996, Pub. L. No. 104-132, §104(3), 110 Stat. 1214, 1219 (1996) [hereinafter as amended]. *See also infra* notes 13-61 and accompanying text.

[8] *Penry*, 532 U.S. at 795.

[9] *Id.* at 804.

[10] *Id.*

[11] 529 U.S. 362 (2000) (O'Connor, J. concurring).

[12] *See infra* notes 44-61 and accompanying text.

II. BACKGROUND

A. THE FEDERAL WRIT OF HABEAS CORPUS AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

Penry filed his petition for the federal writ of habeas corpus after the enactment of the AEDPA.[13] Therefore, the federal habeas statute as amended by the AEDPA governed Penry's case.[14] The AEDPA establishes the authority with which a federal court may grant an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court.[15] Federal courts have long had the power to grant writs of habeas corpus to state prisoners "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[16] However, there has been tremendous disagreement through the years as to the scope and breadth of the 1867 statute, as reflected by the numerous amendments and complex body of case law that has emerged since its original passage.[17] One of the first cases interpreting the statute was *Ex Parte McCardle*,[18] a case in which a Mississippi newspaper editor was imprisoned by Northern military authorities pursuant to the Military Reconstruction Act for publishing unfavorable editorials.[19] While ultimately adjudicated on other grounds,[20] *McCardle* provided an extremely expansive reading of the statute by stating that it "brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of

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[13] *Penry*, 532 U.S. at 792.

[14] *Id.*

[15] *Williams*, 529 U.S. at 402. *See also* Hopkins v. Cockrell, No. 3:98-CV-2355-P, 2001 U.S. Dist. LEXIS 14871, at *6 (N.D. Tex. Aug. 9, 2001) ("Resolution on the merits in the habeas corpus context is a term of art that refers to the states court's disposition of the case on substantive rather than procedural grounds.").

[16] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1868) (codified as 28 U.S.C. §§ 2241–55 (1994)).

[17] *See generally* Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1990–1991).

[18] 73 U.S. (6 Wall) 318 (1868).

[19] *Id.* at 322. The Military Reconstruction Acts provided Northern troops the power to imprison offenders without benefit of a jury trial for inciting insurrection or promoting breaches of the peace.

[20] The case is frequently cited as upholding "judicial stripping" as the Supreme Court held that Congress could invoke the Exceptions Clause in order to take the McCardle case off the Supreme Court's docket.

liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."[21] In 1963, the Court reinforced this reading of the statute in *Fay v. Noia*,[22] stating that "Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of federal courts to their constitutional maximum."[23] Supporters of an expansive interpretation of federal habeas review contend that such a remedy has proven necessary based on past experience, and is especially important in capital cases.[24] The same proponents have also suggested that the "lifetime tenure" of federal judges in contrast to the political pressures on popularly elected state court judges could serve to "immunize" federal judges from outside influence in adjudging habeas cases.[25] Finally, in the capital punishment context, proponents of expanding federal habeas review argue that this broad reading of federal habeas law, by increasing the number of decisions (throughout the course of a capital case, for example) "diminishes the possibility of unconstitutional executions."[26]

Such an expansive reading is not without criticism from commentators, and increasingly, from the Supreme Court.[27] Generally, those who would limit grants of federal writs of habeas corpus are concerned with providing some kind of finality in criminal cases as well as the appropriateness of second–guessing state courts.[28] Nor is the Supreme Court convinced that increased litigation provides "better" results for criminal defendants. Rather, the Court stated in *Brown v. Allen*[29] in 1953 that

> [r]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super–Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible,

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[21] *McCardle*, 73 U.S. (6 Wall) at 325–26.

[22] 372 U.S. 391 (1963).

[23] *Id.* at 426.

[24] Goldstein, *supra* note 17, at 360.

[25] *See* Stone v. Powell, 428 U.S. 465, 525 (1986) (Brennan, J., dissenting).

[26] Coleman v. McCormick, 874 F. 2d 1280, 1295 n.8 (9th Cir. 1989).

[27] *See, e.g.*, Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) ("Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.").

[28] Goldstein, *supra* note 17, at 359–360.

[29] 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

> but we are infallible only because we are final.[30]

The issue of finality, especially in capital cases, has been the subject of heated debate in recent years.[31] Several decisions by the Supreme Court reflect this trend toward limiting the scope of the writ. In *Barefoot v. Estelle*,[32] for example, the Court noted that the "role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited."[33] The Court continued, "Federal courts are not forums in which to relitigate state trials."[34] In *O'Neal v. McAninch*,[35] the Court cautioned:

> We have ample cause to be wary of the writ. Our criminal law does not routinely punish the innocent. Instead, our Constitution requires proof of guilt beyond a reasonable doubt. As a result, the overwhelming majority of the innocent will never reach the habeas stage, since they will not have been found guilty at trial. Appeals and possible state postconviction relief further reduce the possibility that an innocent is in custody. The presumption of finality that we apply in habeas proceedings is therefore well founded.[36]

Similarly, the Court acknowledged the significant costs of an expansive vision of federal habeas review. "[F]ederal habeas review . . . disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."[37]

Despite pronouncements by the Supreme Court suggesting new limits on the scope of the doctrine, Congress' role in determining federal habeas law has not been entirely clear. As pointed out by Justice Brennan in 1989, "Congress has done nothing to shrink the set of claims cognizable on habeas since it passed the Habeas Corpus Act of 1867."[38] Congress took up the challenge of clarifying federal habeas law in 1996.[39] In that year, Congress passed the AEDPA in an

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[30] *Id.* at 540 (Jackson, J., concurring).

[31] Goldstein, *supra* note 17, at 361.

[32] 463 U.S. 880 (1983).

[33] *Id.* at 887.

[34] *Id.*

[35] 513 U.S. 432 (1995).

[36] *Id.* at 447 (citation omitted).

[37] Duckworth v. Eagan, 492 U.S. 195, 210 (1989) (quoting Harris v. Reed, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)).

[38] Teague v. Lane, 489 U.S. 288, 332 (1989) (Brennan, J., dissenting).

[39] Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 382 (1996).

attempt to resolve the confusion with respect to the consequence that federal courts must give to previous state court judgments.[40] Until then, federal courts had viewed state court judgments *de novo* which "left the impression that the federal court was to act without any necessary or explicit reference to a prior state court judgment."[41] Under the AEDPA, however, a federal court, while acting independently, must take the prior adjudication on the merits as a "starting point" from which to begin federal habeas review.[42] "Yet the focus of that independent federal judgment is not the merits of the claim in the air, but rather the accuracy of the prior state court decision on the merits."[43] By clarifying the standard of review, Congress, with the AEDPA, significantly reined in the authority of federal courts to evaluate cases on the merits, and thereby narrowed the scope of the writ.

Williams v. Taylor[44] provides the most recent definitive examination of federal habeas law as interpreted by the Supreme Court since the passage of the AEDPA.[45] In *Williams*, Justice O'Connor was joined by a majority of the Court in her concurrence[46] that interpreted the AEDPA; Justice Stevens delivered the opinion evaluating the substance of the petitioner's Sixth Amendment claim.[47] The Court reversed and remanded the case to the Fourth Circuit, holding that the petitioner had been denied his Sixth Amendment right to effective assistance of counsel when his attorneys failed to present mitigating evidence during the sentencing phase of his capital trial.[48] As to the AEDPA, Justice O'Connor relied on the plain language of the statute to establish that a federal court may apply the writ of habeas corpus to a person "in custody pursuant to the judgment of a State court" *only if* the defendant may show that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

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[40] *Id.*
[41] *Id.* at 383.
[42] *Id.*
[43] *Id.* at 412–13.
[44] *See* Williams v. Taylor, 529 U.S. 362 (2000).
[45] *See id.* at 399.
[46] *Id.* at 399 (O'Connor, J., concurring).
[47] *Id.* at 367.
[48] *Id.* at 398–99.

States."[49] This leading case proposed to clarify the language of the statute holding that a state court decision is "contrary to" Supreme Court precedent if: (1) the "state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law" or (2) the "state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives a result opposite to [the Supreme Court]."[50] Because the Virginia state court in *Williams* had issued a ruling "contrary to" or involving an "unreasonable application of" Supreme Court precedent, namely *Strickland v. Washington*,[51] the Fourth Circuit was reversed and Williams was granted habeas relief.[52]

The Court recognized that 28 U.S.C. § 2254(d)(1) placed new constraints on the grant of federal habeas relief and examined the two conditions set forth in the statute independently.[53] First, the Court instructed that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."[54] The Court also noted that Congress expressly chose the word "unreasonable" rather than a term such as "erroneous" or "incorrect."[55] Justice O'Connor's contribution to the opinion placed great emphasis on the significance of the difference between "unreasonable" and "incorrect," and represents the portion of the opinion upon which lower courts have chosen to rely on as one of the most important aspects of the *Williams* holding.[56] "[T]he most important point is that an *unrea-*

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[49] *Id.* at 402–03. The complete language of the statute quoted in the case reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. (quoting 28 U.S.C. § 2254(d)(1)–(2)).

[50] *Id.* at 405.

[51] 466 U.S. 668 (1984) (defining the constitutional right to the effective assistance of counsel).

[52] *Williams*, 529 U.S. at 399.

[53] *Id.* at 409.

[54] *Id.* at 409.

[55] *Id.* at 410.

[56] *Id. See, e.g.*, Washington v. Smith, 219 F.3d 620, 628 (7th Cir. 2000).

sonable application of federal law is different from an *incorrect* application of federal law."[57] From this, the Court concluded that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[58]

The Court also discussed the significance of the disjunctive test provided by the statute.[59] The *Williams* court asserted that the "contrary to" and "unreasonable application" clauses have "independent meaning," thereby providing a foundation upon which lower courts could rely in interpreting future habeas claims under the AEDPA.[60] *Williams* remains the most definitive interpretation of the AEDPA since its amendment in 1996, and the basis of almost all lower courts' analyses of questions presented under the federal habeas statute.[61]

B. FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND THE USE OF PSYCHIATRIC TESTIMONY IN CAPITAL CASES

Penry's first substantive claim involved his alleged denial of the privilege against compelled self-incrimination in violation of the Fifth Amendment of the United States Constitution.[62] Penry alleged that a psychiatric report ("the Peebles report") that made reference to his "future dangerousness" should have been inadmissible at trial because Penry had not been given proper warnings that statements he made during the uncounseled exam could later be used against him in capital sentencing.[63] The relevant language of the Fifth Amendment states: "nor shall any person . . . be compelled in any criminal case to be a witness against himself."[64] The Founding Fathers included this fundamental constitutional principle in the Bill of Rights in order to protect the common-law privilege against self-incrimination, a privi-

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[57] *Williams*, 529 U.S. at 410.

[58] *Id.* at 411.

[59] *Id.* at 407.

[60] *Id.* at 404. *See also* Gardner v. Johnson, 247 F.3d 551, 558–59 (5th Cir. 2001).

[61] *See, e.g.*, Stephens v. Hall, 294 F.3d 210, 225 (1st Cir. 2002).

[62] Penry v. Johnson, 532 U.S. 782, 793 (2001).

