No. 00-6677

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY
Petitioner

v.

GARY JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION
Respondents.

RESPONDENT'S BRIEF

Filed February 15th, 2001

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTIONS PRESENTED

1. Whether Penry's mitigating evidence was within the jury's effective reach under the instructions submitted at the punishment phase of trial.

2. Whether a report from a defense-requested, court-ordered psychiatric evaluation regarding an unrelated prior offense could be used by the State to rebut psychiatric evidence introduced by Penry at both phases of the trial.

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GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF

Petitioner Johnny Paul Penry was properly re-convicted and sentenced to die for the brutal rape and murder of Pamela Carpenter. After the Court overturned the original conviction and sentence and ordered Penry retried, *see Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), Texas thoughtfully considered and faithfully followed the Court's directions. The court, the defense, and the prosecutors were all careful to ensure that the jury on the retrial properly considered Penry's mitigation evidence in assessing his sentence. The Court should affirm the Fifth Circuit's judgment because the state court decision that it reviewed was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court.

STATEMENT OF THE CASE

On the morning of Thursday, October 25, 1979, Pamela Carpenter was home alone making Halloween decorations when she heard someone knocking at the door. It was Johnny Paul Penry. Pamela did not know Penry, but he had assisted in delivering appliances to her home earlier that month. Penry, who had recently been released on parole from a 1977 rape conviction, woke up that morning and decided to "go [back] over there and get me a piece." JA 1:12-13. Penry described the crime in his confessions:

> She came to the door and opened the wooden door and pushed the screen open a little ways. I asked her if her husband was there and she said no. Then I asked her if I could see her stove and she said, "What for?" I said I was going to fix the stove and she said, "What for, it's working?" She told me, "You better get out of here." That's when I jerked the screen door open, pulled my knife out and grabbed her. I pushed her back in the kitchen. She was screaming and hollering for help, and knocked the knife out of my hand. We fought in the kitchen a little bit. I slapped her in the face about once. I got her down on the floor and she said she was dizzy. I let her up but I held onto her. I looked out the door to see if anybody was coming. I kind of turned [my] back but I still had a hold of her. She picked up some scissors that had some orange handles. They were pretty big and looked like cutting scissors.
>
> She stabbed me in the back. I wrestled with her and took the scissors away from her. Then I started dragging her into the bedroom and she told her dog to bite me. He started trying to bite me and I kicked him in the throat and he landed under the bed. I don't know what happened to the dog after that. She was laying on her back [on] the floor and I was standing up. She said she wouldn't take her clothes off. I kicked her in the left side with my boots. She said just wait she'd take her clothes off. She sat up and pulled her pants down past her knees. I unzipped my pants and started to get on her. She got away from me and got up. The scissors were on the bedroom floor. I had dropped them there. She started for them and I kicked them out of her hand. I pushed her down to the floor and started to get on her again. I told her I'd kill her if she didn't make love to me. I hit her about 2 times in the chest and she said "O.K." she would. I went on and fucked her on the bedroom floor and then after I got through I got up and walked over to the kitchen door where the scissors had landed and picked them up. I walked back to her and got down on her. I sat down on her stomach and I told her that I loved her and hated to kill her but I had to so she wouldn't squeal on me. She didn't say anything and I stabbed her with the scissors. She leaned forward and pulled the scissors out of herself as I was getting up. I then ran out the door and boogied.

JA 1:13-15.[1]

After Penry ran out of the house, Pamela managed to get to the telephone and call a close friend, Cynthia Peters. Peters received the call at about 10:00 a.m. In what Peters described as a "real shaky" voice, she heard, "This is Pam. I have been stabbed and raped. Mother is at the church. Help me and hurry." R.42:130-32. Peters came to Pamela's aid, and a police officer and emergency medical technician arrived shortly thereafter. R.42:142. Pamela described her attacker

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[1] Penry provided additional details regarding the rape and murder in his second confession. For example, Penry said that he knew before going to Pamela's house that he would have to kill her after he raped her because "she would tell who I was to the police and I didn't want to go back to the pen." JA 1:21. Penry also described how he selected the murder weapon: while he was raping Pamela, he "decided to kill her with the scissors since she stabbed me with them." JA 1:23.

as a white male, slender, and short with short black curly hair cut up over the ears. R.42:173-74. At about 10:30 a.m., Pamela arrived at the hospital, where she gave the same description of her assailant to the emergency medical technician, a nurse, and a doctor. R.42:205; R.43:262, 277. She also again stated that she had been raped. R.43:253, 262, 279. Pamela did not know her attacker's name, but she had seen him in the area. She was able to tell the medical personnel that her attacker had "used scissors" on her. R.43:262, 264, 278. Despite desperate life-saving efforts, Pamela died shortly after noon, a little more than two hours after Penry brutally attacked her. R.42:206; R.43:264. She was twenty-two years old. R.42:60.

Later that day, Penry—who fit the description of the attacker—was found with two fresh small puncture wounds close together on his back, R.42:209-210, which were consistent with being inflicted by the scissors found at the scene. R.44:515-17, 520, 643-44. Penry initially stated that his back injury occurred when he fell off of his bicycle that morning and landed on a stick. R.43:294, 324. Penry was read his warnings and stated that he understood them. Penry accompanied officers to the Carpenter residence where he remained unguarded in a patrol car with a door open. R.43:300-02. After about forty-five minutes, Penry called an officer over and stated, despite being told to be quiet, "I want to get it off my conscience, I done it." R.43:303-04, 314. Penry went inside the Carpenter residence and explained what had happened in detail, after which he was taken back to the police department and read his warnings by a justice of the peace. R.43:306, 351-52, 385. Before he could sign the warning form, Penry's father arrived and read the warnings to Penry again. R.43:353, 386. Penry then again admitted that he had raped and murdered Pamela Carpenter. R.43:357, 367. Later that day, Penry gave his first written confession. JA 1:11-16. The following day, October 26th, Penry gave a second written confession. JA 1:16-25.

