Journal of Criminal Law and Criminology

Volume 80
Issue 4 *Winter*

Article 12

Winter 1990

Eighth Amendment--The Death Penalty and the Mentally Retarded Criminal: Fairness, Culpability, and Death

Peter K.M. Chan

0091-4169/90/8004-1211
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 80, No. 4

EIGHTH AMENDMENT—THE DEATH PENALTY AND THE MENTALLY RETARDED CRIMINAL: FAIRNESS, CULPABILITY, AND DEATH

Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

I. INTRODUCTION

In *Penry v. Lynaugh*,[1] the Supreme Court decided that the Texas statutory scheme for the death penalty must allow a sentencer to consider and give effect to all relevant mitigating circumstances of the defendant when assessing the death penalty.[2] The Court also decided that it is not cruel and unusual punishment to sentence a mentally retarded criminal to death.[3]

This Note concludes that the *Penry* decision on the Texas statutory scheme was consistent with the judicial policies of providing individualized treatment of the capital defendant while avoiding the application of the death penalty in an arbitrary, capricious, or freakish manner.

This Note also argues that the Court should have decided that the death penalty for the mentally retarded is a cruel and unusual punishment prohibited by the eighth amendment because the mentally retarded criminal lacks the degree of culpability proportionate to the death penalty. Furthermore, since the Court is uncertain about the culpability of a mentally retarded criminal, it should reject capital punishment for the mentally retarded criminal rather than risk sentencing a defendant to a cruel and unusual punishment. The Court cannot take this risk because the death penalty is unique in its finality and harshness.

Finally, the Court's rulings in *Penry*, along with its voting pattern in the decision, have important implications for capital punishment cases which the Supreme Court may review in the future.

---

1 109 S. Ct. 2934 (1989).
2 *Id.* at 2952.
3 *Id.* at 2958.

II. FACTS

A. BACKGROUND

Pamela Carpenter was brutally raped, beaten, and stabbed with a pair of scissors in her home in Livingston, Texas on October 25, 1979.[4] Several hours after the attack, she died while receiving emergency treatment for her injuries.[5] Before Carpenter died, she gave the police a description of the attacker, leading two police officers to suspect Johnny Paul Penry, who was just recently paroled for another rape charge.[6] Penry confessed to committing the crime and the state of Texas charged him with capital murder.[7]

Arresting and charging Penry was only the beginning of a very long journey through complex judicial and constitutional issues. Because Penry was mentally retarded, this case was different from other capital murder cases. Penry was diagnosed with organic brain damage when he was a child.[8] Since his childhood, his intelligence quotient (IQ) was between fifty and sixty-three, a level associated with mild to moderate retardation.[9] At a competency hearing held before the trial, Dr. Jerome Brown, a clinical psychologist, testified that Penry was mentally retarded and that Penry had an IQ of fifty-four. Dr. Brown testified that Penry had the learning ability of a six and one-half year old and the social maturity, or the ability to function in the world, of a nine or ten year old, although Penry was actually twenty-two years old at the time of the crime.[10] Finally, Doctor Brown testified that "there's a point at which anyone with [Penry's] IQ is always competent, but, you know, this man is more in the borderline."[11]

B. THE TRIAL

After the jury decided that Penry was competent to stand trial, the defense counsel raised an insanity defense by presenting expert testimony concluding that Penry, as a result of his mental retarda-

---

4 *Id.* at 2941.

5 *Id.*

6 *Id.*

7 *Id.* In his confessions, Penry described how he had beaten and raped Carpenter and later stabbed her in the chest with a pair of scissors. In his second confession, Penry stated the following: "I knew that if I went over to the Chick's [deceased] house and raped her that I would have to kill her because she would tell who I was to the police and I didn't want to go back to the pen." Penry v. State, 691 S.W.2d 636, 641 (Tex. Crim. App. 1985).

8 *Penry*, 109 S. Ct. at 2941.

9 *Id.*

10 *Id.*

11 *Id.*

tion, was incapable of appreciating the wrongfulness of his act or to conform his acts to the law.[12] The defense also presented evidence showing that Penry was a physically-abused child.[13] The prosecution refuted the evidence by introducing the testimony of experts stating that while Penry had limited mental abilities, he was not insane and he knew the difference between right and wrong.[14] The prosecution's expert witnesses testified that Penry had an antisocial personality.[15] Although they disagreed with the defense witnesses' views that Penry was insane, the prosecution's expert witnesses did agree that Penry had extremely limited mental ability and was unable to learn from his mistakes.[16] The jury rejected the insanity defense and found Penry guilty of capital murder.[17]

C. THE SENTENCE

At the end of the sentencing hearing, the jury had to decide on the following "special issues" in order to decide whether Penry would receive life imprisonment or the death penalty.

1. Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with 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.[18]

Under the Texas Criminal Code, if the jury unanimously answers "yes" to all of the above special issues, the trial court must sentence the defendant to death.[19] If the jury anwers no to any of the above issues, the sentence must be life imprisonment.[20]

The defense counsel made several objections to the proposed charge to the jury. First, the defense objected to the failure of the court to define terms in the special issues such as "deliberately" in the first issue and "probability," "criminal acts of violence," and "continuing threat to society" in the second issue.[21] Second, the

---

12 *Id.*
13 *Id.*
14 *Id.* at 2942.
15 *Id.*
16 *Id.*
17 *Id.*
18 Tex. Code Crim. Proc. Ann. art. 37.07(b) (Vernon 1981 & Supp. 1989).
19 *Id.* at art. 37.071(c)-(e).
20 *Id.*
21 *Penry*, 109 S. Ct. at 2942.

defense objected to the lack of authorization for a jury to grant mercy based on mitigating circumstances.[22] Third, the defense argued that the trial court should have required that the state must prove beyond a reasonable doubt that mitigating circumstances do not outweigh aggravating circumstances as a condition of assessing the death penalty.[23] Fourth, the defense objected that allowing the jury to assess the death penalty would go against the eighth amendment's prohibition of cruel and unusual punishment.[24]

The trial court overruled these objections and the judge instructed the jury that the prosecution has the burden of proof on the special issues and that the jury must believe beyond a reasonable doubt that their answers to the "special issues" are correct.[25] The jury may also consider all evidence given at trial and at the sentencing hearing when deciding the three special issues.[26] The jury answered "yes" on all three issues and the trial court sentenced Penry to death.[27]

D. THE APPEAL

The defense appealed the conviction and sentence to the Court of Criminal Appeals of Texas.[28] The appeals court rejected the defendant's appeals concerning illegal arrest and illegal police procedures in obtaining Penry's confession.[29] It also rejected claims that certain evidence and testimonies were inadmissible.[30] It found that there was sufficient evidence to justify the jury's affirmative answers to the three special issues.[31] The court ruled that terms in the special issues did not need further definition since the jury understood their common meaning.[32] Citing *Jurek v. Texas*,[33] which upheld Texas' statutory scheme for imposing the death penalty, the Texas appellate court concluded that since the court allowed the defense to present evidence of all relevant mitigating circumstances in the

---

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 2943.

26 *Id.*

27 *Id.*

28 Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985).