[63] *Id.* The psychiatric examination was conducted in 1977 by Dr. Felix Peebles and the report is referred to in the opinion as "the Peebles report." The exam was conducted in order to determine Penry's competence to stand trial for an offense totally unrelated and committed years before the capital offense in which the Peebles report became a Fifth Amendment issue. *Id.* at 788.

[64] U.S. CONST. amend. V.

lege recognized as far back as the thirteenth century.[65] The Supreme Court summed up the "essence" of the privilege saying that it "is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."[66] Subject only to limited exceptions,[67] an individual must explicitly invoke his Fifth Amendment right in order to receive its protections.[68] Unless an individual invokes the Fifth Amendment upon questioning, he is deemed to have waived his right.[69] Once invoked, a determination will be made as to the validity of that invocation, namely whether the individual is being subject to compelled testimonial incrimination. "The three variables—compulsion, testimony, and incrimination—thus form the core of the Fifth Amendment."[70]

1. Compulsion

With regard to the Peebles report, [71] the question of compulsion turned on the fact that it was Penry's own attorney who had requested the psychiatric examination in 1977 in order to determine Penry's competency to stand trial for an offense committed two years before he committed the capital offense in which the Fifth Amendment issue of compulsion was raised.[72] "Compulsion normally means that person has been ordered to testify by a *state actor* who has the power to sanction the refusal to testify."[73] The Supreme Court held in *Lefkowitz v. Turley*,[74] that the Fifth Amendment not only permits a defen-

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[65] Jonathan Kaden, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347, 353-(1998).

[66] Culombe v. Connecticut, 367 U.S. 568, 581–82 (1961).

[67] The three exceptions are police interrogation, statutory reporting requirements for "inherently suspect classes," and in cases in which the exercise of one's Fifth Amendment rights would be penalized. *See* RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 644 (2001).

[68] *Id.*

[69] *See, e.g.*, North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding that *Miranda* rights need not be specifically waived through express written or oral waiver, but that waiver may be "inferred from the actions and words of the person interrogated.").

[70] ALLEN ET AL., *supra* note 67, at 645.

[71] *Penry*, 532 U.S. at 788. *See supra* note 62 (discusses background of the Peebles report).

[72] *Penry*, 532 U.S. at 794.

[73] ALLEN ET AL., *supra* note 67, at 645 (emphasis added).

[74] 414 U.S. 70 (1973).

dant to refuse to testify against himself at a criminal trial, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in *future* criminal proceedings."[75] The Court concluded that a witness who is compelled to answer, if protected by the privilege, would not have provided answers that would be admissible against him in later criminal prosecutions.[76]

By contrast, business papers that were voluntarily prepared,[77] or tax returns and other such papers voluntarily prepared in fulfillment of a regulatory requirement,[78] do not enjoy protection under the Fifth Amendment precisely because their preparation was voluntary and therefore not compelled. Further, depositions in civil actions and voluntary grand jury testimony are similarly not compelled and therefore not protected by the Fifth Amendment.[79] Likewise, the Court has not extended this notion of compulsion to include a voluntary clemency interview in spite of the inherent pressure created by having only one guaranteed clemency review when under a sentence of death.[80] "[T]he respondent has the same choice of providing information to the Authority—at the risk of damaging his case for clemency or for postconviction relief—or of remaining silent. But this pressure to speak in the hope of improving his chance of being granted clemency does not make the interview compelled."[81] Thus, if a statement is in any way voluntarily made, or has been requested by a non–state actor, it will not qualify under the Fifth Amendment as being "compelled." Because the questioning psychiatrist in Penry's case was not a state actor, but rather a doctor called to duty by Penry's own lawyer, the question of compulsion is the key Fifth Amendment issue

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[75] *Id.* at 77 (emphasis added).

[76] *Id.* at 78.

[77] United States v. Doe, 465 U.S. 605, 612 (1984).

[78] *See* United States v. Sullivan, 274 U.S. 259, 263 (1927); *see also* United States v. Hubbell, 530 U.S. 27, 35 (2000).

[79] Eric Steven O'Malley, *Fifth Amendment at Trial*, 89 GEO. L.J. 1598, 1601 (2001). In addition, because these communications are not compelled, they may be subsequently used against a defendant at a later criminal trial. However, if grand jury testimony has been "immunized," the state may not use that testimony against the defendant unless the government may first establish an "independent source" of the same information. Kastigar v. United States, 406 U.S. 441, 460 (1972) (upholding a statute requiring witnesses who invoke the Fifth Amendment to testify upon the grant of "use–immunity").

[80] *See* Ohio Adult Parole Auth. v. Woodward, 523 U.S. 272, 287–88 (1998).

[81] *Id.*

presented by the case.

2. Testimony

After determining whether communication has been compelled, a court will next determine whether it is testimonial in order that it should receive Fifth Amendment protection. The question of whether a communication is testimonial was considered in *Doe v. United States*,[82] where the Court stated that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[83] The Court explained that the privilege might also extend to physical communication, and thus, not be limited to verbal communication. The Court concluded that the key to determining whether the privilege applied was whether or not the content being sought by the government has "testimonial significance."[84] However, the Court has also ruled on a wide variety of physical communications that were *not* found to be testimonial for purposes of the Fifth Amendment, including, blood samples,[85] DNA samples,[86] handwriting exemplars,[87] and voice exemplars.[88] The *Doe* court explained that such decisions were "grounded on the proposition that 'the privilege protects an accused only from being compelled to testify against himself, or otherwise providing the State with

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[82] 487 U.S. 201 (1988).

[83] *Id.* at 210.

[84] *Id.* at 210 n.9. A long line of cases is devoted to defining what is "testimonial" for purposes of the Fifth Amendment. For many years, the Court defined "testimonial" very narrowly and the cases generally restricted the understanding of what would be considered testimonial. *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990) (finding evidence of slurred speech was not testimonial); *see also* South Dakota v. Neville, 459 U.S. 553, 564 (1983) (finding evidence of refusal to submit to a breathalyzer test was not testimonial). On the other hand, the line of cases dealing with the act of production doctrine indicates a distinction between physical and testimonial communication and has significantly broadened what the Court defines as testimonial. *See, e.g.*, United States v. Hubbell, 530 U.S. 27, 38 (2000) (holding that the act of producing documents may be testimonial); *see also* United States v. Doe, 465 U.S. 605, 612–14 (1984). The Court has not given any clarity as to what is will be considered "testimonial" since *Hubbell*. For a proposed unifying theory explaining the complexity of Fifth Amendment doctrine, see Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000).

[85] *See* Schmerber v. California, 384 U.S. 757, 765 (1966).

[86] *See* Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998).

[87] *See* Gilbert v. California, 388 U.S. 263, 266–67 (1967).

[88] *See* United States v. Dionisio, 410 U.S. 1, 7 (1973).

evidence of a testimonial or communicative nature.'"[89] The Court affirmed that the previous examples of physical communications did not violate the Fifth Amendment.[90] Rather, it stated that it is the "'extortion of information from the accused,' the attempt to force him 'to disclose the contents of his own mind,' that implicated the Self–Incrimination Clause."[91] There is little question that statements given to a questioning psychiatrist would have testimonial significance, especially where the mental capacity of the person being questioned was a key issue at trial. Therefore, Penry's statements included in the Peebles report would qualify as "testimonial" under the Fifth Amendment.

3. Incrimination

Finally, in order to receive Fifth Amendment protection, the compelled testimony must also be incriminating. The Court has thus held that "[t]he interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply."[92] However, the Court was reluctant to apply such a high threshold to potential incrimination. In *United States v. Freed*,[93] the Court held that the National Firearms Acts registration requirement did not violate petitioners Fifth Amendment rights in spite of the fact that information disclosed could potentially incriminate him in the future.[94] The Court therefore rejected the argument that furnishing photographs and fingerprints as per the regulatory scheme would likely incriminate the petitioner since he

> [i]s not confronted by 'substantial and real' but merely 'trifling or imaginary, hazards of incrimination'—*first* by reason of the statutory barrier against use in a prosecution for prior or concurrent offenses, and *second* by reason of the unavailability of the registration data, as a matter of administration, to local, state, and other federal agen-

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[89] *Doe*, 487 U.S. at 210 (quoting *Schmerber*, 384 U.S. at 761).

[90] *Id.* at 211 (citations omitted).

[91] *Id.*

[92] Ullmann v. United States, 350 U.S. 422, 431 (1956) (quoting Hale v. Henkel, 201 U.S. 43, 67 (1906)). *Ullmann* marks the modern era of Fifth Amendment jurisprudence where only the risk of conviction will implicate the notion of "incrimination" as opposed to the attendant consequences of conviction. *See, e.g.*, Brown v. Walker, 161 U.S. 591 (1896).

[93] 401 U.S. 601 (1971).

[94] *Id.* at 606.

cies.[95]

The Court again addressed the question of future incrimination in *Hoffman v. United States*,[96] making clear that the quality of the connection between the "testimony" and the potential "incrimination" would be determinative.[97] In that case, the Court extended the privilege to include not only communications that might in themselves be incriminating, but also "those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[98] Providing guidance for trial judges in their determination as to whether the privilege could be properly invoked, the Court directed that in order "[t]o sustain the privilege, it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[99]

The issue of a threatening environment and potentially injurious answers is never more poignant than in the context of psychiatric testimony in capital cases. In the leading case, *Estelle v. Smith*,[100] the Supreme Court held that the prosecution's use of evidence from a court–ordered psychiatric examination at the penalty phase of a capital murder trial constituted a violation of defendant's Fifth Amendment rights.[101] The prosecution used the testimony of an examining psychiatrist to resolve whether "there [was] a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[102] But the Court found that such testimony was inadmissible when it had been procured from a psychiatric report ordered by the trial judge, who was thus in effect acting as an "agent of the State."[103] Because the defendant had made testimo-

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[95] *Id.* (quoting Marchetti v. United States, 390 U.S. 39, 53–54 (1968)).

[96] 341 U.S. 479 (1951).

[97] *Id.* at 486–87.

[98] *Id.* at 486.

[99] *Id.* at 486–87.

[100] 451 U.S. 454 (1981).

[101] *Id.* at 463.

[102] *Id.* at 458. *See also infra* note 182 and accompanying text.

[103] *Estelle*, 451 U.S. at 466. The trial judge ordered the exam at the pre–trial phase of the trial order to establish that defendant Smith was competent to stand trial. Although the court's psychiatrist was examining only to determine competency, he later testified at the penalty stage of the trial that Smith was an extreme sociopath who would likely kill again. *Id.*

nial statements divulging the contents of his mind, compelled by a state actor in the form of the court–ordered examination, which could be incriminating at the penalty phase of his trial, the communication was deemed inadmissible.[104] The Court was clear, however, that the holding would be limited to the "distinct circumstances" presented in the case and no further.[105] "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding."[106] In an explanatory footnote, Chief Justice Burger noted: "Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination."[107] In fact, the *Estelle* holding is so limited, that no other case has been upheld under the same standard.[108]

However, psychiatric testimony at the penalty phase of a trial has likewise been deemed inadmissible when no proper *Miranda* warnings were given prior to the court–ordered examination.[109] Likewise, when the examining psychiatrist does advise a defendant of his constitutional right to remain silent before an examination, and that right is waived, then testimony as to a defendant's future dangerousness has been found admissible in capital cases.[110] A more recent case elaborated on the Supreme Court's proffered possible exceptions to the *Estelle* ruling. In *Buchanan v. Kentucky*,[111] the Court enunciated a "rebuttal exception" whereby if a defendant presented psychiatric evidence, the prosecution had leave to present "rebuttal" psychiatric

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[104] *Id.* at 473.