An autopsy revealed that Pamela had a bruise near one eye, a bruise on her hip, and bruising on the neck that was consistent with strangling. A bruise on her chest in the shape of a shoe heel was consistent with having caused one of her kidneys to rupture and consistent with having been caused by one of the boots Penry was wearing at the time of his arrest. Finally, a stab wound to the chest, which went into the lung, was consistent with having been caused by the scissors recovered from the floor of the Carpenter's bedroom. R.44:637-41, 644-55; *see also* State's Exhibit 82 at 2073-79, 2087-92 (prior testimony of pathologist, deceased); R.42:197; R.43:253, 255-56, 277-78, 409.

Penry was indicted for capital murder on November 7, 1979. Tr 1:1. Following a competency hearing, Penry was tried and convicted of capital murder and sentenced to death on April 2, 1980. Nine years later, this Court granted habeas relief, holding that the three statutory special issues submitted to the jury at the punishment phase of trial, standing alone, precluded consideration of the mitigating effect of Penry's evidence of mental retardation and an abusive background. *Penry v. Lynaugh*, 492 U.S. 302 (1989). On remand, the federal district court entered an order on August 21, 1989, giving the State ninety (90) days to commute Penry's sentence or commence trial proceedings. Tr 1:32. Penry was appointed counsel within the district court's deadline; then Penry moved for, and was granted, additional time to prepare for trial. Tr 1:33-37. Various hearings on pre-trial matters were held in the ensuing months. A competency trial was held, and the jury found Penry competent to stand trial on May 16, 1990. Tr 1:100-01; JA 1:8.

The trial court then selected a separate set of jurors for the case-in-chief. Prior to the beginning of the initial group voir dire, Penry withdrew his previously filed notice of intent to raise an insanity defense. R.15:2. In an effort to comply with *Penry I*, the prosecutor informed venire members that, if

selected as jurors, they would be directed to take mitigating evidence into consideration in imposing punishment and discussed how to apply the punishment-phase instructions to give effect to that evidence in determining punishment. Thereafter, during individual voir dire examination, a copy of the mitigating-evidence instruction, which would ultimately be submitted at the punishment phase, *see* footnote 3, *infra*, was exhibited to venire members. The trial court, the prosecutor, and defense counsel explained to venire members the concept of mitigating evidence, the instruction, and how to apply the instruction in determining punishment.

The guilt-innocence phase of trial began on July 2nd. Tr 1:103. The entirety of Penry's first written confession and a portion of Penry's second written confession were admitted into evidence. R.43:399-407, R.44:569-78. Penry questioned the law enforcement officer who took his first confession regarding, *inter alia*, Penry's mental status, including whether the officer believed that Penry was mentally retarded; any special training the officer had received in dealing with mentally retarded people; the officer's knowledge of the facts contained in the confession prior to the interview; the form of explanations given to Penry regarding the warnings; and the form of questioning utilized. R.43:419-33. Penry questioned the law enforcement officer who took his second confession in a similar manner, including the officer's belief whether Penry was mentally "slow"; the form of explanations given to Penry regarding the warnings; and the form of questioning utilized. R.44:588-600. Penry questioned other law enforcement officers who had interactions with him around the time of the confessions on these same or similar topics. R.43:309-14, 361-66. Penry also questioned civilian individuals who had witnessed the confessions regarding Penry's behavior, verbal and otherwise, in their presence. R.43:449-50; R.44:611. The defense presented documentary evidence from Penry's youth tending to indicate: full scale IQ scores of between 51 and 60; an eagerness to please when taking the IQ

tests; brain damage and a moderate to severe perceptual-motor problem; and prior diagnoses of mental retardation. R.45:676-92. The State presented rebuttal evidence regarding Penry's mental status through the testimony of a psychiatrist, Dr. Fred Fason. R.46:786-813, 824-30.

The jury charge included instructions on capital murder, the lesser offense of murder, and the voluntariness of the confessions. JA 1:28-33. In closing argument, the State argued that Penry possessed the capacity to understand and waive his rights; Penry's confessions were voluntarily given and consistent with the evidence (including facts not known by law enforcement at the time of the interviews); Penry was not mentally retarded; and Penry possessed the capacity to act intentionally. R.46:856-77, 905-16. The defense argued that Penry's confessions were unreliable and should not be believed because: Penry is mentally retarded; Penry is easily led by and has a desire to please authority figures; the law enforcement officers knew all the details at the time of the interviews; and no direct forensic evidence linked Penry to the victim or the victim to Penry. R.46:882-901. The defense further argued that Penry did not possess the capacity to act intentionally because he is mentally retarded. R.46:898. On July 9th, the jury found Penry guilty of capital murder after deliberating for approximately two hours and thirty minutes. JA 1:1; Tr 1:103.

The punishment phase of trial began two days later, July 11th. Evidence of Penry's violent history, in and out of prison, was presented. Lay and expert witnesses discussed Penry's mental status and capabilities. Lay and expert opinions were offered on Penry's prospects for future violence. Lay witnesses described a history of childhood abuse, while expert witnesses offered their opinions regarding what effect this had on Penry. Records documenting Penry's mental status and capabilities, from a variety of sources, were presented. *See* JA 4:878-80.

The trial judge submitted to the jury the three special issues dictated by statute as well as a supplemental instruction directing the jury to consider mitigating evidence. JA 3:674-78. The State's opening and rebuttal argument spanned the record, discussing Penry's criminal history, behavior in prison, mental status, childhood abuse, and personal culpability. JA 3:595-617, 653-68. The overwhelming majority of defense summation focused on those latter three topics. JA 3:622-40, 649-51; *see also* JA 3:643-44 (discussing evidence of mental retardation in relation to deliberateness question). On July 17th, after deliberating for approximately three hours and forty minutes, the jury returned its punishment verdict. Tr1:104; *but see* R.51:1948, 1950 (indicating punishment deliberations lasting two hours and forty minutes). In accordance with state law, the trial court assessed punishment at death.