29 *Id.* at 642-46. The court decided that the police officers gave Penry sufficient warnings before obtaining Penry's confession. *Id.* The court also decided that since the police officially arrested Penry only after Penry confessed, the arrest was not illegal. *Id.*

30 *Id.* at 646-52 (statements made by victim that she was stabbed and raped were admissible as hearsay exceptions because they are spontaneous exclamations).

31 *Id.* at 652-53.

32 *Id.* at 653-54.

33 428 U.S. 262 (1976).

sentencing hearing, there was no need for the trial court to give a special instruction requiring the jury to compare the aggravating and mitigating circumstances of the defendant before imposing the death penalty.[34] In short, the court found that the Constitution did not require a special jury instruction to supplement the Texas statutory scheme for the death penalty. Finally, the court found no constitutional impediments against the death penalty for the mentally retarded.[35]

After the Texas appellate court upheld Penry's conviction and sentence, the defense filed a federal habeas corpus petition challenging the death penalty. The Court of Appeals for the Fifth Circuit reviewed the case after the district court rejected the appeal.[36] The court found that although evidence of mitigating circumstances concerning Penry's mental retardation, abused childhood, and emotional problems were presented to the jury, the special issues under the Texas Criminal Code did not allow the jury to *give effect* to these mitigating factors in imposing the sentence.[37] While questioning the wisdom of the cases, the court decided that since *Jurek* upheld the Texas statutes for the death penalty and since other Fifth Circuit decisions[38] rejected claims similar to Penry's, it had no choice but to uphold Penry's sentence.[39] Citing another Fifth Circuit case,[40] the court held that it was not cruel and unusual punishment to execute a mentally retarded person.[41] Thus, the court relied heavily on stare decisis in upholding Penry's death sentence.

The Supreme Court granted certiorari to review Penry's death sentence.[42] Specifically, the Supreme Court considered the following two issues:

> [1)] [W]as Penry sentenced to death in violation of the Eight Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms

---

34 Penry v. State, 691 S.W.2d 636, 654 (Tex. Crim. App. 1985).

35 *Id.* at 654-55.

36 Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987).

37 *Id.* at 920.

38 *See* Riles v. McCotter, 799 F.2d 947, 952-53 (5th Cir. 1981) (finding that the Texas death penalty statute did not prevent a jury from considering the defendant's mental insanity as a mitigating factor); Granviel v. Estelle, 655 F.2d 673, 675-77 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003 (1982) (finding that the jury was not precluded from considering the defendant's mental condition as a mitigating factor when deciding the special issues under the Texas death penalty statute).

39 832 F.2d at 926.

40 Brogdon v. Butler, 824 F.2d 338, 341 (5th Cir. 1987) (Death penalty for the mentally retarded is not cruel and unusual punishment because of mentally retarded persons' ability to distinguish between right and wrong).

41 832 F.2d at 918.

42 108 S. Ct. 2896 (1988).

in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitgating evidence in answering them?

[2)] [I]s it cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry's reasoning ability?[43]

III. Opinions of the Supreme Court

The Supreme Court remanded Penry's sentence to the trial court after reversing the Fifth Circuit ruling that upheld the application of the Texas statutory scheme for imposing the death penalty in Penry's case, and affirming the Fifth Circuit ruling that it is not cruel and unusual punishment under the eighth amendment to execute a mentally retarded person with Penry's reasoning ability.[44]

Justice O'Connor wrote the opinion announcing the judgment of the Court.[45] However, there were some very interesting alignments by other justices concerning the opinion. Four justices, Brennan, Marshall, Blackmum, and Stevens, joined Justice O'Connor in the part of her opinion which overruled the Texas statutory scheme on imposing the death penalty as applied to Penry.[46] An entirely different group of justices, Rehnquist, White, Scalia, and Kennedy, joined the part of Justice O'Connor's opinion which ruled that the death penalty for the mentally retarded with Penry's reasoning abilities is not cruel and unusual punishment under the eighth amendment.[47] Thus while there is a majority opinion, the makeup of the majority varied according to the particular issue of the case the Court was addressing.

Furthermore, Justice Brennan filed an opinion concurring in part and dissenting in part, in which Justice Marshall joined.[48] Jus-

---

43 Penry v. Lynaugh, 109 S. Ct. 2934, 2943-44 (1989).

44 *Id.* at 2952, 2958. As a threshold issue, the Court also ruled that granting defendant's request for relief would not impermissibly impose the "new rule" retroactively, as prohibited by the Supreme Court's decision in Teague v. Lane, 109 S. Ct. 1060 (1989). *Id.* at 2944-45. The plurality opinion in *Teague* held that new rules will not be applied or announced in cases on collateral review, but for two exceptions. *Id.* at 1072-75. The Court stated that new rules announced in collateral review of sentences in criminal judgments would "delay the enforcement of the judgment at issue and decrease the possibility that there will at some point be the certainty that comes with an end to litigation." *Id.* at 1077 n.3. (citing Sanders v. United States, 373 U.S. 1, 25 (1963)). For in-depth discussion and analysis of the *Teague* decision, see Note, *Sixth Amendment—The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. Crim. L. & Criminology (1990).

45 *Penry*, 109 S. Ct. at 2940.

46 *Id.* at 2958, 2963.

47 *Id.* at 2963.

48 *Id.* at 2958-63.

tice Stevens also filed an opinion concurring in part and dissenting in part, in which Justice Blackmum joined.[49] Finally, Justice Scalia filed an opinion concurring in part and dissenting in part, in which Chief Justice Rehnquist and Justices White and Kennedy joined.[50]

A. THE MAJORITY

Justice O'Connor first discussed the issue of whether the application of the Texas statutory scheme for imposing the death penalty allowed the jury to consider all relevant mitigating factors concerning Penry and thus was constitutional under the eighth amendment.[51] She then discussed the merits of the issue concerning the Texas "special issues." Citing *Lockett v. Ohio*[52] and *Eddings v. Oklahoma*,[53] Justice O'Connor pointed out the principle that "punishment should be directly related to the personal culpability of the criminal defendant."[54] Justice O'Connor explained that when a sentencer makes an individualized assessment of whether to impose the death penalty, he/she must consider the defendant's background and character since defendants with disadvantaged backgrounds and emotional and mental problems are viewed by society as less culpable than defendants without such handicaps.[55] Specifically, Justice O'Connor continued, not only must evidence of the defendant's mitigating circumstances be presented to the sentencer, the sentencer must also be able to consider and give effect to these circumstances when imposing the sentence.[56] According to Justice O'Connor, the policy goals are to treat the defendant as a " 'uniquely individual human bein[g]' " and then impose a sentence which " 'reflect[s] a reasoned *moral* response to the defendant's background, character, and crime.' "[57]

Justice O'Connor next discussed whether the Texas statutory schemes allowed the sentencer to fulfill these goals. She noted that, while *Jurek*[58] had upheld the Texas statutory scheme for the death

---

49 *Id.* at 2963.

50 *Id.* at 2963-69.

51 *Id.* at 2947. As a threshold matter, Justice O'Connor decided that a ruling on this issue would not violate the *Teague* decision. She reasoned that such a ruling would be consistent with past precedents and thus would not be a new rule as prohibited by *Teague*. *Id.* at 2945-47.