[105] *Id.* at 466.

[106] *Id.* at 468.

[107] *Id.* at 469, n.13. The other types of cases that were left open to consideration include (1) when a defendant has put his mental status at issue in the case, (2) when a defendant decides to use psychiatric evidence on his own behalf, (3) when the exam is not ordered by a court–appointed psychiatrist, or (4) when the nature of the conduct exhibited during the examination is not testimonial in nature. *See generally* Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. CRIM. L. & CRIMINOLOGY 943 (1983); *see also* Schmerber v. California, 384 U.S. 757, 764 (1966).

[108] Penry v. Johnson, 532 U.S. 782, 795 (2001).

[109] *See* Jones v. McCotter, 767 F.2d 101, 102–03 (5th Cir. 1985).

[110] *See* Woomer v. Aiken, 856 F.2d 677, 681–82 (4th Cir. 1988).

[111] 483 U.S. 402 (1987).

evidence without violating the privilege against self–incrimination.[112] The Court thus held that introduction of evidence from a psychiatric report did not violate defendant's Fifth Amendment rights because: (1) evidence was used for limited rebuttal purposes on cross–examination and (2) the defendant had asserted an insanity defense thereby placing his mental status at issue.[113] Further, key to the holding in *Buchanan* was the fact that defendant's own counsel had ordered the examination.[114] Thus, while Penry's statements in the Peebles report could have been viewed as incriminating, the key question remained as to whether the report satisfied the first prong of the three–prong Fifth Amendment analysis—whether the statements were compelled or not.

C. JURY INSTRUCTIONS AND MITIGATING EVIDENCE

The second part of Penry's claim addressed by the Supreme Court was the deficiency of the jury instructions offered at Penry's retrial. Specifically, Penry alleged that the given instructions were not constitutionally sufficient under *Penry I* because they "did not provide the jury with a vehicle for expressing its reasoned moral response to the mitigating evidence of Penry's mental retardation and childhood abuse."[115] The Supreme Court was asked more than two decades earlier to rule on the constitutionality of the Texas capital sentencing structure in *Jurek v. Texas*.[116] The Texas statute provides that if a jury answers three statutorily–mandated questions in the affirmative at the sentencing phase of a capital trial, then a death sentence will be automatically imposed.[117] The Court in *Jurek* concluded that the statutory questions do allow jurors to consider mitigating evidence and thus the Court upheld the Texas scheme as constitutional within the bounds of the Court's capital sentencing jurisprudence.[118] "By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable

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[112] *Id.* at 403.
[113] *Id.* at 425.
[114] *Id.* at 423.
[115] Penry v. Johnson, 532 U.S. 782, 796 (2001).
[116] 428 U.S. 262 (1976).
[117] *See infra* note 182 and accompanying text.
[118] 428 U.S. at 276.

it to perform its sentencing function."[119] The decision in *Penry I* declined to overrule *Jurek*, and indeed Penry did not challenge the "facial validity" of the Texas statute during his first Supreme Court trial.[120]

Recently, the Texas legislature amended its capital sentencing statute, as noted by Justice O'Connor in *Penry*, to include the express consideration of mitigating circumstances.[121] The Court offered in dictum tacit approval of the revised Texas capital sentencing scheme:

> Texas now requires the jury to decide '[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.'[122]

This approval sheds light on possible new constitutional boundaries for jury instructions in capital cases and the role of mitigating circumstances.[123] However, because Penry was tried and sentenced prior to the revision, his sentencing took place under the previous Texas statutory scheme, and jurors thus were faced with the same statutory instructions that were upheld as constitutional in *Jurek*.[124]

The importance of adequate jury instructions has been a theme in American jurisprudence since the 1735 trial of Peter Zenger.[125] But only since the United States began a reevaluation of the constitutionality of capital punishment has the consequence of jury instructions been addressed with equal passion. For almost one hundred years prior to the ruling in *Furman v. Georgia*,[126] American juries had unfettered discretion in applying the death penalty, with little or no guidance from state legislatures or judges as to when or how to apply

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[119] *Id.*

[120] *See Penry I*, 492 U.S. 302, 315, 328 (1989).

[121] *Penry*, 532 U.S. at 803.

[122] *Id.* (citing Tex. Code Crim. Proc. Ann., Art. 37.071(2)(c)(1) (Vernon Supp. 2001)).

[123] *See infra* note 345 and accompanying text.

[124] *Penry*, 532 U.S. at 802.

[125] *See* Gerard N. Magliocca, *The Philospoher's Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175, 190–191 (1996). The trial of Peter Zenger involved a charge of seditious libel in which Zenger's lawyer, Alexander Hamilton, instructed the jury that it could vote to acquit if he had proven that Zenger's statements about Governor Cosby were not false. Despite the fact that the law did not allow for truth as a defense, the jury voted to acquit Zenger. In so instructing the jury, Hamilton invited the jury to nullify the law, representing the first notorious case of jury nullification in the New World.

[126] 408 U.S. 238 (1972).

the sentence of death.[127] In *Furman*, the Supreme Court held that the random application of the death penalty represented cruel and unusual punishment in violation of the Eighth Amendment.[128] Thus, the Court struck down as unconstitutional all death penalty statutes in effect at the time of the ruling that gave unlimited and unguided discretion to jurors in applying the death penalty.[129] Four years after its decision in *Furman*, the Court ruled that the death penalty was not inherently cruel and unusual punishment and thus, could provide a constitutionally appropriate sentence in particular circumstances.[130]

Most states had answered *Furman* by implementing "guided discretion" sentencing statutes, later upheld in *Gregg v. Georgia*, which allowed jurors to weigh aggravating circumstances against mitigating circumstances.[131] Mitigating evidence has been defined by the Supreme Court as "any aspect of a defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death."[132] In *Johnson v. Texas*,[133] Justice O'Connor in a dissent addressed the "constitutional requirement that a sentencer be allowed to give *full* consideration and *full* effect to mitigating circumstances."[134] In that case, she stated that "the sentencer in a capital case must be permitted to consider relevant mitigating factors in ways that can affect the sentencing decision."[135] The purpose of allowing a jury to consider mitigating circumstances relates to a long-time emphasis on culpability in sentencing in American jurisprudence.[136] "[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion."[137]

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[127] J. Dwight Carmichael, Penry v. Lynaugh: *Texas Death Penalty Procedure Unconstitutionally Precludes Jury Consideration of Mitigating Evidence*, 42 BAYLOR L. REV 347, 348 (1990).

[128] *Furman*, 408 U.S. at 257.

[129] Carmichael, *supra* note 127, at 349.

[130] Gregg v. Georgia, 428 U.S. 153, 187 (1976).

[131] Carmichael, *supra* note 127, at 350–51.

[132] Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

[133] 509 U.S. 350 (1993).

[134] *Id.* at 381 (O'Connor, J., dissenting) (emphasis in original).

[135] *Id.* (O'Connor, J., dissenting).

[136] *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104 (1982); *Lockett*, 438 U.S. 586.

[137] California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (holding that an instruction informing jurors that they "must not be swayed by mere sentiment, con-

The Supreme Court elaborated on what the Constitution requires of state legislatures and/or trial courts in the composition of jury instructions in *Penry I*.[138] With regard to capital cases and mitigating circumstances, the Supreme Court held that "when . . . mitigating evidence is presented . . . juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed."[139] The Court reasoned that instructions that failed to inform the jury that it could "consider and give effect" to a defendant's mitigating evidence by declining to impose the death penalty were a constitutionally inadequate "vehicle" for expressing the "reasoned moral response" mandated by *California v. Brown*.[140] For it is only when the jury is given an instruction that allows for the consideration of mitigating circumstances that the Court may be assured that the instruction complies with the Eighth Amendment, namely that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence."[141]

However, what a jury does with instructions, once given, is in large part beyond a court's control. Jury nullification occurs when a jury elects not to follow the law as it has been presented to them by a judge in the form of instructions.[142] The issue of jury nullification in criminal cases is especially volatile, and nowhere is that more apparent than in a capital case. The Supreme Court has come down

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jecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a capital murder trial does not violate the Eighth or Fourteenth Amendments to the United States Constitution).

[138] *Penry I*, 492 U.S. 302, 318–19 (1989).

[139] *Id.* at 319.

[140] *Id.* at 328. *See infra* note 137.

[141] *Id.* at 319 (quoting Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (alteration in original).

[142] Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 881 (1999). Jury nullification could occur in a civil or a criminal case. However, in a civil case, the Federal Rules of Civil Procedure provide a mechanism for a judge to grant a motion for judgment as a matter of law, thereby reversing a jury that, perhaps, has not followed the law correctly in the judge's estimation. *See also* FED. R. CIV. P. 50 ('Judgment as a Matter of Law in Action Tried by Jury'). The issue of jury nullification received national attention in a series of cases during the Vietnam War era in which defendant war protestors charged with crimes in relation to acts of "civil disobedience" were denied nullification instructions. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

squarely against jury nullification in capital cases and has characterized jury nullification as the "assumption of a power" which a jury has "no right to exercise" in *Dunn v. United States*.[143] More recently in *United States v. Powell*,[144] the Supreme Court spoke of "impermissible" reasons for returning a verdict of not guilty, and affirmed the principle established in *Dunn* that a defendant could not attack a criminal conviction on one count simply because it was inconsistent with a jury's verdict of acquittal on another count.[145] The D.C. Circuit, in even more serious language, has stated that jury nullifications "are lawless, a denial of due process and constitute an exercise of erroneously seized power."[146] In more recent jurisprudence, the Second Circuit has led the circuits in admonishing jury nullification in all circumstances.[147] "Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become the law unto themselves."[148] Indeed, the circuits remain unanimous in their denial of instructions informing jurors as to their power to nullify.[149]

Finally, in evaluating a set of jury instructions—in order to determine whether a jury has been given a nullification instruction, for example, or whether instructions accurately reflect the law of the jurisdiction—courts have made several assumptions. First, courts will assume that jurors generally follow instructions, even if the instructions are limiting.[150] "The rule that juries are presumed to follow

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[143] 284 U.S. 390, 393 (1932) (quoting Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925)).

[144] 469 U.S. 57 (1984).

[145] *Id.* at 63.

[146] United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983).

[147] United States v. Thomas, 116 F.3d 606, 614–18 (2d. Cir. 1997) ("categorically reject[ing]" jury nullification).

[148] United States v. Lynch, 181 F.3d 330, 338 (2d. Cir. 1999) (quoting Sparf v. United States, 156 U.S. 51, 101 (1895)).

[149] Marder, *supra* note 142, at 903 n.127.