The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on February 22, 1995, rejecting claims that the punishment-phase instructions failed to cure the deficiency found by this Court in *Penry I* and that Penry's Fifth Amendment rights were violated by the admission of a 1977 psychiatric report (the Peebles report) at the punishment phase of trial. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995); JA 1:2; JA 3:767-68, 780-82. On November 13, 1995, this Court denied Penry's petition for certiorari raising those same two claims. *Penry v. Texas*, 516 U.S. 977 (1995). When Penry raised his claim of punishment-phase instruction error on state habeas review, the Court of Criminal Appeals deferred to its finding on direct appeal. JA 4:841, 863. On federal habeas review, the lower federal courts found that the state court's decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court. JA 4:886-93, 912-14, 919-20, 1025-36, 1040-44, 1047-49, 1061-62. This Court granted certiorari review of these two claims on November 27, 2000. *Penry v. Johnson*, 121 S. Ct. 563 (2000); JA 4:1063.

SUMMARY OF THE ARGUMENT

This case is not before the Court in the same posture as *Penry I*. Although bound by the special issues mandated by state statute, the trial court provided the jury with a supplemental instruction that clearly directed them to consider mitigating evidence and to give Penry a life sentence if they found that the evidence sufficiently lessened his moral culpability, regardless of the statutory special issues. The instruction was explained to the prospective jurors, collectively and individually, during voir dire, and defense counsel's closing remarks reminded the jurors in very simple terms how to apply the supplemental instruction. The jury was not instructed to disregard the law, the instructions, their oath, or the evidence. For these reasons, the lower court properly deferred to the state court's decision because the decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court.

Penry's Fifth Amendment rights were not violated by the admission of the Peebles report at the punishment phase of trial after Penry injected mental health issues at both phases of trial. The Peebles report was the result of a psychiatric evaluation conducted more than two years before Penry murdered Pamela Carpenter at the request of Penry's own lawyer regarding an unrelated, non-capital charge. The report was admitted into evidence at the punishment phase of trial during cross-examination of Penry's expert witness on mental health issues after that witness testified that he had relied on the report in forming the opinions he had proffered to the jury on direct examination. The report was also proper rebuttal evidence to demonstrate that his IQ test results were not an accurate indicator of his mental abilities and that his violent behavior was attributable more to his anti-social personality than to his abusive background and alleged mental retardation. Finally, given that the sole "defense-damaging"

portion of the report was cumulative to the opinions of a number of witnesses, including Penry's own expert witness, error, if any, was harmless.

ARGUMENT

This case is before the Court on federal habeas review, and Penry agrees that the deferential standard of review under 28 U.S.C. § 2254(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), guides this Court's review of the questions presented. Pet. Br. at 11; *see also (Michael) Williams v. Taylor*, 529 U.S. 420, 429 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case."). Under the amended provisions of Section 2254(d), a state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). Section 2254(d)(1) provides the standard of review for questions of law and mixed questions of law and fact. *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The Court's decision in *(Terry) Williams* makes clear that a federal court's discretion to grant a writ of habeas corpus is limited and the court may only issue a writ if the state court's decision was "contrary to" or "involved an unreasonable application of" established federal law. 529 U.S., at 412-13.

Under the "unreasonable application" clause, the Court may grant the writ if the state court identifies the correct governing legal principle but applies it incorrectly, or extends or refuses to extend a legal principle to an area outside the scope intended by this Court. *Id.*, at 408, 413. Furthermore, the state court's application of the law must be "unreasonable" in addition to being merely "incorrect." *Id.*, at 411. The Court explained, "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.*, at 409.

Under the "contrary to" clause of section 2254(d)(1), a federal court may grant the writ if the state court has arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Id.*, at 412-13. With these principles in mind, the lower court's decision must, in all things, be affirmed.

I. THE STATE COURT'S DETERMINATION THAT THE PUNISHMENT PHASE INSTRUCTIONS DID NOT PRECLUDE CONSIDERATION OF CONSTITUTIONALLY RELEVANT MITIGATING EVIDENCE IS ENTITLED TO DEFERENCE.

The trial court did not ignore the Court's directive in *Penry I*, this case is not before the Court in the identical posture as *Penry I*, and the jury was not instructed to disregard the law, the instructions, their oath, or the evidence. The trial court listened carefully to this Court's directive and created a reasonable, workable solution to the unique circumstances presented in this case, circumstances that the Court most likely will never confront in any other case.

Following the Court's reversal of Penry's first death sentence, the federal district court entered an order on

August 21, 1989, giving the State ninety (90) days in which to commute Penry's sentence or commence trial proceedings. Tr 1:32. That order put the State in a difficult position. Although the State intended to amend the statutory scheme to create a separate special issue on mitigation, the order on remand required the State to retry Penry before the legislature had an opportunity to amend the statute. Although Penry explicitly waived any right of enforcement he may have possessed in relation to the district court's order in a request to postpone commencement of retrial proceedings, Penry explicitly reserved his "right to have a speedy trial." Tr 1:35. Balancing its obligation to follow state statutory procedures, this Court's holding in *Penry I*, and the district court's order, as well as Penry's veiled threat of raising a speedy trial violation, the trial court submitted a supplemental instruction to the jury regarding mitigating evidence. The instruction clearly directed the jury to consider mitigating evidence and to give Penry a life sentence if it found that the evidence sufficiently lessened his moral culpability, regardless of the statutory special issues.[2] The instruction was explained to the