52 438 U.S. 586 (1978).

53 455 U.S. 104 (1982).

54 109 S. Ct. at 2947.

55 *Id.* at 2947 (citing California v. Brown, 479 U.S. 538, 545 (1987)).

56 *Id.* (citing Hitchcock v. Dugger, 481 U.S. 393 (1987)).

57 *Id.* (quoting Woodson v. North Carolina, 428 U.S. 280, 304; 305 (1976), and California v. Brown, 479 U.S. 538, 545 (1987)) (emphasis in original).

58 428 U.S. 262 (1976).

penalty, it was subsequently understood by the Court that *Jurek* had upheld the "special issues" on the expressed assurance that the "special issues" would be interpreted broadly to allow the jury to consider all relevant mitigating factors.[59] Justice O'Connor noted that the plurality opinion in *Franklin v. Lynaugh*[60] confirmed this interpretation of *Jurek*, and the *Franklin* plurality further required that the special issues must allow the juries to *give effect* to the mitigating circumstances of the defendant.[61] Thus Justice O'Connor in effect argued that past precedents do not necessarily guarantee the constitutionality of the Texas statutory schemes. Instead, she explained, the statute's constitutionality depends on whether the "special issues" allow the jury to consider and give effect to the particular mitigating circumstances of a defendant in each case.[62]

Justice O'Connor then analyzed textually the three "special issues" to determine whether they allowed the jury to consider and give effect to Penry's mental retardation and abused childhood in determining whether Penry should be sentenced to death. On the first special issue of whether the defendant had acted "deliberately and with the reasonable expectation that the death of the deceased or another would result,"[63] Justice O'Connor interpreted "deliberately" to mean "intentionally."[64] However, she pointed out that personal culpability is not only determined by deliberateness.[65] According to Justice O'Connor, it is possible for the jury to find that Penry's mental retardation diminished his moral culpability because such mental handicaps may lessen his ability to control his impulse or judge the consequences.[66] However, she continued, the jury would still have to say that he acted deliberately.[67] Thus Justice O'Connor concluded that without a special instruction allowing the jury to give effect to the mitigating factors, a juror may believe that Penry's mental retardation lessened his culpability and still answer "yes" to Penry's deliberateness.[68]

---

59 *Penry*, 109 S. Ct. at 2948.

60 487 U.S. 164 (1988).

61 109 S. Ct. 2934, 2948 (citing *Franklin*, 487 U.S. at 164). *Franklin* upheld the Texas "special issues" in that instance because two concurring justices decided that a jury could have given effect to a defendant's mitigating evidence of good behavior by answering "no" to the question of future dangerousness of the defendant. *Id.* (O'Connor, J., concurring).

62 *Penry*, 109 S. Ct. at 2945.

63 Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon 1981 & Supp. 1989).

64 *See* 109 S. Ct. at 2948.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

As to the second issue concerning the defendant's future dangerousness, Justice O'Connor stated that Penry's inability to learn from past mistakes would only make his mental retardation an aggravating factor.[69] Justice O'Connor thus concluded that the second special issue failed to provide a "vehicle" for the jury to give effect to Penry's mental retardation as a *mitigating* factor.[70]

Finally, on the third special issue, Justice O'Connor concluded that it was possible for the jury to find Penry's actions to be an unreasonable response to any possible provocations by the deceased and still decide that Penry's mental retardation lessened his culpability.[71]

Justice O'Connor noted that the defense suggested to the jury that it could purposely ignore the meaning and terms of the special issues and simply answer "no" to the special issues in order to give effect to mitigating factors which were not included by the text of the special issues.[72] However, Justice O'Connor stated that since the prosecution urged the jury to follow the law and follow the instructions concerning the issues, it was reasonable that a juror may have been unable to find a "vehicle" to give effect to Penry's mitigating circumstances.[73]

Justice O'Connor concluded that a jury's discretionary grant of mercy based on Penry's mitigating circumstances would not be an "unbridled discretion" in imposing the death penalty, which was prohibited by *Furman v. Georgia*.[74] She noted that the Court had prohibited the capricious imposition of capital punishment on a selected group of offenders and therefore had required in *Gregg v. Georgia*[75] that there must be standards to guide the review of a defendant's circumstances relative to the imposition of capital punishment.[76] However, Justice O'Connor stated that *Gregg* also decided that if the class of murderers at issue was narrowed, then a procedure to allow a jury's discretionary grant of mercy due to mitigating factors was constitutional.[77] She explained that a grant of mercy within the narrowed class of mentally retarded criminals would be consistent with *Gregg*. Thus Justice O'Connor concluded that an instruction authorizing the jury to give effect to Penry's mitigating cir-

---

69 *Id.*
70 *Id.*
71 *Id.* at 2950.
72 *Id.*
73 *Id.*
74 *Id.* at 2951; *see* Furman v. Georgia, 408 U.S. 238 (1972).
75 428 U.S. 153 (1976).
76 *Penry*, 109 S. Ct. at 2951 (citing *Gregg*, 428 U.S. at 199).
77 *Id.* (citing *Gregg*, 428 U.S. at 197-99, 203).

cumstances would provide the jury with a "vehicle" to express its "reasoned moral response to the defendant's background, character, and crime."[78] Justice O'Connor stated that if a jury is unable to consider and give effect to all the relevant mitigating evidence concerning the defendant, the jury may end up giving "an unguided emotional response" in imposing the death penalty.[79]

Next, Justice O'Connor discussed whether it is cruel and unusual punishment under the eighth amendment to sentence a mentally retarded person of Penry's reasoning abilities to death.[80]

In terms of the merits of the issue, Justice O'Connor concluded that capital punishment for the mentally retarded of Penry's reasoning abilities was not cruel and unusual under traditional common law.[81] According to Justice O'Connor, common law prohibited capital punishment for "idiots," a term used to describe persons with absolutely no ability to reason, understand, or distinguish between good and evil.[82] The common law "idiot" would be so severely retarded, she explained, that the modern judicial doctrine of insanity defense would prevent him/her from being convicted.[83] Justice O'Connor noted that Penry was held to be competent to stand trial and had a rational understanding of the proceedings. Furthermore, she noted that his insanity defense was rejected, which means that the jury believed Penry could distinguish between right and wrong.[84] Justice O'Connor thus concluded that Penry would not be considered an "idiot" as protected by the common law.[85]

Justice O'Connor found no emerging national consensus expressing an evolving standard against the execution of the mentally retarded.[86] Rejecting the defense's use of a national poll, Justice O'Connor stated that the only objective evidence of national consensus are actions of the legislatures and that only one state has banned the execution of mentally retarded criminals.[87]

---

78 *Id.* at 2951 (citing Franklin v. Lynaugh, 108 S. Ct. 2320, 2333 (1988)).

79 *Id.*

80 *Id.* at 2952-58. As a threshold matter, Justice O'Connor decided that if the Court ruled that the death penalty for Penry was a cruel and unusual punishment, it would not be a violation of the *Teague* rule. *Id.* at 2952-53. Because such a ruling would exclude a class of individuals from a state sentence, it would be analogous to the exception to the *Teague* rule which allows for new rules in collateral review excluding certain private activities from state regulation. *Id.*

81 *Id.* at 2954.