[150] Richardson v. Marsh, 481 U.S. 200, 206–08 (1987). *Richardson* discusses Bruton v. United States, 391 U.S. 123 (1968), as a narrow exception to the general rule that juries are capable of following complex instructions. "There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitation of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135–36 (quoted in *Richardson*, 481 U.S. at 207). The *Bruton* court held that a defendant faced just such a situation where an extrajudicial confession of a nontestifying codefendant was presented to a jury despite the fact that the jury has been in-

their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."[151] Second, courts have held that jurors will take a "commonsense" approach to jury instructions, looking to the totality of the circumstance in which the instruction has been given.[152] In a case decided before *Penry I*, the Court addressed the capacity of a jury to make sense of a seemingly ambiguous instruction in *California v. Brown*.[153] In *Brown*, jurors had been given an instruction in a capital case that informed them not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[154] The Court found the instruction to be reasonable under the Constitution's Eighth and Fourteenth Amendments, saying that "[t]he doctrine of *noscitur a sociis* is based on common sense, and a rational juror could hardly hear this instruction without concluding that it was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating."[155] The Court did not accept the argument that a juror would take the phrase "mere sentiment" out of context and thereby disregard important mitigating evidence. "Even a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase."[156] Likewise, in *Boyde v. California*, the Court affirmed a defendant's conviction, finding it unlikely that jurors misunderstood their instruction to consider all mitigating evidence.[157] Therefore the conviction was not in violation of *Penry I*.[158] The Court in that case acknowledged that jurors were perhaps less likely to become mired in the complex language of jury

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structed to consider the information exclusively against the codefendant. *Id.*

[151] *Id.* at 211.

[152] *See* Boyde v. California, 494 U.S. 370, 381 (1990).

[153] 479 U.S. 538, 542 (1987).

[154] *Id.* at 552 (quoting People v. Bandhauer, 463 P.2d 408, 416 (Cal. 1970)).

[155] *Id.* at 543. Black's Law Dictionary defines *noscitur a sociis* as the "canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." BLACK'S LAW DICTIONARY 1084 (7th ed. 1999).

[156] *Id.*

[157] *Boyde*, 494 U.S. at 381–83.

[158] *Id.*

instructions than persons with formal legal training: "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shards of meaning in the same way that lawyers might."[159] The Court continued, "[d]ifferences among [jurors] in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting."[160]

While courts presume that juries follow instructions with regard to guilt or innocence, it is not as clear that juries do not exercise considerable discretion with regard to sentencing, especially in capital cases.[161] This potential for unchecked discretion on the part of juries was central to the Supreme Court's decision to overrule a state capital sentencing scheme in Louisiana.[162] The Court in *Roberts v. Louisiana* found that the "responsive verdict procedure not only lacks standards to guide the jury in selecting among first–degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate."[163] The Court was disturbed by the "element of capriciousness" injected into a situation in which a juror's power to decide whether a defendant would face the death penalty or not was "dependent on their willingness to accept this invitation to disregard the trial judge's instructions."[164] The Court concluded that arbitrary sentencing and effective jury nullification was not constitutional.[165] The key to the *Roberts* opinion was that it was intolerable for jurors, on no evidence at all, to be able to move an offense downward, for example, from first– to second–degree murder.[166]

In sum, both courts and legislatures have struggled with how best to instruct juries in the consideration of mitigating evidence in capital cases. Courts have generally disapproved of jury nullification while legislatures have continued to refine capital sentencing structures to avoid nullification instructions and at the same time to allow jurors to consider a wide array of both mitigating and aggravating

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[159] *Id.* at 380–81.
[160] *Id.* at 381.
[161] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 302–03 (1976).
[162] Roberts v. Louisiana, 428 U.S. 325 (1976).
[163] *Id.* at 334–35
[164] *Id.* at 335.
[165] *Id.*
[166] *Id.* at 334.

evidence.[167] Finally, courts have generally given jurors credit for the capacity to make sense of even the most complex instructions. However, this faith in their abilities is always checked against the constitutionality of an instruction.

III. FACTS AND PROCEDURAL HISTORY

Johnny Paul Penry raped and murdered Pamela Carpenter on October 25, 1979 in Livingston, Texas.[168] Penry returned to Carpenter's home after having met her several weeks earlier when he helped deliver appliances in her home.[169] Penry raped Carpenter in her bedroom and then stabbed her with a pair of scissors that she had used earlier to try to defend herself.[170] Police quickly found and identified Penry as meeting the description Carpenter had given shortly before she died under emergency care.[171] After being read his *Miranda* warnings, Penry gave statements confessing to the rape and murder of Pamela Carpenter and was subsequently indicted for capital murder.[172] Although police read Penry his rights, it is not clear that he understood them. Johnny Paul Penry is mentally retarded.[173]

At trial, Penry offered extensive evidence regarding his mental retardation as well as evidence that he had been severely abused as a child.[174] Penry also raised an insanity defense at the guilt/innocence phase of the trial.[175] Despite extensive testimony and agreement among examining psychiatrists that Penry had "mental limitations," the jury rejected Penry's insanity defense and sentenced him to death.[176] The Texas Court of Criminal Appeals affirmed the convic-

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[167] *See infra* notes 342–48 and accompanying text.

[168] *Penry I*, 492 U.S. 302, 307 (1989).

[169] Brief for Respondent at 2, Penry v. Johnson, 532 U.S. 782 (2001) (No. 00–6677).

[170] *Id.* at 3.

[171] *Penry I*, 492 U.S. at 307.

[172] Respondents' Brief at 4–5, *Penry* (No. 00–6677).

[173] At a competency hearing before Penry's trial, Dr. Jerome Brown, testified that Penry was "mentally retarded" with an IQ of 54, and "with learning or knowledge of the average 6 and one–half year old kid." *Penry I*, 492 U.S. at 307–08.

[174] Dr. Jose Garcia testified at trial that Penry suffered from organic brain damage which caused moderate retardation. This condition caused Penry to suffer "poor impulse control and an inability to learn from experience." Further testimony revealed that Penry's mother had often beaten him over the head with a belt and denied him access to toilet facilities for long periods of time while he remained locked in his room. *Penry I*, 492 U.S. at 308–09.

[175] Penry v. Lynaugh, 832 F.2d 915, 917 (5th Cir. 1987).

[176] Penry was convicted in the 258th Judicial District Court, Trinity County, Texas.

tion and the sentence, thereby rejecting Penry's argument that a sentence of death violated the Eighth Amendment because the jury had been unable to give effect to petitioner's mitigating evidence and that it was cruel and unusual punishment to execute a mentally retarded person.[177] The Supreme Court declined to hear Penry's case on direct review.[178] Penry next appealed in federal district court for the issuance of a federal writ of habeas corpus and was subsequently denied by both the district court and the court of appeals.[179] The United States Supreme Court granted relief by vacating his sentence in order to review the case under federal habeas jurisdiction.[180] In that decision, the Court held that the Texas statutory system did not allow jurors to give effect to and consider mitigating evidence regarding Penry's alleged mental retardation and child abuse, and remanded the case to a Texas trial court to be retried in a manner consistent with its opinion.[181]

At retrial, the trial judge adhered to Texas law in presenting to jurors the three statutorily–mandated questions at the sentencing phase of the trial,[182] but supplemented the statutory instructions in or-

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[177] Penry v. State, 691 S.W.2d 636 (Tex. Cr. App. 1985). *See infra* notes 344–48 and accompanying text.

[178] Penry v. Texas, 516 U.S. 977 (1995) (petition for writ of certiorari to the Court of Criminal Appeals of Texas was denied).

[179] The United States District Court for the Eastern District of Texas denied the writ, and the Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals held that: (1) defendant's confession and waiver of *Miranda* rights were voluntary; (2) defense counsel expressly withdrew his objection on the issue of exclusion of one venireman and the juror could not therefore be rehabilitated; and (3) although Texas capital sentencing structure arguably did not provide adequate opportunity for a jury to consider mitigating circumstances in a capital case, the statute had been expressly upheld as constitutional by the United States Supreme Court in *Jurek v. Texas*, 428 U.S. 262 (1976), and the court was thus bound by existing law. Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987).

[180] *Penry I*, 492 U.S. at 302.

[181] *Id.*

[182] The three questions are presented at the sentencing phase of all Texas capital trials. This statutory scheme was found to be constitutional in *Jurek*, 428 U.S. 262. The three questions 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;
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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.

der to comply with the rule of *Penry I* with the following directive:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence .... 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. If you find ... any mitigating 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 the personal culpability of the defendant, a negative finding should be given to one of the special issues.[183]

Jurors were also given information as to how to consider the information in the supplemental instruction during *voir dire* and at closing arguments by both the prosecution and defense.[184] However, jurors were sent to deliberate with only the three statutory questions and no written copy of the supplemental instruction.[185] The jury again answered "yes" to each of the three statutory questions and therefore, as mandated by law, delivered a sentence of death.[186] On direct appeal to the Texas Court of Criminal Appeals the court found that the supplemental instruction complied with the directive of *Penry I* and affirmed Penry's sentence.[187] After being denied a federal writ of habeas corpus, Penry sought a certificate of appealability from the judgment of the United States District Court for the Southern District of Texas.[188] The Fifth Circuit denied his application and held that "the challenged instruction was constitutional [and] was not an unreasonable application of clearly established law, namely *Penry I*."[189]

On November 27, 2000, the United States Supreme Court granted Penry's petition for certiorari and stayed his execution.[190]

Penry, 532 U.S. 782, 805 n.1 (2001) (Thomas, J., dissenting) (quoting Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Supp. 1989)).

[183] Respondents' Brief at 15–16, *Penry* (No. 00–6677).

[184] *Penry*, 532 U.S. at 801–02.

[185] *Id.* at 799.

[186] *Id.* at 790.

[187] Penry v. State, 903 S.W.2d 715 (Tex.Crim.App. 1995).

[188] Penry v. Johnson, 215 F.3d 504 (5th Cir. 2000).

[189] *Id.* at 509.

[190] Penry v. Johnson, 215 F.3d 504 (5th Cir. 2000), *cert. granted*, 531 U.S. 1010 (U.S.

The Court granted the petition to decide whether the court of appeals had properly considered petitioner's application for the federal writ of habeas corpus, namely whether the jury instructions offered complied with *Penry I* and whether admission of a psychiatric report based on an uncounseled interview with Penry violated the Fifth Amendment.[191]

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

In an opinion by Justice O'Connor,[192] the Supreme Court reversed in part the Fifth Circuit's decision because jury instructions did not reasonably comply with federal law established under *Penry I*, and affirmed in part by rejecting petitioner's self-incrimination argument that admittance of psychiatric testimony violated his Fifth Amendment rights.[193] Justice O'Connor began by giving a full explanation of the events which led to the case's arrival in the Supreme Court, specifically the facts and procedural history of *Penry I*.[194] She next stated that the Court granted certiorari and stayed Penry's execution in order to address petitioner's constitutional arguments including the adequacy of jury instructions in complying with the mandate of *Penry I*, as well as petitioner's Fifth Amendment arguments with regard to the admission of the Peebles report.[195]

The Court then looked at the procedural issue of the filing of the federal writ of habeas corpus as a threshold concern before reaching

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Nov. 27, 2000) (No. 00-6677).

