No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Petitioner,

v.

JOHNNY PAUL PENRY,
Respondent.

On Petition For Writ of Certiorari to the
Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTION PRESENTED

This Court's decision in *Atkins v. Virginia,* 536 U.S. 304 (2002), was announced during Penry's retrial proceedings, which focused heavily on whether or not he was mentally retarded. Prior to punishment deliberations, the trial court informed the jury of the definition of mental retardation and instructed it to render a verdict that would result in a life sentence if it found Penry to be mentally retarded. Because the jury found Penry was *not* mentally retarded, it was then instructed to consider *any other mitigating circumstance or circumstances* that might warrant a life sentence in answering the catchall mitigation special issue submitted pursuant to the Texas capital sentencing statute.

The Question Presented is whether the lower court's ruling — there is a reasonable likelihood the trial court's instructions to consider any other mitigating circumstance or circumstances misled the jury to exclude consideration of mental deficiencies that did not rise to the level of mental retardation — conflicts with this Court's decisions in *Brown v. Payton,* 125 S. Ct. 1432 (2005), and *Boyde v. California,* 494 U.S. 370 (1990), which establish that catchall mitigation instructions fulfill Eighth Amendment requirements.

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Respondent Johnny Paul Penry is no stranger to this Court. Twice the Court reversed his death sentence based on Eighth Amendment error. *Penry v. Lynaugh,* 492 U.S. 302 (1989) (*Penry I*); *Penry v. Johnson,* 532 U.S. 782 (2001) (*Penry II*). Yet each time a jury re-sentenced Penry to death. Now, after Penry's third punishment proceeding, the Court of Criminal Appeals of Texas reversed his death sentence for purported Eighth Amendment error. The lower court held that, because of a mental retardation instruction crafted in response to *Atkins v. Virginia,* 536 U.S. 304 (2002), Penry's jury was unable to consider and give effect to evidence of mental deficiencies that fell short of mental retardation.

That decision cannot be reconciled with this Court's opinions in *Brown v. Payton,* 125 S. Ct. 1432 (2005), and *Boyde v. California,* 494 U.S. 370 (1990), which establish that broad catchall mitigation instructions — such as the one given in this case — satisfy the Eighth Amendment. Although Penry's jury did not find him to be mentally retarded, it was instructed to consider *any other mitigating circumstances* — including the facts of the offense, his character, background, and general moral culpability — that might reduce his moral blameworthiness. Because there is no reasonable likelihood a jury would interpret the words "any other mitigating circumstances" to mean anything but "any other mitigating circumstances," this Court should reverse and render judgment for Petitioner State of Texas.

OPINION BELOW

The Court of Criminal Appeals reversed Penry's death sentence on October 5, 2005. *Penry v. State,* 178 S.W.3d 782 (Tex. Crim. App. 2005); PA:1-12.[1]

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[1] "PA" refers to the appendix to the instant petition for certiorari review, and is followed by page references.

JURISDICTION

The Court of Criminal Appeals denied the State's motion for rehearing in an unpublished order on December 14, 2005. PA:29. Thus, the State's petition for writ of certiorari is timely filed on or before March 14, 2006. SUP. CT. R. 13.3 (West 2005). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

STATEMENT OF THE CASE

I. Facts of the Crime

Penry's guilt is no longer in question. The court below succinctly summarized the facts underlying Penry's conviction in a prior opinion:

> [Penry]'s confessions state that he became acquainted with the victim when he was assisting another man with a delivery of some appliances to her home about three weeks prior to October 25, 1979. On the morning of October 25th, he decided he would go to the victim's house and rape her. [Penry] knew that if he went over to the victim's home and raped her, he would have to kill her because she would tell the police. After arriving at the victim's home, he forced his way in and threatened her with a pocket knife. After a struggle during which [Penry] hit the victim, knocked her to the floor, and shoved her into the stove, the victim managed to grab a pair of scissors and stab [Penry] in the back.
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> [Penry] knocked the scissors out of the victim's hand and dragged her into the bedroom. The