82 *Id.* at 2953.

83 *Id.* at 2954.

84 *Id.*

85 *Id.*

86 *Id.* at 2955.

87 *Id.*

Justice O'Connor admitted that because the two major goals of capital punishment are deterrence and retribution, and because retribution depends on a criminal's culpability, a defendant's mental retardation may reduce or totally exculpate the defendant's culpability.[88] Thus, she explained, a defendant's culpability must be proportional to his sentence.[89] Justice O'Connor stated that mentally retarded people are individuals with various abilities and experiences.[90] She cited the example of mental retardation ameliorated by education and life experience.[91] Justice O'Connor could not conclude that all mentally retarded people of Penry's ability, solely because of the mental retardation, lack the mental ability which allow them to have the culpability proportional to a death sentence.[92] Finally, Justice O'Connor concluded that since Penry's mental retardation would be allowed to be considered and given effect by a jury in imposing the death penalty, she could not rule that the death penalty for mentally retarded criminals like Penry is unconstitutional.[93]

B. JUSTICE BRENNAN, CONCURRING IN PART AND DISSENTING IN PART

Justice Brennan, joined by Justice Marshall, concurred in part and dissented in part.[94] He concurred with Justice O'Connor's opinion that the Texas "special issues" did not allow the jury to consider and give effect to Penry's mental retardation and abused childhood.[95]

Justice Brennan dissented with the part of the opinion which held that capital punishment for mentally retarded criminals with Penry's reasoning abilities was not cruel and unusual under the eighth amendment.[96] While Justice Brennan supported Justice O'Connor's requirement that a mentally retarded person must have the mental capabilities to have the degree of culpability justifying

---

88 *Id.* at 2956.

89 *Id.*

90 *Id.* at 2957.

91 *Id.* Justice O'Connor explained that some mentally retarded persons are fully capable of functioning in their communities even though they have difficulties learning from their experience. *Id.*

92 *Id.*

93 *Id.* at 2958.

94 *Id.* (Brennan, J., concurring in part and dissenting in part). Justice Brennan agreed that the Court's rulings would not violate the *Teague* rule although he disagreed with the *Teague* rule as a whole because the decision "prevents the vindication of personal constitutional rights and deprives our society of a significant safeguard against future violations." *Id.* at 2958-59 (Brennan, J., concurring in part and dissenting in part).

95 *Id.* (Brennan, J., concurring in part).

96 *Id.* at 2960 (Brennan, J., dissenting in part).

the death penalty, Justice Brennan disagreed with Justice O'Connor by concluding that all mentally retarded persons are not capable of having such a degree of culpability.[97] Justice Brennan agreed with Justice O'Connor that mentally retarded people may have very different levels of skills and mental abilities because of education and life experience; however, Justice Brennan argued that all mentally retarded persons are, by clinical definition, substantially disabled in cognitive ability and adaptive behavior.[98] Thus, Justice Brennan concluded that mentally retarded persons by definition are so handicapped in their "reasoning abilities, control over impulsive behavior, and moral development" that mentally retarded offenders will always have diminished cupability.[99] Therefore death penalties for mentally retarded criminals would always be cruel and unusual.[100] Justice Brennan stated that a jury's consideration of mental retardation as a mitigating factor would not guarantee that mentally retarded persons would not be executed; thus, there would still be the risk of cruel and unusual punishment.[101]

Furthermore, Justice Brennan argued that capital punishment for the mentally retarded would not achieve the goals of retribution and deterrence because of the mentally retarded persons' diminished culpability and impaired control of impulses.[102] Thus, he concluded, the penalty would be " 'nothing more than the purposeless and needless imposition of pain and suffering.' "[103]

C. JUSTICE STEVENS, CONCURRING IN PART AND DISSENTING IN PART

Justice Stevens, joined by Justice Blackmum, agreed with the Court's ruling concerning the Texas "special issues" failure to allow the jury to consider and give effect to Penry's mental retardation and abused childhood as mitigating factors in imposing the death penalty.[104] Without much elaboration, Justice Stevens also concluded that the death penalty for the mentally retarded offender was unconstitutional under the eighth amendment.[105]

---

97 *Id.* at 2960-61 (Brennan, J., dissenting in part).

98 *Id.* at 2961 (Brennan, J., dissenting in part).

99 *Id.* (Brennan, J., dissenting in part).

100 *Id.* (Brennan, J., dissenting in part).

101 *Id.* (Brennan, J., dissenting in part).

102 *Id.* at 2962 (Brennan, J., dissenting in part).

103 *Id.* at 2963 (Brennan, J., dissenting in part) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

104 *Id.* at 2963 (Stevens, J., concurring in part and dissenting in part). Justice Stevens also agreed that the Court's ruling would not violate the *Teague* rule, although he disagreed with the entire *Teague* decision. *Id.* (Stevens, J., concurring in part and dissenting in part).

105 *Id.* (Stevens, J., concurring in part and dissenting in part).

D. JUSTICE SCALIA, CONCURRING IN PART AND DISSENTING IN PART

Justice Scalia, joined by Justices White and Kennedy and Chief Justice Rehnquist, disagreed with the part of Justice O'Connor's opinion concerning the mitigation issue relative to the Texas "special issues."[106] He stated that the Court's ruling was inconsistent with past Court precedents.[107] Justice Scalia also concurred with O'Connor's conclusion that the death penalty for mentally retarded criminals is not cruel and unusual.[108]

As to the merits of the Court's ruling on the mitigation issue, Justice Scalia stated that *Gregg* required a state's statutory scheme for imposing the death penalty to strike a proper balance between capricious imposition and unduly constricted discretion by channeling a sentencer's discretion without excessively restricting it.[109] Justice Scalia argued that the Court's ruling in *Jurek* found the Texas scheme to have struck such a balance in channeling a sentencer's discretion.[110] Aside from the argument that Texas has a right to channel a sentencer's discretion through the "special issues," Justice Scalia argued that the particular terminology used, such as "deliberateness," was relevant to Penry's mental retardation.[111] Because Texas allows all mitigating evidence to be introduced, Justice Scalia concluded that the channeling of the jury's consideration of such evidence was not unconstitutional.[112] Indeed, Justice Scalia argued that O'Connor's requirement of the jury to be allowed to consider and give effect to all mitigating evidence would return the law to the " 'wholly arbitrary and capricious action' " that had been forbidden by past Court decisions.[113]

IV. ANALYSIS

A. THE SCOPE OF A SENTENCER'S DISCRETION: MITIGATING FACTORS IN APPLYING THE DEATH PENALTY

In order to determine whether the Court decided correctly on

---

106 *Id.* at 2964 (Scalia, J., concurring in part and dissenting in part). As a threshold issue, Justice Scalia concluded that the Court's ruling on the "special issues" was a violation of the *Teague* rule. *Id.* at 2963-64 (Scalia, J., concurring in part and dissenting in part).

107 *Id.* at 2965 (Scalia, J., concurring in part and dissenting in part).

108 *Id.* at 2964 (Scalia, J., concurring in part).