[191] *Penry*, 532 U.S. at 786. The Court of Appeals for the Fifth Circuit addressed all of the issues Penry raised in his petition for the writ of habeas corpus. The Supreme Court granted certiorari, staying Penry's execution, solely to examine the constitutional issues presented by the "admission of the Peebles report and the adequacy of the jury instructions." *Id.* at 792. The Supreme Court declined to consider whether admission of several other psychiatric reports violated the Fifth Amendment, nor did it consider alleged Sixth and Eighth Amendment violations.

[192] Justice O'Connor's decision was unanimous as to Parts I, II and III-A of the opinion. Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer joined Justice O'Conner in Part III-B of the opinion, while Justice Thomas filed an opinion concurring in part and dissenting in part, joined by Chief Justice Rehnquist and Justice Scalia.

[193] *Penry*, 532 U.S. 782.

[194] *Id.* at 786-92.

[195] *Id.* at 792-96; *see infra* note 200 and accompanying text.

the substance of Penry's claims. The Court explained how federal habeas law was applied to cases, such as Penry's, filed after the passage of the AEDPA, relying on the recent decision in *Williams v. Taylor* in which a state court's interpretation of a governing legal rule was "objectively unreasonable."[196] The Court devoted a full section of the opinion to explaining the application of the AEDPA in *Williams* and affirmed that a lower court's decision was not necessarily objectively unreasonable if a state court applied established federal law "incorrectly."[197] The Court concluded Part II of the opinion by approving the standard of review employed by the Fifth Circuit—the same standard articulated in *Williams*—as a framework within which to review the substance of Penry's arguments.[198]

Still joined by a unanimous court, Justice O'Connor proceeded to the substance of Penry's argument, adhering to the standard articulated in *Williams*. The Court first addressed the Fifth Amendment portion of the case, concluding that it was not "objectively unreasonable" for the lower court to deny Penry relief as to his Fifth Amendment claim.[199] Penry argued that admission of the Peebles report, the 1977 psychiatric evaluation by Dr. Felix Peebles referring to Penry's "future dangerousness," constituted compelled self–incrimination and thus, violated his Fifth Amendment privilege.[200] Penry claimed his case was analogous to *Estelle v. Smith*, where the Court found that statements from a defendant's uncounseled competency exam that were later used against him in testimony relating to the defendant's future dangerousness in a capital sentencing hearing violated the defendant's Fifth Amendment rights.[201] The Court distinguished Penry's case from *Estelle*, relying on several key factors. "First, the defendant in *Estelle* had not placed his mental condition" at issue, whereas Penry had made his mental retardation the subject of review at all levels of his trial.[202] The Court also noted that, in this case, Penry's own counsel had called for the competency hearing whereas

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[196] *Id.* at 793; *see also supra* notes 44–61 and accompanying text, discussing Williams v. Taylor, 529 U.S. 362 (2000).

[197] *Penry*, 532 U.S. at 792–93.

[198] *Id.* at 793.

[199] *Id.* at 795.

[200] *Id.* at 793.

[201] *Id.* at 793–94; *see also supra* notes 100–08 and accompanying text, discussing Estelle v. Smith, 451 U.S. 454 (1981).

[202] *Penry*, 532 U.S. at 793–94.

in *Estelle*, the trial court had ordered the examination and the State had chosen the examining psychiatrist, making the doctor an effective "agent of the State."[203] Most noteworthy in the Court's estimation was the fact that, in *Estelle*, the defendant was charged with the capital crime at the time of the psychological examination; whereas, in Penry's case, the testimony was derived from a report taken from a previous offense that occurred years before Penry committed a capital crime.[204]

While the Court seemed to agree with the Fifth Circuit's conclusions that *Estelle* was distinguishable on the facts, the Court again noted the standard of review and declined to rule on the merits:[205] "We need not and do not decide whether these differences affect the merits of Penry's Fifth Amendment claim. Rather, the question is whether the Texas court's decision was contrary to or an unreasonable application of our precedent."[206] The Court thus affirmed the Fifth Circuit with regard to Penry's Fifth Amendment claim and found that the lower court's conclusion that Penry's privilege against self–incrimination had not been violated was not "objectively unreasonable."[207] The Court concluded Part III–A of the opinion by noting that even if the admission of the Peebles report violated Penry's Fifth Amendment rights according to Supreme Court precedent, such an error would not justify overturning Penry's sentence unless Penry could show that the error "had substantial and injurious effect or influence in determining the jury's verdict."[208] Because the Court concluded that Penry could not make such a showing in light of at least four other officials testifying to Penry's future dangerousness and a multitude of other evidence on the same point, the Court reiterated its affirmance of the lower court.[209]

Next, in Part III–B of the opinion, Justice O'Connor addressed the issue of jury instructions under the same standard of review ar-

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[203] *Id.* (quoting *Estelle*, 451 U.S. at 467).

[204] *Id.*

[205] *Id.* at 794–95.

[206] *Id.*

[207] *Id.* at 795.

[208] *Id.* (quoting Brecht v. Abramson, 507 U.S. 619, 637 (1993)).

[209] *Id.* at 795–96. "While the Peebles report was an effective rhetorical tool, it was by no means *the key* to the State's case on the question whether Penry was likely to commit future acts of violence." *Id.* (emphasis added).

ticulated in Part II.[210] However, the Court reached the opposite conclusion here, finding that the lower court's application of *Penry I* had been "objectively unreasonable."[211] The Court first criticized the Texas court for failing to recognize that "mere mention" of mitigating circumstances did not fully comply with *Penry I* since the jury needed to be able to not only "consider" the mitigating circumstances, but also to be able to "give effect" to them when imposing a sentence.[212] Justice O'Connor then addressed each of the State's arguments in turn as to how the supplemental instruction provided the jury the requisite vehicle for giving effect to Penry's mitigating evidence.[213]

First, the Court rejected the possibility that jurors might have taken mitigating evidence into account in their consideration of each of the special issues while at the same time giving truthful answers in accordance with their oath.[214] The Court noted that this situation would not have differed materially from the situation in *Penry I* in which it was found that "none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and child abuse."[215] The Court then rejected the State's argument that the jury could give effect to mitigating evidence by "simply answer[ing] one of the special issues 'no' if it believed that mitigating circumstances made a life sentence . . . appropriate . . . regardless of its initial answers to the questions."[216] Addressing precedent on the issue of how jurors follow instructions, the Court concluded that such an instruction was tantamount to jury nullification.[217] The Court further noted that the reasonable possibility of capricious behavior on the part of the jury could not have provided an adequate "vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence."[218]

The Court found the State's reply insufficient, stating that the context of the supplemental instruction would not save it on a reason-

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[210] *Id.* at 804.
[211] *Id.*
[212] *Id.* at 797.
[213] *Id.* at 797–804.
[214] *Id.* at 797–98.
[215] *Id.* at 798.
[216] *Id.* (quoting Respondent's Brief at 16, *Penry* (No. 00–6677)).
[217] *Id.* at 799–800.
[218] *Id.* at 800.

ableness evaluation.[219] In reply to the State's contention that both the prosecution and defense had adequately explained the supplemental instruction during *voir dire* as well as during closing arguments, the Court found that both did little to give jurors the opportunity to "give effect" to Penry's mitigating evidence—*voir dire* being too long ago to be of import and explanations at closing argument being "neutralized" by statements instructing the jury to follow its oath.[220] The Court observed that the current Texas statutory scheme, amended after Penry's second trial and sentencing, would comply with the mandate of *Penry I*.[221] Justice O'Connor thereby suggested that in contrast, the scheme used at Penry's second trial, despite the addition of the supplemental instruction, did not give jurors an adequate opportunity to consider and give effect to mitigating evidence, a conclusion markedly similar to that reached in *Penry I*.[222]

In a final paragraph, the Court moved from the substance of Penry's claim to the procedure, stating that "to the extent the Texas Court of Criminal Appeals concluded that the substance of the jury instructions given at Penry's second sentencing hearing satisfied our mandate in *Penry I*, that determination was objectively unreasonable."[223] Because the supplemental instruction was "ineffective and illogical," leaving jurors with the same three special issues to consider at sentencing, the Court concluded that the approach was unreasonable, and therefore reversed the Fifth Circuit decision.[224]

B. DISSENT

Justice Thomas and two other justices [225] joined the majority in the Court's decision to affirm the Fifth Circuit's decision as to the alleged Fifth Amendment violation and concurred with the Court in Parts I, II, and III–A of the opinion.[226] However, the three justices, including Justice Thomas writing the dissent, did not agree that the mandate of *Penry I* was still unfulfilled after the second sentencing,

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[219] *Id.* at 799–800.

[220] *Id.* at 800–02.

[221] *Id.* at 804.

[222] *Id.*

[223] *Id.* at 803–04.

[224] *Id.* at 804.

[225] Chief Justice Rehnquist and Justice Scalia joined in Justice Thomas' opinion, concurring in part, dissenting in part. *Id.*

[226] *Id.* (Thomas, J., dissenting).

and therefore dissented from Part III–B of the opinion: "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."[227] Justice Thomas reasoned that jurors in the second trial of Penry were given reasonable opportunity to consider the mitigating evidence that Penry presented and therefore that the constitutional requirements of *Penry I*, namely that jurors be given the opportunity to consider and give effect to mitigating evidence in a capital case, were satisfied.[228] The dissent rejected the majority's position as a threshold issue, citing *Williams v. Taylor* as evidence for the contention that "[w]e 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.'"[229] Because the dissent found that jurors might have given reasonable effect to the mitigating evidence as charged by the supplemental instructions in Penry's second trial, the dissent could not join the majority in finding that the Texas judge's discretion met the high standard for reversal as articulated in *Williams*.[230]

The dissent also relied on a "common sense" understanding of jury instructions, citing two previous Supreme Court decisions that instructed against the "technical parsing of this language" but rather called for a more "common sense understanding of the instructions in the light of all that has taken place at the trial."[231] The dissent concluded that a "straightforward" reading of the instructions would have given any reasonable juror an adequate vehicle for expressing the view that Penry did not deserve to be sentenced to death based on consideration of mitigating evidence.[232] The dissent went beyond defending the Texas supplemental instructions as "straightforward" but also called them "eminently logical."[233]

Justice Thomas laid out three reasons in support of his position.

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[227] *Id.* at 804 (Thomas, J., dissenting).

[228] *Id.* at 806 (Thomas, J., dissenting).

[229] *Id.* at 805 (Thomas, J., dissenting). *See* Williams v. Taylor, 529 U.S. 362 (2000).

[230] *Penry*, 532 U.S. at 805 (Thomas, J., dissenting).

[231] *Id.* at 806 (Thomas, J., dissenting) (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).

[232] *Id.* at 807 (Thomas, J., dissenting).

[233] *Id.* (Thomas, J., dissenting).

