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# Penry v. Johnson 121 S. Ct. 1910 (2001)

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# PENRY V. JOHNSON
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## INTRODUCTION

As the issue of executing the mentally retarded gains greater national attention,[1] the United States Supreme Court has chosen to decide cases that affect defendants who claim they are mentally retarded.[2] In *Penry v. Lynaugh* ("*Penry I*"), the Court stated that the Eighth Amendment does not categorically prohibit the execution of a mentally retarded person based on mental retardation alone.[3] The Court also commented that, at the time of this decision, insufficient evidence of a national consensus against executing mentally retarded individuals existed.[4] Recently, in its 2000-2001 term, the Supreme Court again debated an appeal by Johnny Paul Penry in *Penry v.*

1. *See* Charles Bierbauer, *Is Death Row Any Place for the Mentally Retarded? at* http://www.cnn.com/2001/LAW/03/columns/bierbauer.deathrow.03/19/ (Mar. 26, 2001); *see also* Charles Bierbauer, *Who's to Die? Who's to Say? at* http://www.cnn.com/2001/LAW/06/columns/bierbauer.death.penalty.06.08/ (May 18, 2001) ("As a nation we are at a point of reassessing capital punishment. Is it a credible deterrent to crime? Is it fairly administered? Is it racially and ethnically biased? Is it cruel and unusual punishment?"); Charles Bierbauer, *Court Overturns Retarded Man's Death Sentence*, *at* http://www.cnn.com/2001/LAW/06/04/scotus.penry.02/index.html (June 4, 2001) (discussing that in Penry v. Johnson, 121 S. Ct. 1910 (2000) ("*Penry II*"), the Court did not determine whether executing people with mental retardation violates the Eighth Amendment, but noting that the Court will reconsider this issue during its coming term in McCarver v. State, 548 S.E.2d 522 (N.C. 2001), *cert. granted*, 121 S. Ct. 1401 (2001)).

2. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302 (1989) ("*Penry I*"); Penry v. Johnson, 121 S. Ct. 1910 (2001) ("*Penry II*"); McCarver v. State, 548 S.E.2d 522 (N.C. 2001), *cert. granted*, 121 S. Ct. 1401 (2001). According to the American Association on Mental Deficiency (now Retardation), mental retardation refers to "significantly subaverage general intellectual functioning," which is defined as an I.Q. of 70 or below. *See Penry I*, 492 U.S. at 308 n.1 (quoting AM. ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed., 1983)).

3. *See Penry I*, 492 U.S. at 340. Instead, a jury, weighing mitigating evidence of mental retardation, must make an individualized determination of whether capital punishment is appropriate in each case. *See id. Ford v. Wainwright* held that the Eighth Amendment prohibits the execution of insane persons. 477 U.S. 399, 409-10 (1986) (finding that "[f]aced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane"). *Ford v. Wainwright* did not apply in *Penry I* because the jury found Penry competent to stand trial and rejected Penry's insanity defense. *See Penry I*, 492 U.S. at 333.

4. *Penry I*, 492 U.S. at 335.

*Johnson* ("*Penry II*"), which involved issues regarding evidence of the defendant's mental status.[5] The decision reinforced the Court's desire to protect mentally retarded individuals, but its unwillingness to unconditionally prohibit their execution.[6]

## I. FACTS

On October 25, 1979, Penry raped, beat, and stabbed Pamela Carpenter with a pair of scissors in her home in Livingston, Texas.[7] She died a few hours later, but before her death she was able to provide the police with a description of her attacker, leading authorities to arrest Penry.[8] Penry confessed to the crime, and the following year, a Texas jury convicted Penry of capital murder.[9] The judge instructed the jury at the end of the penalty hearing to answer three statutorily mandated special issues, to which the jury answered "yes," and as required by statute, the judge sentenced Penry to death.[10]

The special issues were:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[11]

While Penry offered evidence that he was mentally retarded, the judge did not instruct the jury that it could consider and give effect to that evidence in imposing the sentence.[12] Penry appealed to the U.S. District Court for the Eastern District of Texas, which denied relief,

5. *See Penry II*, 121 S. Ct. 1910 (2001). The two issues on appeal were whether admitting a psychiatrist's examination of Penry constituted self-incrimination and whether the jury instructions complied with the Court's ruling in *Penry I*. *See Penry II*, 121 S. Ct. 1918.