109 *Id.* at 2965 (Scalia, J., dissenting in part) (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

110 *Id.* at 2966 (Scalia, J., dissenting in part); *see* Jurek v. Texas, 428 U.S. 262, 274 (1976).

111 *Penry*, 109 S. Ct. at 2966 (Scalia, J., dissenting in part).

112 *Id.* at 2968 (Scalia, J., dissenting in part).

113 *Id.* at 2968 (Scalia, J., dissenting in part) (quoting *Gregg*, 428 U.S. at 189).

the issue concerning the Texas death penalty statute, one must consider two policy goals which the Court has adhered to in previous cases dealing with the death penalty. In *Lockett*,[114] the Court stated that individualized decisions in death penalty cases are necessary so that a sentencer will "[treat] each defendant in a capital case with that degree of respect due the uniqueness of the individual. . . ."[115] Another policy goal which was announced by the Court in *Furman* states that a sentencer must not impose the death penalty in an arbitrary, capricous, or freakish manner.[116] Thus, whether the *Penry* Court ruled correctly depends on the Court's decision to allow a sentencer to consider and give effect to all relevant mitigating factors of a defendant.

The Court's decision to allow a jury to consider and give effect to all relevant mitigating factors of a defendant is a logical result of *Lockett* and its policy goal.[117] In *Lockett*, a plurality of the Court overturned the Ohio death penalty statute because it only allowed the sentencer to consider three mitigating factors specified by the statute.[118] The plurality stated that "a death penalty statute must not preclude consideration of relevant mitigating factors."[119] In *Eddings*,[120] the Court reaffirmed the *Lockett* plurality when it overruled the trial court's decision that, as a matter of law, it could not consider as mitigating factors a defendant's troubled family history, abused childhood, and emotional problems.[121] Reaffirming *Lockett*'s emphasis on individualized treatment of defendants in capital cases, the *Eddings* Court reasoned that just as a statute cannot preclude the consideration of any relevant mitigating factors, a sentencer cannot, as a matter of law, refuse to consider any relevant mitigating evidence of a defendant when deciding whether or not to impose the death penalty.[122] Thus the *Penry* decision is correct in requiring that a sentencer consider all relevant mitigating evidence.

The crucial question in *Penry* is whether it is necessary for the

---

114 438 U.S. 586 (1978).

115 *Id.* at 605 (Burger, C.J., plurality opinion). Justice O'Connor explained in *Penry* that the *Lockett* Court's emphasis on individualized treatment is based on the principle that the level of punishment should be directly related to a criminal's degree of culpability. 109 S. Ct. at 2947. A defendant's background, character, and mental state can affect his level of culpability. *Id.* (citing California v. Brown, 479 U.S. 538, 545 (1987)).

116 408 U.S. 238, 274, 295 (1972) (Brennan, J., concurring); 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

117 *See supra* note 114 for a discussion of the *Lockett* Court's policy goal.

118 438 U.S. at 608 (Burger, C.J., plurality opinion).

119 *Id.*

120 Eddings v. Oklahoma, 455 U.S. 104 (1982) (Powell, J., plurality opinion).

121 *Id.* at 110, 117.

122 *Id.* at 113-14.

sentencer to be able to apply or give effect to a defendant's mitigating circumstances in order to satisfy the *Lockett* requirement of individualized treatment of the defendant.[123] For instance, in his dissent in *Penry*, Justice Scalia argued that the Texas death penalty statute was constitutional because the jury was able to consider all mitigating evidence in answering the special issues.[124] Justice Scalia argued that while a sentencer should be able to consider all mitigating evidence, it is up to the state to determine for what purposes and in what ways the sentencer may give effect to the mitigating evidence.[125]

The problem with Justice Scalia's reasoning is that limiting the purposes and ways a sentencer may apply or give effect to a mitigating factor is just another name for limiting the mitigating factors a sentencer may consider, which, of course, was prohibited by *Lockett*.[126] If a state limits the ways a sentencer may apply or give effect to mitigating factors, certain mitigating factors which may be relevant to the character of the defendant will have no weight to the purposes and issues mandated by the state.

Take Penry's mental retardation, for example. Although the defense presented evidence of Penry's mental retardation to the sentencing jury,[127] the evidence had no relevance to the three "special issues."[128] Thus, Penry's mental retardation meant nothing to the jury although Penry's mental abilities were clearly relevant to his character and background, which, in turn, were relevant to his culpability and to the question of whether he deserved the death pen-

---

123 The answer to this question will also determine whether *Penry* is consistent with the Court's decision in Jurek v. Texas, 428 U.S. 262 (1976). *Jurek* upheld the constitutionality of the Texas statutory scheme for the death sentence. *Id.* Justice O'Connor interpreted *Jurek* narrowly and concluded that the "special issues" are only constitutional as long as they allow the sentencer to "fully consider" the relevant mitigating circumstances of the defendant. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). Justice O'Connor argued that full consideration requires the jury to be able to give effect to the mitigating factors. *Id.* Writing separately, Justice Scalia argued that full consideration of mitigating circumstance does not mean a jury can give effect to the mitigating factors. *Id.* at 2966 (Scalia, J., concurring in part and dissenting in part). Justice O'Connor's definition means that *Penry* is consistent with *Jurek* and Justice Scalia's definition means that *Penry* is overruling *Jurek*.

124 109 S. Ct. at 2967.

125 *Id.* at 2966 (Scalia, J., concurring in part and dissenting in part). Thus according to Justice Scalia's reasoning, the Texas death penalty statute would allow for individualized treatment by allowing the sentencer to consider all mitigating circumstances. However, the sentencer is only allowed to give effect to the mitigating evidence for the purpose of answering the three "special issues." *Id.* (Scalia, J., concurring in part and dissenting in part).

126 Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality opinion).

127 *Penry*, 109 S. Ct. at 2950.

128 *Id.* at 2951.

alty. In effect, the jury never really considered Penry's mental retardation. As pointed out in the concurrence in *Franklin*, "the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration."[129] Justice Scalia's reasoning is a clever means of undermining the *Lockett* mandate of individualized treatment of capital defendants.[130] Despite his intricate analysis of the semantics of "consideration," Justice Scalia was really arguing against the *Lockett* policy goal of individualized treatment of capital defendants.

A second consideration, therefore, is whether *Lockett*'s individualized sentencing and *Penry*'s interpretation of *Lockett* result in arbitrary and capricious impositions of death sentences. Justice Scalia, in his dissent in *Penry*, argued that the Court's decision concerning the Texas statute gave the sentencer too much discretion and thus increased the risk that the death penalty would be imposed arbitrarily and capriciously as prohibited by *Furman* and *Gregg*.[131] In *Furman*, the Court struck down Georgia's death penalty statute as unconstitutional because the Georgia statute allowed the sentencer to impose the death penalty arbitrarily and capriciously.[132] Justice Douglas, for example, was concerned that a sentencer would selectively apply the death penalty to prejudiced groups such as the poor and racial minorities under the Georgia statute.[133] He thus expressed a concern with basic fairness. *Gregg* upheld death penalties in Georgia after the Georgia legislature set up guidelines for a sentencing jury to impose the death penalty.[134] The Court in *Gregg* pointed out that a jury must be given guidance on the factors about the crime and the defendant which would be relevant to the sentencing decision.[135] Justice Scalia's argument in *Penry* is that the Court in *Penry* left the jury with no guidance in determining whether to apply the death penalty, leaving the jury to an "unguided, emotional 'moral response.' "[136]

However, is the discretion to consider and give effect to all rele-

---

129 Franklin v. Lynaugh, 487 U.S. 164 (1988) (O'Connor, J., concurring).

130 *See supra* note 114 for a discussion of the *Lockett* rationale.