> victim refused to get undressed so [Penry] kicked her with his boots and "stomped" her once. The victim eventually complied and pulled her underpants down by her knees. [Penry] unzipped his pants and attempted to get on top of her, but the victim got up. [Penry] pushed her back down to the floor, hit her two or three times in the chest, and threatened to kill her if she would not "make love" to him. [Penry] then had intercourse with the victim for about thirty minutes.
>
> After sexually assaulting the victim, [Penry] got up and retrieved the scissors. He then came back and sat on the victim's stomach. [Penry] told her that he hated to kill her but he thought that she would squeal on him. He then plunged the scissors into her chest.

Penry v. State, 903 S.W.2d 715, 755 (Tex. Crim. App. 1995).

II. Prior Proceedings in State and Federal Courts

Penry was originally convicted of capital murder and sentenced to death in 1980. That conviction and sentence was affirmed by the Court of Criminal Appeals, and this Court denied certiorari review. *Penry v. State,* 691 S.W.2d 636 (1985), *cert. denied,* 474 U.S. 1073 (1986). Following unsuccessful state and federal collateral attacks, this Court granted habeas corpus relief and vacated Penry's death sentence in 1989. *Penry I,* 492 U.S. at 328; *see also Penry v. Lynaugh,* 882 F.2d 141 (5th Cir. 1989).

Penry was re-convicted and re-sentenced to death in 1990, and his conviction and sentence were once again affirmed on direct appeal in 1995. *Penry v. State,* 903 S.W.2d 715. This Court denied certiorari and rehearing. *Penry v. Texas,* 516 U.S. 977 (1995); *id.,* 516 U.S. 1069 (1996). As before, state and federal postconviction challenges fell short. *See, e.g., Penry v. Johnson,* 215 F.3d 504 (5th Cir. 2000). But this Court concluded Penry's

death sentence was unconstitutional and reversed again. *Penry II,* 532 U.S. at 804; *see also Penry v. Johnson,* 261 F.3d 541 (5th Cir. 2001).

III. Retrial Proceedings

Penry's most recent retrial began with a competency hearing in April 2002, in which a jury found him competent to stand trial. 3 CR 56-57.[2] A second jury was then empaneled and Penry's punishment retrial commenced on June 10, 2002. 40 RR 137. The central issue was Penry's putative mental retardation. But during opening arguments, both the prosecution and the defense also detailed Penry's history of educational difficulties, intellectual shortcomings, institutionalization, brain damage, child abuse, and behavioral problems. *Id.* at 147-56, 167-73.

The State called two expert witnesses during its case-in-chief. Dr. Roger Saunders, a psychologist, testified at length concerning the diagnostic criteria of mental retardation and his ultimate opinion that Penry is antisocial, not retarded. 43 RR 122-276; 44 RR 6-118, 142-231; 45 RR 13-152. Dr. Edward Gripon, a psychiatrist, also explained the diagnostic elements of mental retardation to the jury and opined Penry is antisocial, but not retarded. 45 RR 236-303; 46 RR 6-245.

The defense then presented four more experts, who also gave detailed testimony concerning Penry's mental impairments. Dr. Jonathan Pincus, a neurologist, testified that Penry's intellectual and adaptive functioning deficits are the result of brain damage. 51 RR 72-315; 52 RR 10-26. Dr. J. Randall Price, a neuropsychologist, opined that Penry is brain damaged and mentally retarded. 52 RR 31-184. Dr. Timothy Derning, a

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[2] "CR" refers to the Clerk's Record of pleadings and documents filed in the trial court. "RR" refers to the Reporter's Record of transcribed trial proceedings. Both references are preceded by volume number and followed by page numbers.

psychologist, also testified that Penry is mentally retarded. 52 RR 186-264; 53 RR 5-193. Dr. Mark Douglas Cunningham, another psychologist, attested that Penry is mentally retarded as well. 53 RR 273-323; 54 RR 4-250.

The defense also presented numerous lay witnesses and a dermatologist to describe Penry's upbringing, diminished mental capacity, and the child abuse he suffered.