6. *See* Charles Bierbauer, *Court Overturns Retarded Man's Death Sentence*, *at* http://www.cnn.com/2001/LAW/06/04/scotus.penry.02/index.html (June 4, 2001) (noting that the Court has not yet ruled that executing mentally retarded individuals violates the Eighth Amendment).

7. *Penry I*, 492 U.S. at 307.

8. *Id.*

9. *Penry II*, 121 S. Ct. at 1915.

10. *Id.*

11. *Penry I*, 492 U.S. at 310 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (West 1981 & Supp. 1989)).

12. *See Penry II*, 121 S. Ct. at 1915. Penry also offered evidence that he was abused as a child, but as with the evidence of his mental retardation, jurors were not instructed to consider the mitigating effects of this in imposing a sentence. *Id.*

followed by the U.S. Court of Appeals for the Fifth Circuit, which also denied Penry relief.[13] Finally, after granting certiorari, the U.S. Supreme Court reversed, holding that in capital cases such as this, the jury must be able "to consider and give effect to mitigating evidence" in imposing a sentence.[14]

Penry was retried in 1990 and convicted.[15] During the penalty phase, the defense offered evidence of Penry's mental status.[16] One defense witness was Dr. Randall Price, who testified that Penry suffered from mental retardation.[17] During cross-examination, the government directed Dr. Price to read a psychiatric evaluation by Dr. Felix Peebles, who had prepared the report to determine Penry's competency to stand trial for a 1977 rape charge, unrelated to the Pamela Carpenter case.[18] Dr. Price read part of the Peebles report aloud, over the objection of defense counsel, which stated that in Dr. Peebles' "'professional opinion . . . if Johnny Paul Penry were released from custody, . . . he would be dangerous to other persons.'"[19]

The judge instructed the jury to determine Penry's sentence by answering the three aforementioned special issues.[20] If the jurors answered in the affirmative to all three issues, the defendant would receive a death sentence.[21] The judge then gave a supplemental instruction to the jurors informing them to consider mitigating circumstances, including any aspect of the defendant's character which could lead a juror to believe that a death sentence would be inappropriate.[22] If the jurors found mitigating circumstances, they would decide the weight of the circumstances; and if a life sentence was more appropriate then a death sentence, then the jurors should

13. *See Penry I*, 492 U.S. at 312 (describing the procedural history of Penry's case).

14. *See id.* at 327-28 ("[F]ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response' to the defendant's background, character, and crime." (quoting California v. Brown, 479 U.S. 538, 545 (1987) (emphasis in original)).

15. *Penry II*, 121 S. Ct. at 1916.

16. *See id.* (noting that Penry's lawyer provided extensive evidence of Penry's mental impairments and childhood abuse).

17. *See id.* (commenting that Dr. Price, a clinical neuropsychologist, stated during direct examination that Penry had an organic brain impairment).

18. *See id.* (noting that Dr. Price, in preparing for his testimony, had reviewed fourteen psychiatric reports, including the evaluation by Dr. Peebles).

19. *Id.* The prosecutor repeated this portion of the report during closing arguments. *Id.*

20. *See Penry I*, 492 U.S. at 310 (quoting the three special issues from the Texas Code of Criminal Procedure).

21. *See Penry II*, 121 S. Ct. at 1916 (commenting that before answering "yes" to any issue, the jurors had to be convinced by the evidence beyond a reasonable doubt).

22. *See id.* at 1917 (quoting the lengthy supplemental instruction).

answer in the negative to one of the special issues.[23] The verdict form contained the text of the three special issues and presented the jury with two choices for each issue – "yes" or "no."[24] The jury returned with an unanimous "yes" to all special issues, resulting in a death sentence for the defendant.[25]

Penry appealed on two grounds.[26] First, he contended that the admission of language from the Peebles report violated his Fifth Amendment privilege against self-incrimination.[27] Second, Penry claimed that the jury instructions at the second sentencing hearing were unconstitutional because they did not allow the jury to give mitigating effect to the evidence of mental retardation as *Penry I* required.[28] The Texas Court of Criminal Appeals, however, affirmed his conviction and death sentence.[29] Again, both the district court and the court of appeals denied Penry relief,[30] but the U.S. Supreme Court granted certiorari.[31]

