

DEATH PENALTY CASES PENDING BEFORE THE U.S. SUPREME COURT

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Four death penalty cases were due to be argued before the Supreme Court in January.

***Abdul-Kabir v. Quarterman*, No. 05-11284 *Brewer v. Quarterman*, No. 05-11287**

Both cases involve the same issues and were due to be heard on 17th January 2007. The issue in question relates to instructions given to the juries that the U.S. Supreme Court has since found to be unconstitutional. Under the law in Texas at the time of the death sentences the jury was given a series of questions about the offence and the future dangerousness of the defendant requiring “Yes” or “No” answers. Since the trials the Supreme Court has ruled that such an approach does not allow the jury to consider fully the mitigation put forward on behalf of the defendant and in particular whether the defendant’s mental disabilities should be counted as mitigating factors. The judge at trial instructed the jury that they could answer “No” to one of the factual questions if they did not want to pass a death sentence even though the correct answer on the facts should be “Yes”. In both cases the defendants were sentenced to death and their most recent appeals were rejected by the U.S. Court of Appeals for the Fifth Circuit.

The questions the Supreme Court will consider are:-

1. Do the former Texas “special issue” capital sentencing jury instructions which permit only a “Yes” or “No” answer to the question whether the defendant killed “deliberately” and probably would constitute a “continuing threat to society” permit constitutionally adequate consideration of mitigating evidence about a defendant’s mental impairment and mistreatment and deprivation in childhood, in light of the Supreme Court’s emphatic statement in *Smith v. Texas*¹ that those same two questions “had little if anything to do with” the evidence of mental impairment and childhood mistreatment that was put forward in that case?

2. Do the recent opinions of the Supreme Court in *Penry v. Johnson*² and *Smith v. Texas*, both of which require instructions that permit jurors to give “full consideration and full effect” to the defendant’s mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from following its prior decisions, which predated *Penry* and *Smith*, that reject *Penry* error whenever the former special issues might have allowed the jury some indirect consideration of the defendant’s mitigating evidence?

3. Has the Fifth Circuit, in insisting that a defendant show as a predicate to relief under *Penry* that he suffers from a mental disorder that is severe, permanent or untreatable, simply resurrected the threshold test for “constitutional relevance” that this Court emphatically rejected in *Tennard v. Dretke*?³

4. Where the prosecution, as it did here, repeatedly implores jurors to “follow the law” and “do their duty” by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant’s mitigating evidence?

***Smith v. Texas*, No. 05-11304**

On 17th January 2007 The U.S. Supreme Court was due to hear an appeal from Texas death row inmate LaRoyce Smith even though the Court has reviewed his case once before. The Court granted *certiorari* to decide whether the Texas Court of Criminal Appeals had applied the wrong standard after the Supreme Court had sent Smith’s case back to them earlier.

Again the issue in this case relates to the instructions given to the jury in the punishment phase of Smith’s trial. In 2004 the Supreme Court

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held (seventy-two) that Texas' jury instructions did not allow the jury sufficient latitude to consider Smith's low I.Q. and other mitigating evidence. However, instead of giving Smith a new sentencing hearing, the Texas Court of Criminal Appeals ruled in March that the fault in the jury instructions was negligible because it did not cause "egregious harm" to Smith's right to a fair trial, and thus upheld Smith's death sentence. Texas has changed the way the jury is instructed in capital cases, but the change was not in effect for Smith's sentencing.

Schriro v. Landrigan, No. 05-1575

On 9th January 2007 the Court was due to hear an Arizona appeal testing whether defence counsel has a duty to develop and offer evidence favourable to the client in a death penalty case when the client actively opposes presentation of mitigating evidence. At his trial, Jeffrey Landrigan objected to his defence attorney's attempts to present mitigating evidence. He later appealed to the Arizona Supreme Court and then petitioned for *habeas corpus* relief from the Federal Courts, challenging the effectiveness of his trial representation. His petition was denied by the District Court, and that decision was upheld by a panel of the U.S. Court of Appeals for the Ninth Circuit. However, after a rehearing *en banc* by the Ninth Circuit, the decision was reversed. The court said that Landrigan had presented a colourable claim of ineffectiveness and was entitled to an evidentiary hearing: *Landrigan v. Stewart*.⁴ Arizona's petition for *certiorari* to the U.S. Supreme Court was granted in September 2006. The state maintains that the Ninth Circuit did not give sufficient deference to the State Court's findings that trial counsel's representation was constitutionally adequate. Landrigan argues that his attorney did not sufficiently investigate his past so that an informed decision could be made about presenting mitigating evidence.

The decisions in these cases will be digested in the next issue of the *Journal*.

¹ 543 U.S. 37,48 (2004).

² 532 U.S. 782 (2001).

³ 542 U.S. 274 (2004).

⁴ 397 F.3d 1235 (9th Cir. 2005).