[2] At the time of the district court's order, the Texas Legislature was not in session and the next regular session did not convene until January 8, 1991. *See* TEX. GOV'T CODE ANN. §301.001 (Vernon Supp. 1991) ("The legislature shall convene in regular session at 12 noon on the second Tuesday in January of each odd-numbered year."). Subsequently, in 1991, the legislature amended the capital sentencing statute to include a separate special issue on mitigation. The bill creating that amendment, Senate Bill No. 880, was introduced on March 11, 1991. S.J. OF TEX., 72nd Leg., R.S. 373 (1991). After its eventual passage, the amendment did not become effective until September 1, 1991, and expressly applied solely to offenses committed on or after its effective date. TEX. CRIM. PROC. CODE ANN. art. 37.071 §2(e) (Vernon Supp. 1992); *see Lagrone v. State*, 942 S.W.2d 602, 606 n.2 (Tex. Crim. App. 1997). It was not until 1993 when the legislature provided that the separate special issue on mitigation would be applied to offenses committed prior to September 1, 1991. TEX. CRIM. PROC. CODE ANN. art. 37.0711 §§1, 3(e) (Vernon Supp. 1994); *Lagrone*, 942 S.W.2d, at 606 n.2. Regardless of the subsequent statutory changes, Penry's jury was fully able to consider his

prospective jurors, collectively and individually, during voir dire, and defense counsel's closing remarks reminded the jurors in very simple terms how to apply the supplemental instruction. The lower federal courts properly deferred to the state court's decision because the decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court. JA 3:780-82; JA 4:886-93, 1025-36, 1040-44.

A. The Court's holding in *Penry I*.

At his first trial, Penry presented evidence of childhood abuse and mental retardation in mitigation of a death sentence. In invalidating Penry's first death sentence, the Court found that the Texas special issues, standing alone, precluded consideration of the mitigating effect of Penry's evidence of mental retardation and abusive background in assessing punishment:

> The jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence.
>
> * * * *
>
> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

Penry I, 492 U.S., at 320, 322, 328. Subsequently, the Court noted that the defect identified in *Penry I* was that the jury

mitigating evidence at his second trial. That the legislature later enacted a different mechanism to consider mitigating evidence does not suggest that the trial court's supplemental instruction was ineffective.

was prevented "from giving *any* mitigating effect to the evidence" at issue. *Saffle v. Parks*, 494 U.S. 484, 491 (1989) (emphasis added).

B. There is no reasonable likelihood that Penry's jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence.

In order to be entitled to relief on this claim, Penry must demonstrate a "reasonable likelihood" that the jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (citing *Boyde v. California*, 494 U.S. 370, 380 (1990)); *see also* Pet. Br. at 12-13. The requirements of the Eighth Amendment are satisfied if the mitigating value of the evidence, as actually proffered at trial, is within the "effective reach" of the jury in responding to the punishment issues and instructions. *Johnson*, 509 U.S., at 368; *Graham v. Collins*, 506 U.S. 461, 475 (1993). "In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson*, 509 U.S., at 368 (quoting *Boyde*, 494 U.S., at 381).

1. The charge clearly instructed jurors to consider Penry's personal moral culpability and to impose a life sentence, if warranted.

Penry's death sentence was based upon the jury's affirmative responses to the following three statutory punishment phase issues:

> (1) Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> (3) Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

JA 3:676-77. To make certain it cured the deficiency recognized by this Court's holding in *Penry I*—that the special issues, standing alone, were insufficient to provide a vehicle for consideration of the mitigating effect of Penry's evidence of mental retardation and abusive background, *Penry I*, 492 U.S., at 328—the trial court gave the following supplemental instructions:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that *your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant*, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, *you are to consider*

> *mitigating circumstances*, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. *If you determine, when giving mitigating effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.*

JA 3:674-75 (emphasis added).

Contrary to Penry's assertions, the instructions given in this case did not impermissibly limit the jury's ability to consider and give effect to his mitigating evidence. The trial judge specifically instructed the jury to consider Penry's personal moral culpability and then told the jury how to impose a life sentence, if warranted. The trial court told the jury to simply answer one of the special issues "no" if it believed that mitigating circumstances made a life sentence an appropriate response to Penry's personal culpability. Further, the instruction did not specifically require mitigating evidence to fall under the literal language of the special issues, although much of Penry's mitigating evidence was relevant to the deliberateness prong of the first question. In any event, the instructions informed the jury how to give effect to mitigating evidence and impose a life sentence regardless of its initial answers to the questions. While the "as reflected by a negative finding" phrase in the final

sentence was less than artful, the instruction as a whole adequately informed the jury how to impose a life sentence, if warranted.

There is no reasonable likelihood that the jury felt that it could not do that which the instructions specifically required. For the jury to believe that it could not give effect to mitigating evidence in the manner dictated by the charge would have rendered meaningless both the extensive mitigation instruction itself and the mitigating evidence that required it. *See Boyde*, 494 U.S., at 383 (finding jurors unlikely to construe instructions so as to transform defendant's presentation of "favorable testimony into a virtual charade") (citation omitted). The Court's core concern in *Penry I*, that "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence," *Penry I*, 492 U.S., at 320, was satisfied in this case.

2. Any ambiguity in the charge itself was clarified by statements of the trial court judge, the prosecutors, and defense counsel.

Even if the language of the charge, standing alone, was ambiguous, when viewed "with a commonsense understanding of the instructions in the light of all that has taken place at the trial," *Johnson*, 509 U.S., at 368 (internal quotes and citation omitted), it is clear that Penry's jury could not have felt precluded from giving mitigating effect to his evidence. Contrary to Penry's assertions that it was solely defense counsel who explained to the jurors how to apply the supplemental instruction, Pet. Br. at 20-21, the conduct of all the participants throughout the proceedings supports the conclusion that Penry's mitigating evidence was within the jury's effective reach.