131 109 S. Ct. at 2968-69 (Scalia, J., concurring in part and dissenting in part) (citing Gregg v. Georgia, 428 U.S. 153 (1976), and Furman v. Georgia, 408 U.S. 304 (1972)).

132 408 U.S. at 274, 295 (Brennan, J., concurring); 408 U.S. at 310 (Stewart, J., concurring).

133 *Id.* at 256 (Douglas, J., concurring).

134 428 U.S. at 153.

135 *Id.* at 192.

136 Penry v. Lynaugh, 109 S. Ct. 2934, 2968 (1979) (Scalia, J., concurring in part and dissenting in part).

vant mitigating factors of a defendant necessarily arbitrary and capricious? The Court in *Furman* feared that juries were making decisions on imposing the death penalty based on prejudices and other irrelevant factors. Thus the Court in *Furman* and *Gregg* was more concerned about procedural fairness rather than superficial consistency in the sentences. The *Penry* decision allows the sentencer to see the complete picture of the defendant in deciding his level of culpability. With the information about the defendant, a sentencer can weigh the various relevant mitigating factors and aggravating factors to give a "reasoned moral response to the defendant's background, character, and crime."[137] The jury's discretion is still guided by a court's determination of what is relevant to a defendant's background, character, and offense, and the jury is still required to weigh the mitigating factors against the aggravating factors.[138] A jury allowed to treat and respond to a defendant as a three-dimensional individual is less likely to sentence a person to death based on pure prejudice and ignorance. An informed determination of a defendant's culpability is clearly not arbitrary or capricious. Thus, Justice O'Connor was absolutely correct in stating that the full consideration of evidence of mitigating circumstances would allow the jury to give a " 'reasoned *moral* response to the defendant's background, character, and crime.' "[139] When a sentencer is allowed to consider and give effect to the various mitigating circumstances, the imposition of the death penalty may appear to be inconsistent and therefore arbitrary. However, as pointed out in *Eddings*, "a consistency produced by ignoring individual differences is a false consistency."[140]

B. THE DEATH PENALTY FOR THE MENTALLY RETARDED: THE CRUEL AND UNUSUAL PUNISHMENT QUESTION

In announcing the judgment of the Court in *Penry*, Justice O'Connor held that the eighth amendment does not preclude the execution of any mentally retarded criminal of Penry's ability by virtue of his mental retardation.[141] Justice O'Connor arrived at this decision after concluding as follows: 1) sentencing Penry to death would not have been cruel and unusual under traditonal common

---

137 *Id.* at 2951.

138 Franklin v. Lynaugh, 487 U.S. 164 (1988) (finding the defendant's good behavior in prison not clearly relevant to his character).

139 *Penry*, 109 S. Ct. at 2951 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (emphasis in original).

140 Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

141 109 S. Ct. at 2958.

law;[142] 2) there is no emerging national consensus against the execuiton of the mentally retarded as shown by state legislative actions;[143] and 3) not all mentally retarded people of Penry's ability are incapable of having the degree of culpability proportionate to and deserving of the death penalty.[144]

The Court has always ruled those punishments to be violative of the eighth amendment which were already considered cruel and unusual at the time the Bill of Rights was adopted.[145] Justice O'Connor's analysis clearly shows that while common law prohibited capital punishment for the "idiots" or "lunatics," it was referring to the mentally insane and not the mentally retarded of Penry's abilities.[146] Even Justice Brennan in his dissent did not challenge this conclusion.[147]

The Court nevertheless seems to recognize that social values do change and fluctuate. Thus, if there is an emerging national consensus against a certain type of punishment reflecting the "evolving standards of decency that mark the progress of a maturing society," the Court would consider that punishment to be a cruel and unusual one as prohibited by the eighth amendment.[148] The Court determines whether there is a national consensus by observing the actions of the state legislatures.[149] The defense in *Penry* tried to prove that there is a national consensus against the death penalty for the mentally retarded by producing opinion polls of various states against sentencing mentally retarded criminals to death.[150] However, the Court in *Penry* noted that only one state, Georgia, has explicitly prohibited imposing the death penalty on the mentally retarded and thus decided that there was no national consensus against such a punishment.[151] In making this decision, Justice O'Connor rightly rejected the use of opinion polls to determine national consensus. After all, opinion polls only show passing sentiments at a specific time while legislative actions shows more

142 *Id.* at 2954.

143 *Id.* at 2955.

144 *Id.* at 2956-57.

145 Ford v. Wainright, 477 U.S. 399, 405 (1986) (death penalty for the mentally insane criminal is cruel and unusual punishment).

146 *Penry*, 109 S. Ct. at 2954.

147 *Id.* at 2958-63 (Brennan, J., concurring in part and dissenting in part).

148 *Id.* at 2953 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

149 *Id.* In *Ford*, the Court noted that 26 states had statutes explicitly prohibiting the death penalty for the mentally insane when the Court ruled that such punishment is cruel and unusual when applied to the insane. 477 U.S. at 408 n.2.

150 Reply Brief for Petitioner at 6-7, Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (No. 87-6177); Brief for the Petitioner at 38, Joint App. 279, 283, *Penry* (No. 87-6177).

151 109 S. Ct. at 2955.

permanence because of the arduous process of lawmaking.[152] Thus Justice O'Connor was correct in deciding that there was no national consensus against sentencing the mentally retarded criminal to death.[153]

Since neither the common law nor evolving standards of society prohibit the death penalty for the mentally retarded capital offender, the only remaining question is whether capital punishment is proportional to the degree of culpability a mentally retarded criminal is capable of having.[154] Justice O'Connor was incorrect in deciding that the death penalty for the mentally retarded was not cruel and unusual under the proportionality test. Justice O'Connor reasoned that there are various degrees of mental retardation and mentally retarded people are individuals of various abilities.[155] For example, mentally retarded persons may improve their mental abilities by education, habilitation, and life experience.[156] Thus, Justice O'Connor could not conclude, because of the different levels of mental abilities, that mentally retarded criminals generally lack the degree of culpability associated with the death penalty.[157] This reasoning shows a disturbing lack of understanding of the nature of mentally retarded persons.

---

152 Unlike an opinion poll which may fluctuate, a law is usually the result of not only public sentiment but public debate, committee hearings, lobbying by various groups, and voting by the legislative body. An issue as controversial as the death penalty guarantees that any law dealing with the issue would have faced tremendous challenges and intense struggle before being voted upon by the legislature. Such a law would clearly be a better and more permanent representation of national consensus than a telephone poll.