## II. HOLDING

The U.S. Supreme Court, in *Penry II*, affirmed in part and reversed in part the judgment of the Court of Appeals for the Fifth Circuit, remanding the case for further proceedings.[32] Addressing Penry's first claim, the Court held that Penry's Fifth Amendment privilege against self-incrimination was not violated by admitting the Peebles report into evidence.[33] On the second issue, however, the Court agreed with Penry, holding that the jury instructions at his resentencing did not comply with *Penry I* because the jury was unable to "consider and give effect to" the defendant's mitigating evidence

23. *Id.*

24. *See id.* (observing that the jury, with respect to each special issue, could either unanimously determine beyond a reasonable doubt that the answer to that special issue was a "yes," or conclude with a "no" if at least ten jurors had a reasonable doubt as to the matter asked about in that issue).

25. *See id.* (noting that the jury deliberated approximately 2 ½ hours).

26. *See id.* at 1917-18 (describing the two claims Penry filed with the Texas Court of Criminal Appeals).

27. *See Penry II*, 121 S. Ct. at 1917.

28. *Id. See also Penry I*, 492 U.S. at 328 (requiring that the jury be able to weigh and give effect to mitigating evidence relevant to the defendant's background and character or the circumstances of the crime).

29. *Penry II*, 121 S. Ct. at 1917.

30. *See id.* at 1918 (commenting that the U.S. District Court for the Southern District of Texas and the Texas Court of Criminal Appeals denied defendant's motion).

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

32. *Penry II*, 121 S. Ct. at 1924.

33. *Id.* at 1919-20.

in imposing a sentence.[34]

## III. ANALYSIS

The Supreme Court granted certiorari to determine whether Penry's case had "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."[35] To resolve this issue, the Court focused on whether the Texas trial court's admission of Dr. Peebles' report into evidence and the jury instructions given at Penry's resentencing hearing were "contrary to" or "an unreasonable application" of Supreme Court precedent.[36]

### *A. Admission of Dr. Peebles' Report into Evidence is Neither "Contrary to" Nor "an Unreasonable Application" of Supreme Court Precedent*

With respect to the first issue, the Court concluded that the Texas court did unreasonably apply precedent by allowing the Peebles report into evidence.[37]

Penry argued that his case paralleled *Estelle v. Smith*,[38] hence precedent required the Court to rule that admission of the psychiatric evaluation violated the Fifth Amendment.[39] In *Estelle*, the Court equated the psychiatrist to "'an agent of the State recounting unwarned statements,'" holding that 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.'"[40] The Court in *Estelle* stated that admission of the psychiatrist's testimony in those limited circumstances violated

34. *Id.* at 1920–24.

35. *See id.* at 1918 (quoting the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (Supp. V 1994) ("AEDPA"), which now governs the Court's review since Penry filed his appeal after the law's enactment).

36. *See id.* (remarking that in making an "unreasonable application" inquiry, a federal court "should ask whether the state court's application of clearly established federal law was objectively unreasonable") (citations omitted).

37. *See id.* at 1919 (reasoning that because substantial differences existed between precedent and Penry's case, it was not unreasonable for the lower court to deviate from precedent).

38. 451 U.S. 454 (1981) (finding that admission of a psychiatrist's testimony was in violation of the Fifth Amendment where the psychiatrist conducted a "neutral" competency examination of a defendant but drew conclusions from his uncounseled statements and later testified for the prosecution regarding the defendant's future dangerousness).

39. *Penry II*, 121 S. Ct. at 1919.

