

MITIGATING EVIDENCE. U.S. CONST. AMEND. VIII.

This Court has a unique opportunity in Applicant's case to correct what has become a constitutional crisis in Texas death penalty law: the absence of a third sentencing alternative of life without parole. What was only a political issue when Texas enacted the **post-Furman** death penalty scheme has now become a trial issue; it has manifested itself with sufficient clarity in Applicant's case to provide for a meaningful analysis and to demonstrate the defect in the Texas statute as it affected Applicant.

When a Texas jury hears evidence that they believe is mitigating in the sense that it makes "life" a more appropriate penalty than death, they must take "life" to mean "life with the possibility of parole" because they know that to be the case. When that same jury has just found unanimously, beyond a reasonable doubt, that the defendant is a continuing threat to society, the likelihood is vanishingly small that they will find it appropriate to give him the sentence that might release him back into society. The Texas system, without an alternative sentence of life-without-parole, results in the arbitrary imposition of the death penalty, as in Applicant's case.³⁰

Applicant raised this Eighth Amendment claim in his pretrial motion challenging the constitutionality of the Texas death penalty scheme based on the absence of life without

³⁰ This is even more applicable since the recent change in Texas Law mandating life without parole.

parole as a third punishment option. (CR 2, 218-219). It is illustrative of Applicant's point that Mr. Current, who was accepted as a juror, agreed during voir dire, that in deciding the second special issue, whether a defendant would be a continuing threat to "society", it was reasonable for a juror to consider, in defense counsel's words, "... depending upon the facts of the case, depending upon what you learn about the individual, and depending upon what you learn about the restrictive environment that the prison is, to say, Hey, if he were out and had access to whatever he might have access, I think he's a dangerous person, but in that restrictive environment I may not think he is." (RR 28, 123-124). Notably, Mr. Current immediately qualified this agreement by saying that he was willing to consider such evidence of defendant's lack of dangerousness in prison society, in answering the special issue, only he could be completely assured that the defendant would be in that society forever, "no parole, nothing like that" and he said he was sure he could rely on the trial judge "to take care of that." (RR 28, 124).

The Supreme Court has recognized that a state's death penalty scheme and the Texas death penalty scheme in particular, may be unconstitutional as applied to a defendant if it provides no vehicle for him to gain the jury's effective consideration of his individual mitigating circumstances that fall outside the scope of the special issues as drafted. In **Penry v. Lynaugh, (Penry I), supra**, the Court found that, although the defendant could gain some consideration of his evidence of mental retardation through the continuing threat special issue, the evidence was more aggravating than mitigating as it pertained to that issue.

A supplemental issue or instruction had to be provided, the Court held, for a Texas capital defendant like Penry to obtain the jury's effective consideration (of his evidence of mental retardation and childhood abuse) as mitigation. Only in providing a vehicle, in addition to the existing special issues, for the jury to express its reasoned moral response to Penry's specialized mitigation evidence, could Texas satisfy the Eighth Amendment's mandate for individualized, non-arbitrary assessment of punishment in a capital case. In **Penry v. Johnson, (Penry II), supra**, the Court found the ad hoc "nullification instruction" that was submitted at Penry's retrial on punishment to be an ineffective procedure. Because it required jurors to answer one of the special issues falsely in order to "achieve" a life sentence based on the mitigating evidence, the nullification instruction was unacceptable. Jurors would have to answer against their reason and against their oath to achieve a result that was not a true, straightforward option.

The Supreme Court in **Penry II, supra**, did not assess the appropriateness, or the constitutionality of the statutory special issue enacted in 1991; that instruction was not a part of Penry's trial, but that Court has now made it abundantly clear that the scope of "Penry evidence" or "constitutionally significant mitigating evidence" is far broader than this Court and the Fifth Circuit have considered it. **Smith v. Texas**, ___ U.S. ___, 125 S.Ct. 400 (2004). In deciding whether the "nullification" mitigation instruction in Smith's case had been sufficient to empower the jury to give effect to Smith's mitigating evidence, the Supreme Court held that this Court had "screened" his proffered mitigating evidence too narrowly

under an improper legal standard. The Court restated its rejection³¹ of the requirement that the proffered mitigating evidence, to be "constitutionally relevant" must pass a threshold of "whether the defendant's criminal act was 'due to the uniquely severe permanent handicaps with which [he] was burdened through no fault of his own.'"