153 There is disagreement in the Court as to whether a proportionality test should be used after the Court has determined that there is no national consensus against a certain type of punishment. For instance, Justice Scalia would have stopped the analysis at this point. In Stanford v. Kentucky, 109 S. Ct. 2969 (1989), a death penalty case decided at the same term as *Penry*, Justice Scalia argued strongly for the right of legislative bodies to determine what the evolving standards are in defining cruel and unusual punishment. *Id.* at 2979-80. He argued that the Court should only determine what the standards are and not what they should be. *Id.* at 2979. He thus rejected the use of a proportionality test as a judicial encroachment of legislative power. *Id.* at 2980. Justice Scalia's arguments are flawed because the eighth amendment, along with the rest of the Bill of Rights, was meant to be a check of the abuses of majority rule in a democracy. *Id.* at 2987 (Brennan, J., dissenting). As pointed out by Justice Brennan in his dissent in *Stanford*, if the Court allows the legislature to define the eighth amendment, the Court will be abrogating its constitutional role. *Id.* at 2987 (Brennan, J., dissenting).

154 Solem v. Helm, 463 U.S. 277, 292 (1983). *Solem* held, inter alia, that not only must a punishment be proportionate to the gravity of the offense, but also to the defendant's moral culpability. *Id.*

155 *Penry*, 109 S. Ct. at 2956-57.

156 *Id.* at 2957 (citing Ellis & Luckasson, *Mentally Retarded Defendants*, 53 GEO. WASH. L. REV. 414, 424, n.54 (1985) and Amicus Brief for AAMR at 6, Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (No. 86-6177)).

157 *Penry*, 109 S. Ct. at 2957.

As pointed out by Justice O'Connor, mentally retarded persons vary in their mental abilities. However, by clinical definition, all mentally retarded people are below a certain level of mental capabilities.[158] First, they are all severely handicapped in their mental abilities although the level of severity may vary. By definition, they all have "significant limitations in . . . meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group. . . ."[159] Second, unlike mental illness, which can be cured, mental retardation is a permanent condition.[160] While learning, habilitation, and life experience may improve the mental abilities of a mentally retarded person, he/she will always be mentally retarded and therefore severely handicapped in his/her mental abilities. Finally, while mentally retarded people are individuals, they frequenty have the same disabling characteristics. Among these characteristics are limited communication skills, poor impulse control, and an incomplete or immature concept of blameworthiness and causation.[161] As Justice Brennan concluded in his dissent, the disabilities and handicaps which mentally retarded persons, by definition, possess mean that "the ultimate penalty of death is always and necessarily disproportionate to [their] blameworthiness and hence is unconstitutional."[162]

The prosecution in *Penry* argued that the Court should not allow mental professionals and clinical definitions to control the administration of criminal justice and that common law standards should be controlling.[163] The problem with this argument is that since mental retardation is an inherently mental health condition, it is only reasonable that a court should rely on medical information just as much as a court will admit expert witnesses for technical and scientific matters. The need for mental health professionals' expertise is especially important for mentally retarded defendants since mentally retarded persons have long suffered an "irrational social

158 AMERICAN ASSOCIATIN ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed. 1983). The American Association on Mental Deficiency (AAMD) defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." *Id.*

159 *Id.* at 11.

160 Ellis & Luckasson, *supra* note 156, at 424.

161 *Id.* at 429.

162 Penry v. Lynaugh, 109 S. Ct. 2934, 2961 (1989) (Brennan, J., dissenting in part).

163 Brief for Respondent at 44-49, Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (No. 86-6177).

stigma" in the United States.[164]

Another argument for sentencing mentally retarded criminals to death is the argument that since the jury has already found Penry to be competent to stand trial, he must have a rational understanding of the court proceeding.[165] The jury also rejected Penry's insanity defense, and therefore he could be convicted by the jury.[166] However, just because a defendant is competent to stand trial and to be convicted does not mean that he should be sentenced to death. The Court has traditionally treated capital punishment with greater sensitivity and care because capital punishment is "qualitatively different" from any other sentence.[167] This reasoning implies that the imposition of the death penalty requires a higher standard than the imposition of a regular sentence.

Considering the Court's special sensitivity toward the imposition of the death penalty, Justice O'Connor's conclusion is especially surprising. In essence, her reasoning is that since she cannot conclude that all mentally retarded defendants should not be sentenced to death, the general rule is that the death penalty for the mentally retarded is not cruel and unusual.[168] Such a rule creates the risk that a mentally retarded defendant who lacks the culpability deserving of the death penalty may still be sentenced to death since there is no guarantee that individualized consideration required by *Lockett* will prevent such a sentence.[169] The unique finality and harshness of the death sentence makes such a risk unacceptable.

Indeed, the extreme severity of the death sentence requires that there should always be a presumption toward life when a sentencer is deciding whether or not to impose the death sentence.[170] When

---

164 Smith v. Francis, 474 U.S. 925, 927 (1985) (memorandum opinion denying certiorari) (Marshall, J., dissenting).

165 *Penry*, 109 S. Ct. at 2954.

166 *Id.*

167 Lockett v. Ohio, 438 U.S. 586, 604 (1977) (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

168 *See Penry*, 109 S. Ct. at 2957.

169 *Id.* at 2962-63 (Brennan, J., dissenting in part).

170 This is not a novel idea. One of the underlying rationale for requiring the sentencer to consider all mitigating circumstances of a capital defendant in assessing the death penalty is the presumption toward life.

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. *When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.*"

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (emphasis added). It is therefore ironic that Justice O'Connor supported the rationale of *Lockett* and still decided that it is not cruel

in doubt, the Court should not impose the death penalty. Looking at the language of her ruling, it is obvious that Justice O'Connor was not at all certain that mentally retarded criminals do have the culpability proportionate to the severity of the death penalty.[171] It would seem logical that considering the uncertainty in a mentally retarded criminal's culpability and the certainty in the severity of the death sentence, Justice O'Connor should have ruled that capital punishment for the mentally retarded, as a general rule, is cruel and unusual punishment.

C. IMPLICATIONS FOR THE FUTURE

In *Penry*, the Court decided that a sentencer must be allowed to consider and give effect to all relevant mitigating factors of a defendant when deciding whether to impose the death penalty.[172] What then, are the implications of the Court's decision? First, the decision does not require the Texas legislature to amend the statutory scheme for the death penalty.[173] However, when juries are the sentencers, courts in Texas and elsewhere must give special instructions informing the juries that they should consider and give effect to relevant mitigating circumstances of the defendant.[174] Second, sentencers, whether they are judges or juries, will have a great deal of discretion in deciding whether a criminal is deserving of the death penalty because they are entitled to consider and give effect to a large number of relevant mitigating factors. Third, this discretion is not unlimited in that a mitigating factor must be relevant to the defendant's background, character, and to the circumstances of the

---

and unusual punishment to sentence mentally retarded criminals to death when she has serious doubts about the mentally retarded criminal's culpability.

171 *Penry*, 109 S. Ct. at 2957. Justice O'Connor stated, "I *cannot conclude* that all mentally retarded people of Penry's ability . . . inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Id.* (emphasis added). An inability to conclude is hardly a sign of certainty.

172 *Penry*, 109 S. Ct. at 2952.