During the initial group jury voir dire, the prosecutor specifically told the venire that jurors would be instructed to take mitigating evidence into consideration and:

> . . . if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death . . . then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

JA 1:9-10. The prosecutor followed up on this explanation during individual voir dire. For example, during the individual voir dire of William Franz, the first venire member ultimately selected to serve on the jury, the following exchanges occurred during the prosecutor's questioning:

> Q: . . . Now, this [supplemental] instruction . . . is almost like a fourth issue in that you will hear this other evidence that comes in about the defendant, and you will take that into consideration when you are answering these three [special issues], but you can also take that evidence independently, even if you felt like the answers to these three questions was yes, if you felt like there was something in the defendant's background that the death penalty would not be appropriate, pick them all out, or pick one of them out and answer no. Do you feel like you can do that?
>
> A: Yes.
>
> * * * *
>
> Q: Now, if you are on this jury, and you look at the evidence like I have talked about on these three issues here, you look back at the facts of the crime and you believe that should be answered yes, and you look to the second one, you look at the facts and the defendant's background, you think that should be yes, and you look at, again, the facts of the case and you believe number three should be yes, but if then you look at the mitigating evidence and you felt like that because of this mitigating evidence that the death penalty wouldn't be appropriate, if you felt like that indeed somehow the defendant's blame to this offense was reduced, could you then answer one of these issues no and in effect give the defendant a life sentence?
>
> A: Yes, I could.
>
> Q: Because that is what you would be sworn to do, and if you felt that way, you would be sworn to do that, and I just want to make sure that you can.
>
> A: Yes.
>
> Q: The other side of the coin is if you answered these three issues yes, and if you looked at this instruction and you weighed that mitigating evidence, if you decided in your mind that this mitigating evidence did not lessen the blame or did not lessen it to the extent that the death penalty would be inappropriate, if you just didn't think the mitigating evidence was strong enough, could you still answer these three issues yes, and in fact give the defendant a death sentence?
>
> A: Yes, sir, I do.

R18:854-55, 866-67. The voir dire questioning of the remaining venire members ultimately selected to decide this case, *see* Tr 3:774 (list of jurors chosen), reflects similar comments from the prosecutor *and* the trial court regarding the supplemental instruction. In each case, the supplemental instruction was exhibited and explained to the venire member, and any confusion arising from a venire member's initial exposure to the instruction was addressed until resolved. R.18:966-67, 980-81, 990 (Lloyd Davis); R.20:1287-88, 1315, 1318, 1321-22 (Gary McClure); R.22:1764-65, 1787, 1790-92 (David Moreno); R.23:2004, 2025-26, 2036-37 (Forest Marler); R.23:2144-45, 2168, 2171 (Mary Yarbrough); R.26:2751-52, 2776-77 (Machere

Gillaspie); R.27:2901-02, 2930-31, 2942-43 (Thomas Roberts); R.28:3330-31, 3359-62 (Earl Fountain); R.32:4466-67, 4481-86, 4488 (Diane Wood); R.34:344-45, 359-60 (Douglas Massey); R.35:751-52, 768-69, 774 (Mark McElligott); *see also* defense counsel questioning at R.18:1018; R.20:1397; R.23:2224; R.26:2800, 2841; R.27:2947, 2952-53, 2955, 3012-13; R.28:3386-87; R.32:4556-58, 4562; R.34:418.[3]

During closing arguments, at no time did the prosecutors argue that the jury could not or should not vote "no" on a special issue unless Penry's evidence was directly relevant, in a mitigating fashion, to one of the three special issues. To the contrary, when prosecutors discussed mitigating evidence during punishment phase summations, they focused on the fact that Penry's violence was not attributable to alleged mental retardation and childhood abuse and, therefore, his blameworthiness and culpability were not reduced.[4] *See, e.g.*, JA 3:611-17, 664-67.

Consistent with the remarks of the trial court and the prosecutor during voir dire, defense counsel's closing remarks reminded the jurors in very simple terms how to

[3] The supplemental instruction ultimately given was identical to the sample supplemental instruction exhibited during voir dire with the exception that the voir dire exhibit concluded with "a negative finding should be given to that special issue under consideration" as opposed to "a negative finding should be given to one of the special issues." *See* JA3:723-24. At trial, Penry called the change a "slight improvement to the Charge." R.50:1812.

[4] Penry's claim of mental retardation was vigorously disputed by the State at trial. Penry's claim of childhood abuse was not as vigorously disputed. For example, during closing arguments, while the prosecutors did not dispute that Penry had been abused and had suffered a "bad childhood," they asked the jury to consider whether testimony regarding the extent of the alleged abuse was credible. JA 3:604-08, 610-11, 615, 661-64.

apply the supplemental instruction in determining the appropriate punishment:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you['ve] got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all this time with you to make sure you understand what it says.
>
> If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

JA 3:640.

This case does not present facts "materially indistinguishable" from *Penry I*, and the state court's decision that Penry's jury possessed an adequate vehicle for consideration of mitigating evidence was not objectively unreasonable. All the parties were operating on the same permissible understanding of the mitigation instruction, and the instruction specifically directed the jury to answer any special issue "no" if it believed mitigating evidence called for a life sentence. There simply is no reasonable probability that the jury misinterpreted the instruction to preclude consideration of constitutionally relevant mitigating evidence.

C. The charge was not an unconstitutional "nullification" instruction.

Penry erroneously argues that the supplemental instruction was an unconstitutional "nullification" instruction under *Roberts v. Louisiana*, 428 U.S. 325 (1976). In *Roberts*, the Court declared unconstitutional Louisiana's mandatory death

sentence statute because it failed to comply with the requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. *Roberts*, 428 U.S., at 334. Under the Louisiana system, once a jury found a defendant guilty of first-degree murder, the defendant would be automatically sentenced to death; however, the jury in every first-degree murder case was instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there was not a scintilla of evidence to support the lesser verdicts. *Id.* At the same time, however, the jury was instructed "to return a guilty verdict for the offense charged if warranted by the evidence and to consider lesser verdicts only if the evidence does not justify a conviction on the greater offense." *Id.*, at 334 n.10. The Court found that there was "an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions." *Roberts*, 428 U.S., at 335.