40. *Id.* (quoting Estelle v. Smith, 451 U.S. 454, 467-68 (1981)).

the Fifth Amendment.[41]

The Court, in evaluating Penry's claim, reasoned that his case differed from *Estelle* in four aspects. First, in *Estelle*, the defendant had not made his mental condition an issue, whereas Penry made his mental condition an issue.[42] Another distinction between the two cases was that in *Estelle*, the trial court requested a competency evaluation and the State chose the examining psychiatrist; in Penry's case, the defendant's own counsel in the 1977 case requested that Dr. Peebles perform a psychiatric exam.[43] Third, the prosecutor in *Estelle* called the psychiatrist to testify as part of its case, while in this case, Penry's own witness during cross-examination quoted the statement from the Peebles report.[44] Finally, the defendant in *Estelle* faced a capital crime charge at the time of his competency exam, so his future dangerousness would be an issue during the sentencing phase.[45] On the other hand, Penry had not yet murdered Pamela Carpenter at the time of the interview with Dr. Peebles.[46]

The Court asserted that it need not decide whether these differences affected Penry's Fifth Amendment claim.[47] The issue, instead, was whether the Texas court's admission of the Peebles report "was contrary to or an unreasonable application of the . . . [U.S. Supreme Court's] precedent."[48] A federal court making the "unreasonable application" inquiry must determine whether the state court's application of precedent was objectively unreasonable.[49] Noting that its decision in *Estelle* was limited to the unique circumstances presented in that case, the Court held that it was not objectively unreasonable for the Texas court to deny Penry relief on his Fifth Amendment claim.[50]

Even if *Estelle* established that the State's use of the report violated Penry's privilege against self-incrimination, the Court would only

41. *Id.* (citing *Estelle*, 451 U.S. at 466).

42. *See id.* (emphasizing that Penry made his mental state a "central issue" in the 1977 rape case and the Pamela Carpenter case).

43. *Penry II*, 121 S. Ct. at 1919 (citing *Estelle*, 451 U.S. at 456-57).

44. *Id.* (citing *Estelle*, 451 U.S. at 459).

45. *Id.* (citing *Estelle*, 451 U.S. at 459).

46. *Id.*

47. *See id.* The Court did not make this decision because AEDPA governed this case. *See supra* note 35 and accompanying text.

48. *Penry II*, 121 S. Ct. at 1919.

49. *See id.* at 1918 (explaining that "contrary to" and "unreasonable application" have independent meanings).

50. *See id.* (contrasting *Penry* with *Estelle* in that the holding in *Estelle* was limited to the circumstances presented in *Estelle*).

overturn Penry's sentence if he could demonstrate that the error "had substantial and injurious effect or influence in determining the jury's verdict."[51] While the Peebles report strengthened the State's argument that Penry posed a future danger, the jury heard many opinions on this point, so the Court reasoned that it was unlikely Penry could prove substantial injury.[52] Therefore, the Court ruled that admission of the Peebles report did not violate Penry's Fifth Amendment privilege against self-incrimination.[53]

### *B. Jury Instructions at Defendant's Resentencing Were an Unreasonable Application of Supreme Court Precedent*

The Court, in response to Penry's second contention,[54] asserted that the Texas Court of Criminal Appeals was objectively unreasonable when it concluded that the jury instructions given at Penry's resentencing complied with *Penry I*.[55] *Penry I* required the Texas court to provide special instruction to the jury, allowing the jury to consider and give effect to mitigating evidence that relates to the "defendant's moral culpability beyond the scope of the special issues."[56]

Penry contended that the jury instructions given at the second sentencing hearing did not comply with *Penry I* "because they did not provide the jury with a vehicle for expressing its reasoned moral response to the mitigating evidence" of his mental retardation.[57]

The Court, in agreeing with Penry, held that the jury was not able to give full consideration and effect to the mitigating circumstances.[58] The Court felt that there were two ways to interpret the supplemental jury instructions.[59] First, the jury could have thought they were to take Penry's mitigating evidence into account in determining their truthful answers to each special issue.[60] Under this interpretation, the

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51. *Id.* at 1919-20 (citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)) (citations omitted).

52. *See id.* at 1920 (listing alternative opinions presented to the jury by prison officials who testified that Penry was a threat to society, and three psychiatrists who testified that Penry was a dangerous individual and posed a continuous threat to society).

53. *Id.*

54. *See id.* (contending that the jury instructions given at Penry's second sentencing hearing did not follow the Court's holding in *Penry I*).

55. *Penry II*, 121 S. Ct. at 1924.

56. *Penry I*, 492 U.S. at 321 (citations omitted).

57. *Penry II*, 121 S. Ct. at 1920.

58. *Id.*

59. *Id.* at 1921.