173 In fact, the defense never challenged the facial validity of the Texas statutes. It did contend that, in this case, the jury was unable to fully consider Penry's mitigating circumstances unless the trial court gave a special instruction to the jury to consider mental retardation and abused childhood. *Penry*, 109 S. Ct. at 2945.

174 Thus, the Court decided in *Penry* that because of the lack of such a special instruction, the special issues could have prevented the jury from considering and giving effect to Penry's mental retardation and abused childhood. *Id.* at 2952. Arguably, if a state's death penalty statute clearly allows the jury to consider and give effect to mitigating factors at issue in a case, the trial court would not need to give the special instruction. When the judge is the sentencer, he or she should interpret the death penalty statute broadly so that he or she can consider and give effect to all relevant mitigating factors of a defendant.

offense.[175] Nevertheless, this would still leave the sentencer with a broad range of factors to consider. Furthermore, courts will continue to struggle with the question of when a potential mitigating factor is relevant to the defendant's character, background, and offense.

The Court also ruled that it is not cruel and unusual punishment under the eighth amendment to sentence a mentally retarded criminal of Penry's reasoning abilities to death.[176] Note the wording of the ruling. The implication is that sentencing to death a criminal who is mentally retarded to a degree greater than Penry may be prohibited by the eighth amendment. The Court, however, did not define at what level the eighth amendment prohibits the death penalty for the mentally retarded criminal.

The voting pattern of the Court also has definite implications for future cases involving capital punishment issues. Justice O'Connor casted the deciding vote in *Penry*. Although she announced the opinion of the Court, the four votes she received for her decision on the constitutionality of the Texas court's application of the Texas statutory scheme were not the four votes she received for her decision on the constitutionality of capital punishment for the mentally retarded criminal.[177] She thus crafted a decision between two sharply divided blocs, gaining partial consent from each side.

The Court's voting pattern was similar to two other recent Supreme Court decisions concerning the death penalty. In *Thompson v. Oklahoma*,[178] the Court, in a 5-3 decision, overturned Oklahoma's imposition of the death penalty for a defendant who committed murder when he was fifteen years old.[179] Based on the narrow statutory ground that the Oklahoma statute set no minimum

---

175 *Penry*, 109 S. Ct. at 2948. For instance, the Court cited Franklin v. Lynaugh, 487 U.S.164, (1988), which found the defendant's good behavior in prison not clearly relevant to his character. *Id.*

176 109 S. Ct. at 2958.

177 Justices Brennan, Marshall, Stevens, and Blackmum supported Justice O'Connor's ruling against this application of the Texas statutory scheme for assessing the death penalty. The same four justices disagreed with Justice O'Connor's position that sentencing a mentally retarded criminal of Penry's reasoning ability was not cruel and unusual punishment. *Penry*, 109 S. Ct. at 2959, 2963. Justices Scalia, Rehnquist, White, and Kennedy disagreed with Justice O'Connor's position on the Texas statutory scheme but agreed with her position on the constitutionality of death penalty for the mentally retarded criminal. *Id.* at 2963-64.

178 108 S. Ct. 2687 (1988).

179 *Id.* at 2700. For an in-depth analysis of the *Thompson* decision, *see* Note, *Eighth Amendment—The Death Penalty for Juveniles: A State's Right or a Child's Injustice?*, 79 J. CRIM. L. & CRIMINOLOGY 921 (1988) (supporting the *Thompson* decision because it meets the precepts and objects of the juvenile justice system).

age for the death penalty, Justice O'Connor joined the decision with a separate concurring opinion.[180] Justice Kennedy did not participate in the decision. If he had, it probably would have been a 5-4 decision and Justice O'Connor's vote would have been pivotal since Justice Kennedy voted with Justice Scalia in *Stanford v. Kentucky*.[181] Thus, in *Stanford*, Justice O'Connor's vote was pivotal. In that case, Justice O'Connor joined the decision to uphold Kentucky's death sentence for a defendant who committed murder when he was sixteen years old because there was a clear national consensus supporting the death penalty for criminals who were between sixteen and seventeen years old.[182]

These recent cases, along with *Penry v. Lynaugh*, show that Justice O'Connor is a crucial swing vote on capital punishment issues. She will probably continue to be an influential voice in future cases dealing with the death penalty.

The voting pattern in *Penry* further indicates that the Court is still unable to arrive at anything close to a consensus on issues dealing with the death penalty. For the past two decades, the Court has handed down plurality opinions on issues involving the death penalty.[183] As shown earlier, the most recent cases on capital punishment were decided with the barest of margins. *Penry* itself is a 5-4 decision with three separate opinions concurring in part and dissenting in part. This means that future decisions on death penalty issues will continue to be unpredictable, uncertain, and even confusing.

---

180 Justice Stevens wrote the plurality opinion, joined by Justices Brennan, Marshall, and Blackmun, which held that the death penalty for a defendant who committed first-degree murder when he was 15 years old was cruel and unusual punishment under the eighth amendment. *Id.* at 2700. Justice O'Connor agreed with the decision to overturn the sentence but she did so on the narrow ground that the Oklahoma statute did not set a minimum age for the death penalty. *Id.* at 2711. Justice O'Connor reasoned that there is a risk that the Oklahoma legislature either did not intend to apply the death penalty to 15 year olds, or the legislature never seriouly considered the matter. *Id.* Furthermore, because there is no clear indication of a national consensus supporting the death penalty for 15 year old criminals, the Oklahoma statute cannot be constitutional. *Id.*

181 109 S. Ct. 2969, 2972 (1989).

182 Justice Scalia wrote the plurality opinion, joined by Justices Rehnquist, White, and Kennedy. Stanford v. Kentucky, 109 S. Ct. 2969 (1989). Justice O'Connor once again wrote a separate concurring opinion. *Id.* Justice Brennan wrote the dissenting opinion, joined by Justices Marshall, Blackmum, and Stevens. *Id.*

183 *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (five separate concurring opinions and four separate dissenting opinions); Gregg v. Georgia, 428 U.S. 153 (1976) (four separate concurring opinions and two dissenting opinions); Jurek v. Texas, 428 U.S. 264 (1976) (four concurring opinions and two dissenting opinions).

V. CONCLUSION

The lack of consensus in the Court in *Penry* and other capital punishment cases results in unpredictability and uncertainty in Supreme Court jurisprudence on capital punishments. Meanwhile, this lack of consensus has given Justice O'Connor an influential voice on death penalty decisions.

The Court's decision to allow a sentencer to consider and give effect to all relevant mitigating circumstances of a defendant follows the policy of individualized treatment espoused in *Lockett* without violating the prohibition against arbitrary and capricious death sentences announced in *Furman*. The decision thereby ensures procedural fairness in the imposition of the death penalty.

The Court is incorrect in not ruling that the death penalty for the mentally retarded is cruel and unusual punishment under the eighth amendment. By definition, all mentally retarded defendants are severely handicapped in their mental abilities. While capital punishment for the mentally retarded is not prohibited by common law or national consensus, it certainly violates the proportionality test because mentally retarded criminals lack the culpability deserving of the death sentence.

Finally, because of the unique finality and harshness of the death penalty, the Court should always rule in favor of life if there are any doubts or uncertainities about the correctness of the sentence.

PETER K.M. CHAN