Unlike *Roberts*, the jurors in this case were neither instructed nor invited to disregard the law, the instructions, their oath, or the evidence; instead, the jury was instructed how to obey the law (as decided by this Court and set forth by the trial judge) by imposing a life sentence ("reflected by a negative finding") if the jury found that it was appropriate. *See* JA 4:1044 ("The jury was not told to disregard the law; rather, it was instructed on how to obey the law, as explained by the Supreme Court in *Penry I*.").[5]

[5] Penry misquotes *Roberts* in an attempt to stretch that case to his argument regarding nullification. *See* Pet. Br. at 22 (substituting "the law" for "the trial court's instructions" in the above quoted sentence). Regardless, even with Penry's misrepresentation, *Roberts* is irrelevant because the jury in the instant case was neither instructed nor invited to disregard the law, the instructions, their oath, or the evidence.

Further, *Roberts* is entirely irrelevant in light of the material differences between the capital sentencing at issue in *Roberts* and the Texas scheme. While *Roberts* involved a mandatory capital sentencing statute, Penry's trial was bifurcated into separate guilt-innocence and punishment phases.

> Elimination of the mandatory-sentencing procedure also eliminates the problem of the possibility of jury nullification which has been known to arise under mandatory schemes. If a jury does not believe that a defendant merits the death sentence and it knows that such a sentence will automatically result if it convicts the defendant of the murder charge, the jury may disregard its instructions in determining guilt and render a verdict of acquittal or of guilty of only a lesser included offense. . . . The guided-discretion statutes that we have upheld . . . provide for bifurcated trials in capital cases to avoid nullification problems. Bifurcating the trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other.

Sumner v. Shuman, 483 U.S. 66, 85 n.13 (1987) (citation omitted); *see also Graham v. Collins*, 506 U.S., at 486 (Thomas, J., concurring) (Mandatory death statutes like those in *Roberts* were invalidated for three reasons, one being that "experience had suggested that such statutes 'simply papered over the problem of unguided and unbridled jury discretion' by provoking arbitrary jury nullification") (citation omitted).

Because Penry's trial was bifurcated, and because the jury was able to exercise guided discretion at the punishment phase, it was empowered to effectively assess a life sentence without resort to nullification of the law as defined by this Court's jurisprudence. Thus, the concerns of *Roberts* are not present.

For all of the above reasons, the lower courts' rejection of Penry's claim concerning the punishment phase jury instructions was entirely correct under the AEDPA standard of review. This case does not present facts "materially indistinguishable" from this Court's precedent. And, even assuming *arguendo* that the underlying state court decision was erroneous, it certainly was not objectively unreasonable.

II. THE STATE COURT'S DETERMINATION THAT PENRY FAILED TO DEMONSTRATE A FIFTH AMENDMENT VIOLATION IS ENTITLED TO DEFERENCE.

Just as a criminal defendant possesses a right to a fair trial, so too does the State. A criminal defendant does not possess a constitutional right to offer mental health evidence at both phases of a bifurcated trial while prohibiting the State from offering rebuttal evidence on the same topic. Creating such a windfall for a criminal defendant would be a drastic departure from this Court's existing jurisprudence and would serve no purpose other than to encourage manipulation of the truth-seeking function of the adversarial process. The lower federal courts properly deferred to the state court's decision rejecting Penry's Fifth Amendment claim because the decision was objectively reasonable and not contrary to this Court's clearly established precedent. JA 3:767-68; JA 4:1047-49, 1061-62.

A. Penry's case does not implicate the Fifth Amendment concerns of *Estelle v. Smith.*

In *Estelle v. Smith*, 451 U.S. 454 (1981), a capital murder defendant was subjected to a court-ordered psychiatric examination to determine his competency to stand trial for capital murder. It was disputed whether Smith's counsel received prior notice that the examination was to take place,[6]

[6] Subsequent to the examination, the psychiatrist submitted a letter to the trial court opining that Smith was competent to stand trial and Smith was "a severe sociopath," but containing no specific reference to his future dangerousness. *Estelle v. Smith*, 451 U.S., at 457-59. "Defense counsel discovered the letter at some time after jury selection began." *Id.*, at 459 n. 5.

but it was not disputed that the defense did not request the examination and did not place Smith's mental status at issue in pretrial pleadings or at trial. 451 U.S., at 457 n.1, 458 n.5. At the punishment phase of trial, the State presented no witnesses in its case-in-chief, while Smith called three witnesses—his stepmother, his aunt, and the man who owned the gun that Smith possessed during the commission of the offense—none of whom testified regarding his mental status. *Id.*, at 458. In rebuttal, the psychiatrist, who examined Smith pursuant to the trial court's order, and who was not listed on the State's witness list, was permitted to testify on behalf of the State concerning Smith's future dangerousness.[7] *Id.*, at 459. The Court held that such testimony violated Smith's Fifth Amendment privilege against self-incrimination:

> 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.

Id., at 468. The Court also recognized that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." *Id.*, at 472.