First, the dissent argued that the judge gave clear instructions to the jury indicating that mitigating evidence could be considered in the sentencing phase of the trial.[234] Next, the dissent pointed out how the sentencing court "explained to the jury how it must give effect to the evidence."[235] The dissent concluded its analysis by stating that the court "unambiguously" instructed the jury to vote "no" instead of "yes" if they felt that death was not an appropriate sentence. Justice Thomas stated, "[w]ithout performing legal acrobatics, I cannot make the instruction confusing. And I certainly cannot do the contortions necessary to find the Texas appellate court's decision 'objectively unreasonable.'"[236]

The dissent next addressed the issue of jury nullification raised by *Roberts v. Louisiana*, and called any suggestion of jury nullification or reliance on *Roberts* "misplaced."[237] The dissent distinguished *Roberts* on the facts, pointing out that *Roberts* had involved a case where jurors were instructed to find the defendant guilty of a lesser offense, even if unsupported by evidence, if they felt that death was not an appropriate sentence.[238] The dissent differentiated Penry's case where there was no suggestion, "express or implied," that the jury could "disregard" the evidence.[239] The dissent, rather, saw the instructions given at Penry's second trial as completely fulfilling the *Penry I* mandate, instructing jurors not to disregard evidence, but rather to "give effect" to mitigating evidence.[240]

The dissent concluded by noting that the Court was sending "mixed signals" with its majority opinion.[241] The dissent reasoned that this Court had previously upheld the Texas sentencing statute as constitutional in *Jurek v. Texas*, as already permitting jurors to consider mitigating evidence, and yet had refused to overrule *Jurek* in *Penry I*.[242] Given that, the dissent reasoned, it was not clear how the latest answer to Court's directive did not meet its constitutional crite-

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[234] *Id.* (Thomas, J., dissenting).

[235] *Id.* (Thomas, J., dissenting).

[236] *Id.* at 808 (Thomas, J., dissenting).

[237] *Id.* at 809 (Thomas, J., dissenting) (discussing Roberts v. Louisiana, 428 U.S. 325, 334–35 (1976)).

[238] *Id.* (Thomas, J., dissenting).

[239] *Id.* (Thomas, J., dissenting) (emphasis in original).

[240] *Id.* (Thomas, J., dissenting).

[241] *Id.* (Thomas, J., dissenting).

[242] *Id.* at 810 (Thomas, J., dissenting); *see also supra* notes 116–24 and accompanying text (discussing Jurek v. Texas, 428 U.S. 262 (1976)).

ria: "[T]his Court yet again has second-guessed itself and decided that even this supplemental instruction is not constitutionally sufficient."[243]

V. ANALYSIS

This Note argues that the Supreme Court correctly applied the standard of review as mandated by the AEDPA and as articulated in *Williams* in its analysis of Penry's alleged Fifth Amendment violations, but failed to apply the same standard when evaluating the reasonableness of the jury instructions at Penry's second trial. Rather, the Court overlooked what it had written just one year earlier in *Williams v. Taylor* when it examined the issue of jury instructions, and incorrectly applied the AEDPA to conclude that Penry's second sentencing did not comply with the directive of *Penry I* and was therefore "objectively unreasonable."[244] The Court took care to dedicate an entire portion of the opinion to articulating the standard of review.[245] In so doing, it affirmed the Fifth Circuit's enunciation of the standard of review in its denial of relief to Penry, and thereby rejected the District Court's approach to its review of the Texas Court of Criminal Appeals.[246] The Court made perfectly clear that *Williams* would dictate its approach to the substance of Penry's claims and a unanimous court supported the articulation of this standard.[247] Yet it was fulfilled in only one half of the opinion and all but disregarded in the second half.[248]

A. WHILE APPLYING *WILLIAMS* CORRECTLY ON THE FIFTH AMENDMENT ISSUE, THE COURT'S ANALYSIS FAILED TO CLARIFY AMBIGUITIES AFTER *WILLIAMS*

Justice O'Connor's opinion, joined by a unanimous court for Parts I, II and III-A of the opinion, correctly articulated the standard of review and applied it with sufficient dexterity in reaching the conclusion that the lower court's rejection of Penry's Fifth Amendment claims was not "objectively unreasonable" or "contrary to" Supreme

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[243] *Id.* (Thomas, J., dissenting).

[244] *Id.* at 808 (Thomas, J., dissenting); *see also* Williams v. Taylor, 529 U.S. 362, 409 (2000).

[245] *Penry*, 532 U.S. at 792–93.

[246] *Id.*

[247] *Id.*

[248] *Id.*

Court precedent, namely *Estelle v. Smith*.[249] However, while reaching the proper conclusion under the proper standard of review, the Court left some ambiguity as to how lower courts should approach habeas review under the AEDPA.[250] There was little discussion of *Williams v. Taylor* as applied to *Penry*. For example, the Court never fully explained why its decision rested on the "objectively unreasonable" standard as opposed to the "contrary to" standard.[251] Further, the Court declined the opportunity to clarify the *Brecht* rule of "harmless error" after the passage of the AEDPA, leaving lower courts to guess at the vitality of that rule.[252]

The Court began its look at the Fifth Amendment issues by providing a step–by–step analysis of the differences between the *Estelle* facts and the facts presented by Penry's case.[253] The Court correctly noted that the differences were "substantial."[254] However, only after a discussion of the facts and distinguishing precedent—substantive concerns—did Justice O'Connor reach the central question presented by Penry's claim—the procedural merits, namely whether his claim was justified under a federal habeas standard of review.[255] Thus, it was more than halfway through the Fifth Amendment portion of the opinion, that the Court finally addressed the primary question, which was "whether the Texas court's decision was contrary to or an unreasonable application of [Supreme Court] precedent."[256] The Court concluded very briefly: "We think it was not."[257] Justice O'Connor brought the discussion to a close by stating that it was not "objectively unreasonable for the Texas court to conclude that Penry is not entitled to relief on his Fifth Amendment claim."[258] While the Court did provide an example of the concise nature of a habeas review by declining to rule on the merits of the case, the Court's conclusion that the lower court's application of the legal principle discussed in *Estelle* was satisfactory as per the AEDPA, did not rest on a compre-

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[249] *Id.* at 795; *see* Estelle v. Smith, 451 U.S. 454 (1981).

[250] *See, e.g.*, Downs v. Moore, 801 So. 2d 906 (Fla. 2001).

[251] *Penry*, 532 U.S. at 794–98.

[252] Brecht v. Abramson, 507 U.S. 619, 637 (1993); *see supra* notes 208–09 and accompanying text; *see also* Anderson v. Cowan, 227 F.3d 893, 898 n.3 (7th Cir. 2000).

[253] *Penry*, 532 U.S. at 794.

[254] *Id.* at 795.

[255] *Id.*; *see also* Williams v. Taylor, 529 U.S. 362 (2000).

[256] *Penry*, 532 U.S. at 795.

[257] *Id.*

[258] *Id.*

hensive discussion of how *Williams* was being applied to the relevant precedent.[259]

Further, while the Court did do an adequate job of discussing and distinguishing *Estelle*, there was little discussion of *Buchanan v. Kentucky*,[260] which is also relevant precedent and received considerable attention in the briefs.[261] The Court did not address the rebuttal issue presented by *Buchanan*, likely because it was not applicable to the legal question presented by *Penry*.[262] However, by not evaluating all relevant precedent, it is difficult to make the sweeping statement that the lower court's decision was not "objectively unreasonable" in light of "clearly established federal law."[263] In fact, *Buchanan* received no more than parenthetical treatment by the Court.[264] Because *Buchanan* represents the more recent look at the Fifth Amendment by the Supreme Court, it is important that the Court at least attempt to distinguish the case with comparable analysis to the treatment of *Estelle*. It is not sufficient to merely note that "we have never extended *Estelle*'s Fifth Amendment holding beyond its particular facts."[265] By discussing only two previous cases, and one only parenthetically, the Court did not squarely establish that the lower court had not reached a conclusion contrary to *all* relevant precedent, nor did it indicate how extensively future courts need inquire into precedent in order to meet the "clearly established federal law" requirement under 28 U.S.C. § 2245(d)(1).[266]

In addition, the Court never explained why it chose the "unreasonable application" inquiry rather than the "contrary to" inquiry, leaving lower courts to formulate their own ideas as to the application of *Williams*.[267] The *Williams* court stated that "a run–of–the–mill state court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within §

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[259] *Id.*

[260] 483 U.S. 402 (1987).

[261] Brief for Petitioner at 7–10, Penry v. Johnson, 532 U.S. 782 (2001) (No. 00–6677).

[262] *Id.*; *see supra* notes 111–14 and accompanying text (discussing *Buchanan*, 483 U.S. at 403, which enunciates a "rebuttal exception" whereby if a defendant presented psychiatric evidence, the prosecution has leave to present rebuttal psychiatric evidence without violating the privilege against self–incrimination).

[263] *Penry*, 532 U.S. at 793.

[264] *Id.* at 795.

[265] *Id.*

[266] *Id.* at 793.

[267] *See, e.g.*, Anderson v. Cowan, 227 F.3d 893, 896 (7th Cir. 2000).

2254(d)(1)'s 'contrary to' clause."[268] The fact that the Court did point out the substantial differences between the extant case and the facts presented in *Estelle* ignores what the Court previously highlighted under *Williams*: "[T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[269] Therefore, the Court was not strictly applying Supreme Court precedent, but rather distinguishing precedent. A more illustrative approach might have shown why the distinguishing features made the decision on the merits of Penry's claim fall within the "unreasonable application of" inquiry rather than the "contrary to" inquiry as mandated by the AEDPA, and as shown to be independent inquiries under *Williams*.[270]

Lower courts looked to the fact that the *Williams* court focused its attention on the "unreasonable application" clause and generally took guidance from *Williams* in applying the AEDPA rather than following *Penry*.[271] A recent First Circuit decision noted that the "unreasonable application of" prong of § 2254(d)(1) essentially "reduces to a question of whether the state court's derivation of a case–specific rule from the [Supreme] Court's generally relevant jurisprudence appears objectively reasonable."[272] Other courts have emphasized the standard of review, calling it a "high threshold" and "highly deferential" standard of review, citing to *Williams* rather than taking guidance from the more recent *Penry* as a roadmap in applying the AEDPA.[273]

Finally, the Court failed to clarify whether the "harmless error" rule of *Brecht v. Abrahamson* or the AEDPA controls.

> Under *Brecht*, a constitutional trial error is not so harmful as to entitle a defendant to habeas relief unless there is more than a mere reasonable possibility that it contributed

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[268] Williams v. Taylor, 529 U.S. 362, 406 (2000).

[269] *Id.* at 409.

[270] *Id.*

[271] *See, e.g.*, *Anderson*, 227 F.3d at 896–97 (stating that "[w]hen the case fits under the 'unreasonable application' clause of § 2254(d)(1), however, we defer to a reasonable state court decision").

[272] Williams v. Matesanz, 230 F.3d 421, 425 (1st Cir. 2000) (quoting O'Brien v. Dubois, 142 F.3d 16, 25 (1st Cir. 1998)).

[273] *See, e.g.*, Miller v. Francis, 269 F.3d 609, 615 (6th Cir. 2001). *See also* Frye v. Lee, 235 F.3d 897, 903–04 (4th Cir. 2000) ("Our conclusion that Frye's claims are premised on clearly established federal law, however, merely allows us to continue our inquiry. . . . We are cognizant of, and we are bound to apply, the *Williams* reasonableness standard as we analyze and consider the claims made in this proceeding.").