Applicant's claim is like Tennard's and Smith's. Both those cases challenged the structure of the Texas death penalty scheme on the ground that the absence of a particular statutory option made it unconstitutionally likely that the jury would give effect to his mitigating evidence. Applicant demonstrates the same defect, resulting from the absence of a life-without-parole option in this case. The current statutory scheme with its special issues, only two punishment options, and no discretion to assess life without parole, suffers from the same kind of Eighth Amendment defect ins the pre-Penry scheme, the Penry II nullification scheme, and the current statutory scheme.

Applicant, in this case presented mitigating evidence on the special issue of continuing threat, including Dr. Gollaher's testimony that he would not be a continuing threat in the structured society of prison, (RR, 28, 105-123)³² and that Applicant wanted the jury

31 The Court rejected the screening test of Smith in **Tennard v. Dretke**, ____ U.S. ____, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

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Actually, the trial court did not permit Dr. Gollaher to give the precise opinion on direct testimony; although defense counsel argued that because on voir dire both sides had questioned jurors based on the proposition that the evidence might show a defendant would be "dangerous" if he were in free society, yet not dangerous when confined in prison, the court would not allow the witness to attach her answer to a specific environment. (RR, 27, 120-123). On cross examination, the prosecutor asked Dr. Gollaher if she understood that the jurors' decision was, "predicated on their knowledge that we are talking about society, including prison society; right?" "Yes, Ma'am." The witness

to consider and give effect to this evidence as it mitigated against the imposition of the death penalty. As illustrated in the excerpt of Mr. Current's voir dire above, the jurors were not able to give effect to this evidence in answering the special issue unless they could be certain that Applicant would remain in prison for "life without parole".

Two alternatives provided by the instructions did not allow the jury to give effect to any of Applicant's mitigating evidence from his family and friends, (RR, 27, 28-63, 100-104), or from the deputies who testified he had been a non-dangerous prisoner in the Harris County Jail. (RR, 27, 64-69). If the jurors gave effect to the mitigating evidence by finding "life" more appropriate, that would nullify their finding that Applicant was a continuing threat to free society.

answered. "And the free world; right?" "I guess-I guess if someone was early paroled or released, yes, Ma'am." Dr. Gollaher responded. "And that's what they have to figure out, both of those words, when they have to figure out what to do with this Defendant; do they not?" asked the prosecutor. (RR, 27, 132). Later the prosecutor attacked the validity of Dr. Gollaher's testimony because she would not offer an opinion on Applicant's dangerousness to free society. The witness explained that her task had been to try to give an accurate assessment of the likelihood of Applicant's being a future danger in the context of prison society; she said she had not been asked to do a free society assessment, like one she would make in the context of a probation evaluation. She said she would not be able to do such an evaluation in Applicant's situation "unless he was at the point of potentially being released on parole ..." The prosecutor replied, "But you don't know when that is going to. So, you can't just blow it off; right?" "It is not that I am blowing it off, Ma'am. It would not be accurate until and if that ever comes." The prosecutor's response supplies the very essence of the problem with the Texas special issue, and demonstrates vividly why the jurors cannot hope to answer it accurately or honestly based on the evidence, beyond a reasonable doubt:

PROSECUTOR: Okay, So, this is like a hypothetical pretend game that you are playing with the jury? Then let's pretend for a minute that he never can get paroled out there. I always want to pretend like he's always going to be in prison and he's going to get the death penalty. Is that the head game we're playing here?" ... "And you understand that if the day comes when he might be paroled out, we don't get to bring you back down here to sit in that chair to reevaluate and answer those questions again. Do you understand that?" (RR, 27, 126-147).