This case is distinguishable from *Estelle v. Smith* on numerous levels: Penry requested the examination in

[7] The psychiatrist testified to Smith's jury that: Smith was "a very severe sociopath"; Smith would "continue his previous behavior"; Smith's sociopathy would "only get worse"; Smith had no regard for human life; no treatment was possible; Smith would "commit other similar or same criminal acts if given the opportunity"; and Smith felt "no remorse or sorrow for what he has done." *Id.*, at 459-60. This is a far cry from Dr. Peebles's single sentence that if Penry "were released from custody [] he would be dangerous to other persons." *See* JA 1:60; Pet. Br. at 6, 35.

question; Penry was not charged with capital murder at the time of the examination, and in fact had yet to commit capital murder; the Peebles report could not have been based, obviously, on any testimonial statements regarding the murder; Penry placed his mental status at issue throughout both phases of trial; and the Peebles report was admitted into evidence during cross-examination of Penry's own mental health expert after that witness testified that he relied on the report in forming the defense-favorable opinions he proffered to Penry's jury.[8] JA 1:114, 125, 141-43, 172, 210; JA 2:326-27, 345-46; R.45:678-692; R.46:882-901. Given the stark contrast between the record in this case and that presented in *Estelle v. Smith*, the state court's holdings—that *Estelle v. Smith* was inapplicable to the instant case, and that the Fifth Amendment was not implicated because Penry made his statements "two years prior to the offense at issue here and thirteen years prior to [his] capital murder trial"—were neither unreasonable nor contrary to this Court's precedent. JA 3:767-68, JA 4:1048-49; *see also Estelle v. Smith*, 451 U.S., at 466 (limiting the Court's holding to the "distinct circumstances" of Smith's case). Finally, the state court reasonably declined to extend *Estelle v. Smith* to the facts of Penry's case.[9]

[8] Unlike *Estelle v. Smith*, Penry's attorneys were certainly aware of Dr. Peebles's reference to "future dangerousness" well prior to trial.

[9] If the rule in *Estelle v. Smith* extends to the facts of Penry's case, where the examination was conducted at the request of defense counsel pursuant to an unrelated prior rape charge, then one may question whether the results of *any* previous court-ordered examination would be admissible at a later trial, even if such a use was unforeseeable at the time of the examination. For example, would *Estelle v. Smith* bar the results of a court-ordered examination related to a civil commitment proceeding at a subsequent, unrelated criminal trial that could not have been contemplated at the time of the original examination? Moreover, if *Estelle v. Smith* applied to such a case, what type of warnings would prevent a Fifth Amendment violation from arising in connection with that examination?

B. Alternatively, even if Penry's case implicates the Fifth Amendment, the *Buchanan* exception applies.

In any event, Penry's situation is more analogous to *Buchanan v. Kentucky*, 483 U.S. 402 (1987), where the Court explained one of the "different situation[s]" mentioned in *Estelle v. Smith*. In *Buchanan*, the Court held:

> if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan, 483 U.S., at 422-23. The Court reasoned, "with petitioner not taking the stand, the [State] could not respond to this defense unless it presented other psychological evidence." *Id.*, at 423. Thus, just as a defendant who takes the witness stand waives his Fifth Amendment privilege and may be impeached with prior, unwarned statements,[10] a defendant who uses psychiatric evidence at trial waives his right to exclude other, admissible psychiatric evidence.[11]

[10] *See, e.g., Harris v. New York*, 401 U.S. 222, 225-26 (1971).

[11] Given the instant record, Penry's focus on a "State agency" theory, isolated from the other factors in the record, is entirely myopic. First, Penry cites only pre-*Buchanan* authority to support his "State agency" theory, with the exception of a 1994 district court opinion, but not one of these decisions turned on Penry's illusory agency premise. *See Battie v. Estelle*, 655 F.2d 692, 702 (CA5 1981) (holding that "a defendant can invoke the protection of the [*Estelle v. Smith*] privilege *when he does not introduce mental health expert testimony*" (emphasis added)); *Hargrave v. Wainwright*, 804 F.2d 1182, 1191 (CA11 1986) (holding that "there is no constitutional error when the State introduces psychiatric or psychological evidence during the penalty stage of a bifurcated trial to counter other psychiatric or psychological evidence the defendant has announced he

It is, of course, undisputed that Penry presented psychological evidence at both phases of trial. Primarily, the Peebles report rebutted Penry's mitigation arguments during the punishment phase. In response to the defense evidence that Penry was truly as mentally retarded as his test scores indicated, the report supported the testimony of the State's rebuttal experts that Penry was actually malingering regarding his mental abilities. *See* JA 3:550, 552 (testifying that Penry would use mental retardation as an excuse for his behavior); *see also* JA 2:478 (testifying that the presence of an anti-social personality disorder is a factor in the analysis of whether someone is malingering).

Additionally, using anecdotal evidence and the expert testimony of Dr. Price, a clinical and neuro-psychologist who based his opinions in part on an eleven-hour examination of Penry, the defense sought to persuade the jury that Penry's violence was attributable to childhood abuse and mental retardation or brain impairment. For example, Dr. Price testified that "brain impairment of this type, causes the person problems in areas such as . . . impulse control, . . . tolerance, it decreases that. It affects their judgment and their ability to reason." JA 2:279-84. In rebuttal, the State presented evidence, including the Peebles report and expert testimony, that Penry's violence was attributable to his anti-social personality rather than to childhood abuse and mental

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will proffer"); *Tuggle v. Thompson*, 854 F.Supp. 1229, 1242 (W.D. Va. 1994) (holding that defendant does not waive Fifth Amendment when he does not present his own psychiatric testimony). Second, post-*Buchanan* circuit precedent also rejects Penry's agency theory. *See, e.g., Schneider v. Lynaugh*, 835 F.2d 570, 575-76 & nn.17, 24 (CA5 1988); *Giarratano v. Procunier*, 891 F.2d 483, 488 (CA4 1989); *Pawlyk v. Wood*, ___ F.3d ___, 2001 WL 46575 at *6 (CA9 January 19, 2001). Finally, the Fifth Circuit recognized as much in its opinion on Penry's petition for rehearing, explaining that *Buchanan* abrogated the agency considerations of *Estelle v. Smith* when a defendant requests an examination or presents psychiatric evidence at trial. JA 4:1061-62.

retardation, if any. The prosecutor made this point in his cross-examination of Dr. Price:

> Q: [Y]ou are telling this jury that he is mentally retarded . . . and that, that could be a contributing cause to the criminal acts, is that right?
> A: In so many words.
> Q: Is that what you told this jury on direct examination?
> A: That, it influences that he has engaged in criminal activities?
> Q: Psycho-path also, does the same thing, doesn't it, Doctor?
> A: Certainly.