> to the verdict. It must have had a substantial effect or influence in determining the verdict. Moreover, the *Brecht* standard does not require in order for the error to be held harmful that there be a reasonable probability that absent the error the result would have been different.[274]

The Seventh Circuit conducted a survey of the other circuits' approach to the question of *Brecht* after the passage of the AEDPA in *Anderson v. Cowan*.[275] In that case, the court questioned the applicability of *Brecht* since the passage of the AEDPA.[276] The Eighth Circuit has also noted the limited vitality of the *Brecht* rule in the wake of the AEDPA, suggesting that the standard in *Brecht* is more generous than that of the AEDPA and therefore in potential conflict with congressional intent.[277]

However, the Supreme Court in *Penry* missed the opportunity to provide clarification on this issue. The Court instead discussed both standards in equal detail and appears to have ultimately relied on *Brecht* in making its final ruling as to the Fifth Amendment issue.[278] "*Even if* our precedent were to establish squarely that the prosecution's use of the Peebles report violated Penry's Fifth Amendment privilege against self–incrimination, that error would justify overturning Penry's sentence *only if* Penry could establish that the error" was harmful.[279] Again, the Court addressed the question of error on the merits, explaining that the Peebles report "was neither the first nor the last opinion the jury heard" on the issue of Penry's future dangerousness.[280] The Court further addressed the critical showings of Penry's future dangerousness in turn, concluding that "[w]hile the Peebles report was an effective rhetorical tool, it was by no means the key to the State's case on the question whether Penry was likely to commit future acts of violence."[281] The Court thus appeared to rely on *Brecht* for its ultimate conclusion, stating, "[*a*]*ccordingly*, we will not disturb the Texas Court of Criminal Appeals' rejection of Penry's Fifth Amendment claim."[282] However, the Court failed to clarify

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[274] Tucker v. Johnson, 242 F.3d 617, 620 (5th Cir. 2001); *see* Penry v. Johnson, 532 U.S. 782, 795–96 (2001) (citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).

[275] *Anderson*, 227 F.3d at 898 n.3.

[276] *Id.*

[277] *See* Witmore v. Kemna, 213 F.3d 431, 433 (8th Cir. 2000).

[278] *Penry*, 532 U.S. at 796.

[279] *Id.* at 795 (emphasis added).

[280] *Id.*

[281] *Id.* at 796.

[282] *Id.* (emphasis added).

whether its decision could have been framed exclusively under *Williams*. The Court did, however, reach the proper conclusion in finding that the lower court had not erred in rejecting Penry's claim that admission of the Peebles report had violated his Fifth Amendment rights under the Constitution.

B. CONCLUDING THAT THE SUPPLEMENTAL JURY INSTRUCTION COMPLIED WITH *PENRY I* REPRESENTS A REASONABLE APPLICATION OF SUPREME COURT PRECEDENT

This Note next argues that in the interest of seeing *Penry I* complied with as a substantive constitutional question, Justice O'Connor lost sight of the standard of review—a test of objective reasonableness—and improperly decided the case on the merits. Because the Texas trial judge's decision to supplement the statutory scheme was not objectively unreasonable, the Court reached the improper conclusion in reversing the Fifth Circuit on the question of the reasonableness of jury instructions.

While the Court acknowledged the *Williams* standard in the first section of its opinion, there is no reference to the standard of review, *Williams* or the AEDPA, in Part B of the opinion.[283] This glaring deficiency opened the door for the Court to advance freely into the merits of the claim, rather than keeping its focus narrow, as is required in federal habeas review. The Supreme Court previously stated that "[h]abeas is an extraordinary remedy" and therefore should be used judiciously.[284] The purpose of federal habeas review is not to provide an alternative avenue for the relitigation of the issues, but rather to decide whether the court below made a decision contrary to or unreasonably applied Supreme Court precedent.[285] Even if a decision is patently wrong, the Court acknowledged in Part II of the opinion that it would not necessarily be unreasonable.[286] However, Justice O'Connor appeared reluctant to follow this rigorous standard when applying it to a case she had tried on the merits years earlier.[287]

The Court demonstrated that its interest was not in procedural or reasonableness review, but rather in seeing that the mandate of *Penry*

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[283] *Id.* at 796–804.

[284] Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

[285] *Williams*, 529 U.S. at 398.

[286] *Penry*, 532 U.S. at 792.

[287] *Penry I*, 492 U.S. 302 (1989).

I was substantively complied with at Penry's second trial. "Our opinion in *Penry I* provided sufficient guidance as to how the trial court might have drafted the jury charge for Penry's second sentencing hearing to comply with our mandate."[288] Reference to *Penry I*, while correctly an examination of "clearly established federal law," appeared to lament the fact that the Texas court did not fulfill the mandate of *Penry I* as the Court might have hoped. The Court highlighted the fact that the factual situation presented in *Penry* was virtually indistinguishable from that of *Penry I*.[289] "Viewed in this light, however, the supplemental instruction placed the jury in no better position than was the jury in *Penry I*."[290] This would consequently suggest an outcome in Penry's second trial that was contrary to Supreme Court precedent.

But the Court did not embrace the approach outlined in *Williams*, and instead embarked on an "unreasonable application of" inquiry without explanation of its choice between the two clauses.[291] In so doing, the Court failed to give proper credit to the substance of the supplemental instruction. The *Williams* court was abundantly clear that a habeas reviewing court is not required to give "deference" to a state court decision: "Section 2254(d) requires us to give state courts' opinion a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails."[292] However, Justice O'Connor does not appear to give even a "respectful reading" to the supplemental instruction. The Court did note that merely adding an instruction would not comply with the mandate of *Penry I*.[293] However, the Court failed to give objective consideration to the reasonableness of the content of the supplemental instruction. Instead, O'Connor dismissed the new instruction as confusing and therefore inadequate with little or no evaluation of relevant Supreme Court precedent regarding the content of complex

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[288] 532 U.S. 802–03.

[289] *Id.*

[290] *Id.* at 798.

[291] For this reason lower courts have had to look to *Williams* for guidance as to how to apply the AEDPA instead of finding an application technique in *Penry*. *See, e.g.*, Hurtado v. Tucker, 245 F.3d 7, 14–15 (1st Cir. 2001).

[292] Williams v. Taylor, 529 U.S. 362, 387 (2000).

[293] *Penry*, 532 U.S. at 797.

jury instructions, as is mandated by the AEDPA.[294]

The Supreme Court has held that jurors, while generally presumed to follow given instructions,[295] will evaluate those instructions in light of all the information that they have received at trial.[296] Justice O'Connor did not succeed in giving a clear, "common sense" reading to the supplement as the dissent suggested was required in this case. Instead, the majority in *Penry* implied that because the supplemental instruction was not what the Court would have written, it was therefore unreasonable.[297] As suggested in *Boyde v. California*, the Court should have approached the evaluation of the jury instructions as would have reasonable jurors, rather than as Supreme Court justices with years of legal training.[298] Also, as the dissent pointed out, the Court never made clear the leap from inadequacy to objective unreasonableness.[299] "Because Congress specifically used the word "unreasonable," and not "a term like 'erroneous' or 'incorrect,' a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state court decision applied federal law erroneously or incorrectly. "Rather, that application must also be unreasonable."[300]

The majority, however, not only overlooked the commonsense approach to the supplement, but also dismissed the explanation of the supplemental instruction at *voir dire*, both collectively and individually to potential jurors, as well as at closing arguments by both the prosecution and the defense.[301] The majority thus found itself engaged in the same "technical parsing of the language" which *Boyde*

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[294] *Id.* at 797–99.

[295] *See* Richardson v. Marsh, 481 U.S. 200, 211 (1987).

[296] *See* Boyde v. California, 494 U.S. 370, 381 (1990).

[297] *Penry*, 532 U.S. at 803 ("A clearly drafted catchall instruction on mitigating evidence also might have complied with *Penry I*. Texas's current capital sentencing scheme (revised after Penry's second trial and sentencing) provides a helpful frame of reference.").

[298] 494 U.S. at 381.

[299] *Penry*, 532 U.S. at 805 (Thomas, J., dissenting).

[300] Williams v. Taylor, 529 U.S. 362, 409 (2000).

[301] Respondents' Brief at 21, *Penry* (No. 00–6677).

> If, 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['ve] got to answer one of . . . those questions no. The Judge has not told you which questions, and you have to give that answer, even if you decide the literally correct answer is yes.

Id.

specifically found that jurors do not themselves do.[302] As the Court in *Boyde* said, "[e]ven were the language of the instruction less clear than we think, the *context* of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation."[303] But the majority in *Penry* disagreed. Instead, the majority was skeptical of a juror's ability to remember instructions from *voir dire*, having taken place "a full two months" before the jurors began deliberations over Penry's sentence.[304] The Court made much of the fact that jurors received "mixed signals."[305] O'Connor highlighted the fact, as she did in *Penry I*, that defense counsel's attempt to clarify the jury's responsibility to give effect to mitigating evidence would be "neutralized" by the prosecution's closing instructions that reminded jurors of their duty to "to follow [their] oath, the evidence and the law."[306]

The dissent, on the other hand, gave careful examination to Supreme Court precedent, and thus, properly fulfilled the role of a habeas reviewing court. Rather than assuming that jurors cannot remember information given at *voir dire* as did the majority, the dissent looked to Supreme Court precedent which suggests that jurors *do* have significant ability to remember and follow instructions.[307] Because the AEDPA calls for an examination of "clearly established federal law" and because the Supreme Court has ruled squarely on the issue of a jury's ability to comprehend jury instructions, the majority overlooked important precedent in reaching its conclusion.[308]

The key concern in *Penry I* was that jurors were never instructed that they could "consider and give effect" to mitigating evidence.[309] It is not objectively unreasonable to find that the supplemental instruction at issue in *Penry*, which stated in relevant part that "[i]f you determine, when *giving effect to the mitigating evidence*, if any, that a life sentence . . . rather than a death sentence, is . . . appropriate . . . a

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[302] *See Boyde*, 494 U.S. at 381.

[303] *Id.* at 383 (emphasis added).

[304] *Penry*, 532 U.S. at 802.

[305] *Id.*

[306] *Id.*

[307] *See, e.g.*, Weeks v. Angelone, 528 U.S. 225, 234 (2000).

[308] *Id.* ("Had the jury desired further information, they might, and probably would, have signified their desire to the court. The utmost willingness was manifested to gratify them, and it may fairly be presumed that they had nothing further to ask.").

[309] *Penry I*, 492 U.S. 302, 320 (1989).

negative finding should be given to one of the special issues," satisfied this concern.[310] It is, however, reasonable that the Texas trial judge, when interpreting *Penry I*, chose to employ a supplemental instruction as opposed to changing the legislative scheme by adding a fourth question without legislative authority.[311] Thus, the choice to follow the Supreme Court precedent does not represent an unreasonable solution to the problem posed by Penry's retrial in light of the suggestion in *Penry I*.