60. *Id.*

instruction gave the jurors no more of a way to give effect to the mitigating factors than they had in *Penry I*.[61]

On the other hand, the instruction could have been telling the jury to answer one of the special issues as a "no" on the verdict form if the jury thought that based on mitigating evidence, a life sentence was more appropriate.[62] The only way that the jury could avoid a death sentence for Penry was to change at least one truthful "yes" answer to an untruthful "no" answer.[63] The jury could not have sincerely followed both the verdict form and supplemental instructions.[64] Because the supplemental instruction required the jury to give more weight to it than the verdict form, the Court found that the supplemental instruction was inadequate.[65]

The Court then went on to state that *Penry I* provided sufficient guidance as to how the trial court could have drafted the jury charge for Penry's second sentencing hearing.[66] By defining the term "deliberately" in the first special issue in a way that would direct the jury to weigh Penry's mitigating evidence as it bears on his moral culpability, the trial court would have complied with *Penry I*.[67] Because the trial court failed to provide a vehicle for jurors who wanted to express the view that Penry did not deserve to be sentenced to death based on his mitigating evidence, the Court reversed this part of the Court of Appeals' judgment.[68]

## IV. CONCURRING AND DISSENTING OPINION

Chief Justice Rehnquist along with Justices Scalia and Thomas concurred in part and dissented in part with Justice O'Connor's majority opinion.[69] The three concurred with respect to the first issue, the admission of the Peebles report, and dissented with respect

61. *See id.* (commenting that because none of the special issues on the verdict form was broad enough to allow the jury to give mitigating effect to Penry's evidence of mental retardation, the supplemental instruction did not comply with *Penry I*).

62. *See Penry II*, 121 S. Ct. at 1921 (instructing the jury that a "no" answer was only appropriate when there was reasonable doubt).

63. *See id.* at 1922 (allowing the jury to render a positive verdict if the mitigating circumstances warranted a life sentence).

64. *See Perry* II, 121 S. Ct. at 1932 (finding that it would have been "both logically and ethically impossible for a juror to follow both sets of instructions").

65. *See id.* (theorizing that the jurors' ability to avoid the death penalty was determined by their willingness to give greater weight to the supplemental instructions rather than the verdict form).

66. *Id.* at 1923.

67. *Id.*

68. *See id.* at 1922 (urging the court to evaluate the supplemental instructions).

69. *Penry II*, 121 S. Ct. at 1924.

to the second issue, the court's supplemental instruction.[70]

Justice Thomas, writing for the dissenters, asserted that the Court should only decide whether the sentencing court's supplemental jury instruction was objectively unreasonable.[71] While Penry's offered evidence did not fit into any of the three special issues, Justice Thomas argued that the sentencing court adequately instructed the jury to consider the mitigating evidence and explained to the jury how to give effect to the evidence.[72] Justice Thomas stressed that the supplemental instruction was constitutionally sufficient in providing the jurors the vehicle for giving mitigating effect to Penry's evidence.[73]

## V. IMPLICATIONS

*Penry I* and *Penry II* led to greater scrutiny for considering whether it is cruel and unusual punishment to execute a mentally retarded individual.[74] In its 2001-2002 term, the Court will consider *McCarver v. North Carolina*,[75] and will determine if significant objective evidence demonstrates that national standards oppose executing a mentally retarded man because doing so would violate the Eighth Amendment.[76]

Ernest McCarver, whose lawyers contend has the mind of a ten-year old and is mentally retarded, had just finished eating his last meal when the Court stayed his execution.[77] The jury in *McCarver* was allowed to consider his intelligence as a mitigating factor against imposing the death penalty but found that the murder's

70. *Id.* (Thomas, J., concurring & dissenting).

71. *See id.* (Thomas, J., concurring & dissenting) (arguing that the Court overstepped its role when it dictated ideal jury instructions on how on the jury should weigh Penry's evidence about his mental status).

72. *See id.* at 1925-26 (Thomas, J., concurring & dissenting) (reasoning that Penry's evidence did not fit neatly into any of the special issues for imposing the death penalty under Texas law).

73. *See id.* at 1926 (Thomas, J., concurring & dissenting) ("Without performing legal acrobatics, I cannot make the instruction confusing. And I certainly cannot do the contortions necessary to find the Texas appellate court's decision 'objectively unreasonable.'").