JA 2:303. Dr. Price summarized his opinion by testifying that Penry "looks more like people with brain damage that I have seen than those with anti-social personality." JA 2:322. He added, "I think in this particular case, that the extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry." JA 2:414. The State's rebuttal experts, however, testified that Penry's violence was more attributable to his anti-social personality than to any mental retardation. *See, e.g.*, JA 2:461, 482-85 (testifying that incidents of violence are not higher among the mentally retarded); JA 3:554 (testifying that "Penry was a person who really, simply made a series of choices over time not to live within the . . . norm [*sic*] and standards of society," and that this was consistent with an anti-social personality disorder but probably inconsistent with mental retardation).

The Peebles report was also relevant to rebut portions of Penry's mental health records submitted by the defense at the guilt-innocence phase of his trial. R.45:674-77. Those selected by Penry reflected his low scores on intelligence tests as well as the examiners' impressions that Penry was doing his best and trying to please. R.45:678-92. This

evidence, if credited, supported the defensive theories that Penry lacked the mental capacity to knowingly and intelligently waive his *Miranda*[12] rights, that Penry falsely confessed in order to please the authority figures represented by law enforcement officers, and that Penry was incapable of acting with criminal intent. *See* R.46:893-99 (urging these theories during guilt-innocence phase summation); *see also* JA 3:643-44 (arguing in punishment-phase summation that Penry's admission in his confession that he knew beforehand that he was going to have to kill the victim was false because mentally retarded people such as Penry want to appear smart and do not want to admit they have acted rashly).

The Peebles report, admitted at the punishment phase, additionally reinforced the testimony of State's witness Dr. Fason on rebuttal at the guilt-innocence phase that, despite Penry's below normal scores on intelligence tests, Penry's intellect and adaptive skills rendered him capable of understanding and waiving his *Miranda* rights, and capable of correctly relating the facts set forth in his confessions. R.46:766-68, 787-88. It further supported Dr. Fason's testimony that Penry had an anti-social personality, a factor which Dr. Fason testified could explain Penry's low scores on intelligence tests and also indicated that Penry was unlikely to falsely confess due to a desire to please authority figures. R.46:766, 790-91, 796-805.

Given the record in this case, Penry erroneously attempts to distinguish his case from *Buchanan* by arguing that the only mental status issue he raised was the issue of mental retardation and that he did not present evidence that he was *not* dangerous. This Court did not premise the *Buchanan* exception on any specific mention of future dangerousness by the defense expert; indeed, to do so would have led to confusion and subterfuge as expert witnesses learned to avoid

[12] *Miranda v. Arizona*, 384 U.S. 436 (1966).

using such specific terms. What Penry's argument ignores is that one of the issues raised by Penry before the jury at the punishment phase was to *what* factors Penry's violence was attributable. The report was proper rebuttal evidence on that topic, as well as the others noted above. In light of the many issues raised by the defense to which the report was proper rebuttal, and considering that the facts of Penry's case are materially indistinguishable from *Buchanan*, the state court's conclusion that no Fifth Amendment violation occurred was not contrary to, or an objectively unreasonable application of, clearly established Supreme Court precedent.

C. The admission of the Peebles report, even if it was error, did not have a substantial and injurious effect on the punishment verdict.

Fifth Amendment violations are subject to harmless error analysis. *Chapman v. California*, 386 U.S. 18, 22 (1967); *Brecht v. Abrahamson*, 507 U.S. 619, 622-23 (1993); *see also Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (applying harmless error analysis to Sixth Amendment violation under *Estelle v. Smith*). On federal habeas review, the inquiry is whether the error had a "substantial and injurious" effect on the verdict. *Brecht*, 507 U.S., at 637.

Penry asserts that the defense-damaging portion of the Peebles report is "its devastating statement about Penry's dangerousness." Pet. Br. at 36. That statement, *i.e.*, "if Johnnie [*sic*] Paul Penry were *released from custody* [] he would be dangerous to other persons," JA1:60 (emphasis added), was hardly a surprising proposition given Penry's criminal history, including the facts of the instant offense. Regardless, Penry's own expert, Dr. Price, opined that if Penry "was *in the free world,* I would consider him dangerous." JA 2:392 (emphasis added). It is difficult to believe that the Peebles report had any significant impact on the jury's verdict in this case where Penry's own expert testified to the exact same conclusion. Further, the jury heard

the testimony of four prison guards and the State's rebuttal expert witnesses that they believed Penry would be a future danger, and the jury read for themselves the inculpatory and remorseless statements in Penry's confessions. JA 1:11-25, 81-83, 92-94, 103-04, 136-38; JA 2:487; JA 3:557; R.47:970.

Finally, the offending statement is, at least in part, irrelevant to the verdict. The jury in this case was asked to determine whether there was "a probability that . . . Penry would commit criminal acts of violence that would constitute a continuing threat to society." JA 3:677. Because the jury was also instructed that life imprisonment was the only alternative to a death sentence, JA 3:672, a critical inquiry for the jury was whether Penry would be dangerous while incarcerated. *See also* JA 3:622 (defense arguing for "no" answer to future dangerousness special issue because "Johnny Paul Penry, in prison will not be a dangerous man, not the kind of danger that you should answer yes" to that issue); JA 3:648-49 (defense arguments that Penry "is not dangerous in prison. . . he is not a rape or murder waiting to happen. . . . He is someone the prison system can handle."). Therefore, Drs. Peebles's and Price's opinions on Penry's dangerousness *if released from custody* would have had little or no impact on the jury's verdict, much less a substantial or injurious effect.

For all of these reasons, even assuming *arguendo* that the admission of the Peebles report was error under *Estelle v. Smith* or *Buchanan,* any such error was harmless as a matter of law, and habeas relief was reasonably denied.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the lower court's decision be affirmed.

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