The State then recalled Drs. Saunders and Gripon to address Penry's evidence of mental retardation and brain damage. 55 RR 15-103; 56 RR 133-66. The State also presented two additional psychologists — Drs. Gary Mears and Billie Walker — who testified that Penry's mental deficiencies did not rise to the level of mental retardation. 55 RR 105-193; 56 RR 5-132.

On June 20, 2002 — in the midst of the defense's case-in-chief — this Court handed down its opinion in *Atkins,* which prohibits the execution of the mentally retarded. 536 U.S. at 321. During the charge conference, Penry urged the trial court to submit a special issue to the jury on mental retardation. 57 RR 31-32; 5 CR 42. This proposed special issue would have asked the jury whether the State proved Penry was *not* mentally retarded beyond a reasonable doubt prior to the submission of the statutory special issues,[3] in which the jury would "consider *any other* issues" in

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[3] Penry was tried pursuant to TEX. CODE CRIM. PROC. Art. 37.0711, which requires the submission of four special issues concerning deliberateness, future dangerousness, provocation, and mitigation. The first three issues are identical to the ones considered by the Court in *Penry I,* 492 U.S. at 310. The fourth "catchall instruction on mitigating evidence," or Special Issue No. 4, "requires the jury to decide '[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.'" *Penry II,* 532 U.S. at 803 (citation omitted). Special Issue

mitigation of punishment. 5 CR 42 (emphasis added).

Ultimately, the trial court opted to instruct the jury as follows:

> You are instructed that Mental Retardation is a mitigating factor as a matter of law. Mental Retardation is defined as:
>
> > (A) Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test;
> >
> > (B) Concurrent deficits or impairments in present adaptive functioning (*i.e.,* the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety; and
> >
> > (C) The onset is before 18 years.
>
> Therefore, you are instructed that if you believe from all the evidence that the Defendant is a person with Mental Retardation then you are instructed to answer Special Issue Number 4 "Yes." However, if you do not believe from all the evidence that the Defendant is a person with

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No. 4 is also referred to as the mitigation special issue herein.

> Mental Retardation, then you shall follow the Court's instructions previously given herein concerning the appropriate answer to Special Issue Number 4 and consider whether *any other mitigating circumstance or circumstances* exist as defined herein.

5 CR 50 (emphasis added); *see also* PA:14-15.[4]

The trial court previously explained the concept of mitigating evidence to the jury:

> You are instructed that when you deliberate on the Special Issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in the trial. A mitigating circumstance may include, but is not limited to, any aspect of the Defendant's character, background, or circumstances of the crime which you believe could make a death sentence inappropriate in this case, if any. If you find that there are mitigating circumstances in this case, you must decide how much weight they deserve, if any, and thereafter give effect to them in assessing the Defendant's personal culpability at the time you answer the Special Issues.

5 CR 48-49; *see also* PA:13. Penry objected to the trial court's instruction and, in fact, maintained the entire proceeding was unconstitutional. 57 RR 27-35.

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[4] Prior to closing arguments, the trial court read aloud the punishment charge and the verdict form to the jury. 58 RR 5-17. The lower court incorporated this reading as an appendix to its opinion, rather than the written charge and verdict form. PA:12-19. However, there is no significant variation between the oral and written versions. *Cf.* 5 CR 48-57. The State will provide parallel citations for the Court's convenience.

Closing argument highlighted the mitigation evidence once again. Both prosecutors and defense attorneys focused not only on mental retardation, but on the evidence of Penry's behavioral difficulties, educational problems, intellectual deficits, abusive childhood, and brain damage. 57 RR 34-48, 57-79, 85-86, 88-99, 101-04, 108-20. The prosecution also discussed the operation of the mitigation special issue, and specifically explained to the jury:

> If you don't believe [Penry]'s mentally retarded, *your job is not complete* on that fourth special issue. As we discussed, you still have to look at the other evidence in this case and decide whether there are any other kind of evidence there that you believe reduces this man's moral culpability for commission of these crimes, *whether it's child abuse, mental illness, whatever.* You get to decide.