74. *See* Meggen Lindsay, *McCarver, Ernest v. North Carolina, On the Docket—Medill School of Journalism, at* http://www.medill.nwu.edu/cases.srch?-database=docket&-layout=lasso&response=/docket/detail.srch&-search&docket=00-8727 (last visited Sept. 2, 2001) (discussing how one day before the Supreme Court heard oral arguments in *Penry II*, the Court granted certiorari to McCarver v. State, 548 S.E.2d 522 (N.C. 2001), *cert. granted,* 121 S. Ct. 1401 (2001). Five days after staying McCarver's execution, the Court also halted the execution of Antonio Richardson, a mentally retarded Missouri inmate who was scheduled to die on March 7) *Id.*

75. 121 S. Ct. 2213 (2001) (granting motion of respondent to supplement the record).

76. Lindsay, *supra* note 74.

77. *Id.*

premeditation outweighed any mental retardation.[78] McCarver's intelligence, determined at his sentencing hearing, was slightly higher than the score that is considered mentally retarded.[79] After a series of appeals, a lower state court judge stayed McCarver's execution until the North Carolina legislature voted on a bill prohibiting execution of mentally retarded individuals.[80] On another intelligence test taken during the month that the legislature was considering the bill, McCarver's score landed him within the recognized class of mentally retarded individuals.[81]

In *Penry I*, the Court asserted that sufficient evidence of a national consensus against capital punishment did not exist.[82] When the Court decided *Penry I*, only two death penalty states, Georgia and Maryland, barred the execution of the mentally retarded.[83] Now, thirteen states decline to execute the mentally retarded.[84] While the Court in *Penry II* did not address the broader Eighth Amendment issue, the Court did rule in Penry's favor, further delaying his execution.[85] Outside the courtroom, Justice Sandra Day O'Connor, a steadfast supporter of capital punishment, recently questioned whether the death penalty is being fairly administered.[86] With a combination of such doubt, greater national focus on the issue, and the Court's recent intervention in death penalty cases,[87] the Court may be signaling a shift away from its view in *Penry I* that the Eighth Amendment does not categorically prohibit execution of the mentally retarded.

## CONCLUSION

In *Penry II*, the Court both agreed and disagreed with Penry. The

78. *Id.*

79. *See id.* (stating that McCarver scored 74 on one intelligence test; a score of 70 usually is considered evidence of mental retardation).

80. *See id.* (noting that McCarver filed numerous appeals to both the U.S. Supreme Court and to the Fourth Circuit Court of Appeals).

81. *See id.* (stating that McCarver scored 67 on a subsequent intelligence test).

82. *See Penry I*, 492 U.S. at 335 (disregarding several states' public opinion polls that indicate that those surveyed overwhelmingly oppose the execution of the mentally retarded).

83. Lindsay, *supra* note 74.

84. These states are: Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, South Dakota, Tennessee, Washington, and New York. Further, the federal government and the District of Columbia bar such executions. *See* Lindsay, *supra* note 74.

85. *See Penry II*, 121 S. Ct. at 1924 (remanding the case for further proceedings).

86. *See A Justice's Doubts*, L.A. TIMES, July 5, 2001, at B12, *available at* 2001 WL 2501009.

87. *See* cases cited *supra* note 2 and 74 (listing cases in which the Supreme Court granted stays of execution).

Court disagreed with Penry when it held that admission of a psychiatric report, which was based on an examination of the defendant on an unrelated prior charge, did not warrant relief. On the other hand, the Court agreed with Penry when it ruled that juries must be able to weigh and give effect to a defendant's mitigating evidence in imposing a sentence. This holding, reinforcing *Penry I*, requires courts to sincerely provide juries with a way "to give effect to" a defendant's evidence of mental retardation[88] and ensures that defendants receive constitutional protection. In its 2001-2002 term and over a decade after briefly commenting on the issue in *Penry I*, the Court in *McCarver* may extend further protections to mentally retarded defendants if it holds that executing such defendants violates the Eighth Amendment by virtue of their mental retardation alone.

PUJA SATIANI

88. *Penry I*, 492 U.S. at 328.