In fact, *Penry I* suggested the use of an instruction rather than mandating an additional question.[312] Indeed, the Texas statutory scheme, upheld as constitutional in *Jurek*, provided for three questions, and there was no conclusion mandating that a fourth question would be required.[313] The majority in *Penry* referred to specific substantive examples, suggested in *Penry I* as well as by Penry's counsel at oral argument, of how jurors might have been able to consider mitigating evidence.[314] But if a court should choose not to follow another court's suggestion in dicta or one adversary's suggestion at oral argument, it does not necessarily make that court's chosen course objectively unreasonable.[315] The dissent properly pointed out that "[a]s a habeas reviewing court, we are not called upon to propose what we believe to be the ideal instruction . . . . 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 [lower court] . . . was 'objectively unreasonable.'"[316] What the majority neglected to address is that under *Williams*—even if the lower court's determination that the supplemental instruction allowed jurors to consider and give effect to mitigating evidence was incorrect—it was not unreasonable to think that such an instruction could very well provide

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[310] *Penry*, 532 U.S. at 797–98 (emphasis added).

[311] Penry v. Johnson, No. 00–6677, 2001 U.S. Trans LEXIS 31, at *25 (Mar. 27, 2001) (transcript).

[312] *Penry I*, 492 U.S. at 328 ("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.") (emphasis added).

[313] *Penry*, 2001 U.S. Trans LEXIS 31, at *26.

[314] *Penry*, 532 U.S. at 801–02.

[315] *See* Williams v. Taylor, 529 U.S. 362, 409 (2000).

[316] *Penry*, 532 U.S. at 805 (Thomas, J., dissenting).

such a vehicle as mandated by *Penry I.*[317]

The dissent, on the other hand, more clearly outlined why the supplemental instruction is not objectively unreasonable. First, the Court's precedent speaks to the manner in which jurors evaluate jury instructions.[318] The Court noted in *Johnson v. Texas* that jurors will not approach an instruction as a lawyer might—engaging in the "technical parsing of the language"—but rather will "approach the instructions . . . with a 'commonsense understanding of the instructions in light of all that has taken place at the trial.'"[319] The dissent correctly highlighted that reading the supplemental instruction in such a "straightforward" manner as the Court has held that juries will, yields a clear opportunity to meet the mandate of *Penry I.*[320] Second, Justice Thomas noted that "common sense" compels the dissent to classify the Texas court's action at Penry's second trial as objectively reasonable.[321] Because a juror was given an instruction that if he or she did not think the death penalty an appropriate sentence in light of Penry's mitigating circumstances, then he or she should simply return an answer of "no" to at least one of the three special issues, the dissent reasoned that jurors had ample opportunity to "give effect" to any mitigating evidence they might find.[322] When read with such a common sense approach, the instruction seems far from "confusing" or "illogical" as the majority tried to persuade.[323] While the dissent might be extending itself somewhat in calling the instruction "eminently logical," Justice Thomas is at least persuasive in demonstrating that the instruction is an objectively reasonable response to the mandate of *Penry I.*[324]

Finally, the dissent properly pointed out that there is nothing arbitrary or capricious about how jurors were instructed in *Penry* as evidenced by the careful instructions during *voir dire*, opening and closing arguments, as well as the supplemental instruction.[325] Both

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[317] *See id.* (Thomas, J., dissenting).

[318] *Id.* at 805–07 (Thomas, J., dissenting); *see, e.g.*, Richardson v. Marsh, 481 U.S. 200 (1987); Boyde v. California, 494 U.S. 370 (1990).

[319] Johnson v. Texas, 509 U.S. 350, 368 (1993).

[320] *Penry*, 532 U.S. at 806 (Thomas, J., dissenting).

[321] *Id.*

[322] *Id.*

[323] *Id.* at 807 (Thomas, J., dissenting).

[324] *Id.*

[325] *Id.* at 807–08 (Thomas, J., dissenting).

prosecution and defense were well aware of the mandate of *Penry I*, and demonstrated a good faith effort to comply with it.[326] Further, there is no evidence to support the conclusion that jurors were given a nullification instruction.[327] A nullification instruction would invite a juror to breach his or her oath to answer each of the three questions truthfully in accordance with the law.[328] In the case of Penry's retrial, however, the supplemental instruction was not a nullification instruction. A juror could have upheld his or her oath since the supplemental instruction, which guided jurors to answer "no" if they did not wish to impose the death penalty, was part of the overall instruction—three questions plus a supplement—that the jurors received.[329] As the Supreme Court has pointed out in other cases, jurors will not view an instruction as discrete parts, but rather will approach a complex instruction as a whole, giving it a common sense reading.[330] There was no invitation to give false answers or to disregard Penry's culpability.[331] Rather, the jury was invited to consider just how Penry's culpability should be reflected in his sentence.[332]

The Court had been disturbed in *Roberts* by the "element of capriciousness" that accompanied being able to "disregard the trial judge's instructions."[333] However, the *Roberts* opinion involved a situation where jurors could adjust a defendant's sentence downward "on no evidence at all."[334] In *Penry*, on the other hand, the jury was asked to "consider and give effect" to the evidence in order to give a "reasoned moral response" and in light of his mitigating circumstances."[335] Thus, jury nullification was not an issue in *Penry* despite language by lower courts calling it a "nullification instruction."[336]

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[326] *Id.* at 808 n.4 (Thomas, J., dissenting).

[327] *Id.* at 807–08 (Thomas, J., dissenting).

[328] Marder, *supra* note 142, at 881.

[329] *Penry*, 532 U.S. at 807–08 (Thomas, J., dissenting).

[330] *See* Boyde v. California, 494 U.S. 370, 381 (1990).

[331] *Penry*, 532 U.S. at 809.

[332] *Id.* at 809–10; *see* Roberts v. Louisiana, 428 U.S. 325, 335 (1976).

[333] *Roberts*, 428 U.S. at 335.

[334] *Id.*

[335] *Penry I*, 492 U.S. 302, 304 (1989); *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

[336] Penry v. Johnson, 215 F.3d 504, 509 (5th Cir. 2000).

Rather, the appellate court properly noted that, "[t]he jury was not told to disregard the law; rather, it was instructed on how to obey the law."[337] Therefore, because the jurors had not acted capriciously, nor had they been given an invitation to nullify the law, the majority mischaracterized the instruction as jury nullification in a final attempt to explain why the supplemental instruction was unreasonable. However, Justice O'Connor and the *Penry* majority overlooked the *Williams* roadmap in evaluating the supplemental jury instruction and decided the issue based on the merits of the case and thereby neglected the mandate of a federal habeas review court.

VI. CONCLUSION

Having declined to accept the Fifth Circuit's implicit invitation to overrule *Jurek* in *Penry I*, the *Penry* court was left little room in which to rule, further narrowed by the procedural posture of the case. The Supreme Court held that John Paul Penry's Fifth Amendment privilege had not been abridged when evidence from a psychiatric report regarding Penry's future dangerousness was deemed admissible.[338] Having clearly and correctly articulated the standard of review under the AEDPA and *Williams*, the Court affirmed the lower court's finding that admission of the report was not objectively unreasonable nor was it contrary to or an unreasonable application of Supreme Court precedent, notably *Estelle*.[339] While the Court might have provided a more accurate roadmap for lower courts in following this standard of review with regard to future habeas petitions and especially as to the application of the *Brecht* rule after the passage of the AEDPA, the Court did reach the proper conclusion using proper reasoning.

As to the second issue faced by the Court in *Penry*, Justice O'Connor, joined by five other justices, found that jury instructions given at Penry's second trial did not comply with *Penry I* and were therefore objectively unreasonable.[340] By not bearing in mind more carefully the standard of review, the Court needlessly addressed the substance of the issue, without ever reaching the heart of the issue—reasonableness. It cannot escape notice that Justice O'Connor wrote

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[337] *Id.*

[338] Penry v. Johnson, 532 U.S. 782, 796 (2001).

[339] *Id.* at 795–96.

[340] *Id.* at 804.

the opinion in *Penry I* in 1989 and again in *Penry* in 2001. Justice O'Connor's interest in adjudicating the constitutionality of Penry's second trial on the merits overshadowed her task as a federal habeas review court. Thus, as the dissent expressed, the Supreme Court sent an even more "mixed signal" to lower courts than the jury received in Livingston, Texas.[341]

VII. EPILOGUE

Since the writing of this Note, there has been significant activity at the state level with regard to the constitutionality of the death penalty as applied to the mentally retarded. Most specifically, as mentioned in the analysis section of this Note, the Texas state legislature has revised its capital sentencing guidelines requiring juries to make an unambiguous determination that death is the appropriate sentence in a particular case.[342] Further, many states have banned executions of the mentally retarded altogether.[343] Finally, in *Atkins v. Virginia*, decided in June of 2002, the Supreme Court acknowledged the "dramatic shift in the state legislative landscape" against the execution of the mentally retarded since the decision in *Penry I*.[344] The court overruled *Penry I* to hold that it is cruel and unusual punishment in violation of the Eighth Amendment to execute a person who is mentally retarded.[345] While the *Atkins* ruling does not change the analysis of the habeas issue addressed in this Note, it does shed light on the change in American thought on the subject of the death penalty and mental illness, and the influence that this change in thought has had on the legislative landscape, as alluded to by Justice Stevens in the *Atkins* opinion. Quoting the dissenters from the Virginia Supreme Court opinion, Justice Stevens writes that "[the mentally retarded]

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[341] *Id.* at 809 (Thomas, J., dissenting).

[342] *See supra* notes 121–23 and accompanying text.

[343] Eighteen states have enacted statutes outlawing the execution of the mentally retarded. Those states include Georgia, Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina. Additionally, Texas unanimously adopted a similar bill in 2001, which was subsequently vetoed by Texas Governor Perry on June 17, 2001. Virginia and Nevada both have passed similar bills in one house of the state legislatures and the Illinois state legislature is currently reviewing the work of the Governor's Commission on Capital Punishment which has recommended that Illinois prohibit the execution of the mentally retarded. *See* Atkins v. Virginia, 122 S. Ct. 2242, 2248–49 (2002).

[344] *Id.* at 2246.

[345] *Id.* at 2252.

have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way."[346]

The opinion, however, "leave[s] to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences" and therefore provides no process for ensuring that the mentally retarded are not executed.[347] The Texas state district judge presiding in Penry's new trial decided not to delay his re–sentencing in light of the pending Supreme Court's decision in *Atkins* and instead merely instructed jurors that they had to find that Penry was not retarded in order to impose the death penalty.[348] Though the high court has called it unconstitutional to execute the mentally retarded, Penry's fate ultimately may be in the hands of the Texas state legislature when they convene in January of 2003 to decide how Texas will define who is and who is not mentally retarded, and thus implicitly, who is and who is not to remain on death row.

Mary Connell Grubb

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[346] *Id.* at 2246 (quoting Atkins v. Commonwealth of Virginia, 534 S.E.2d 312, 325 (Va. 2000)).

[347] *Id.* at 2250 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

[348] *Death Penalty; Delays Needed on Retarded Defendants*, DALLAS MORNING NEWS, July 28, 2002, at 2J.