Id. at 32-33, 49-50 (emphasis added); *see also* PA:9.

On July 3, 2002, after nearly a month of testimony, the jury returned a verdict that resulted in a sentence of death. 57 RR 137-39; 5 CR 53-61. The trial court denied Penry's motion for new trial on August 17, 2002. 5 CR 68.

IV. Subsequent Proceedings in the Court Below

Penry's death sentence was automatically appealed to the Court of Criminal Appeals.[5] In a 5-4 decision, the lower court

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[5] A controversy arose concerning who would represent Penry on appeal. After the trial court denied Penry's motion to substitute counsel for lack of jurisdiction, this Court denied certiorari review. *Penry v. Texas,* 538 U.S. 1016 (2003). The lower court also denied Penry's request for a writ of mandamus. *Penry v. Coker,* No. 15,918-04, 2003 WL 21401978 (Tex. Crim. App. 2003) (unpublished order). Ultimately, when Penry properly filed a motion to substitute counsel in the Court of Criminal Appeals, it was granted. *See id.,* 2003

reversed Penry's death sentence on October 5, 2005. PA:1-12. The court first noted the standard of review set forth in *Boyde.* PA:5-6 (citing *Boyde,* 494 U.S. at 380-81). The court also appeared to recognize the similarity between California's catchall mitigation factor — "any other circumstance which extenuates the gravity of the crime" — and the instant charge — "any other mitigating circumstance or circumstances." PA:6-9 & n.14 (quoting *Boyde,* 494 U.S. at 373 n.1). Yet, inexplicably, the court found that the instruction given during Penry's trial "excludes what the jury had already considered: mental impairment that did not rise to the level of mental retardation." PA:9. The state court held this was *Penry* error. PA:9 (citing *Penry I,* 492 U.S. at 328). Additionally, the court below concluded that "[t]he parties' arguments to the jury did not clear up this confusion." PA:9-10.

Four judges dissented in two separate opinions. Presiding Judge Keller explained that "[l]ow intelligence that does not sink to the level of mental retardation is a circumstance other than mental retardation" and, thus, was well within the scope of the jury's instruction to consider "any other mitigating circumstance." PA:20. Presiding Judge Keller also opined that, although the majority opinion purported to rely upon *Boyde,* it "failed to apprehend its significance," *i.e.,* jurors are presumed to rely upon commonsense and not technical hairsplitting in interpreting their instructions. PA:20-22. Finally, Presiding Judge Keller noted that the majority also misunderstood this Court's emphasis on the policy of finality. PA:23 (citing *Boyde,* 494 U.S. at 380).

Judge Cochran also focused on the majority's misreading of *Boyde,* reasoning that there may have been a *possibility* the jury misread its instructions, but not a *reasonable* one. PA:24-25 &

WL 21401978, *2 (suggesting proper procedure under TEX. R. APP. P. 6 for substitution of counsel on appeal) (Cochran, J., concurring).

n.2 (citing *Boyde,* 494 U.S. at 379-80). The entire proceeding was focused on "the intersection of Johnny Paul Penry's mental abilities and moral culpability and to what extent his mental 'slowness' was related to his deplorable childhood." PA:25-26. Thus, Judge Cochran thought it "manifestly unlikely" the jury felt precluded from considering and giving effect to this "other" mitigating evidence as defined by its instructions. PA:26-28.

The State's motion for rehearing was denied on December 14, 2005, as detailed *supra.* PA:29.[6] The instant petition follows.

REASONS FOR GRANTING THE WRIT

The Court of Criminal Appeals has now joined the United States Court of Appeals for the Ninth Circuit in its misunderstanding of *Boyde v. California. Cf. Payton v. Woodford,* 346 F.3d 1204 (9th Cir. 2003) (*en banc*), *rev'd sub nom. Brown v. Payton,* 125 S. Ct. 1432; *Belmontes v. Brown,* 414 F.3d 1094 (9th Cir. 2005), *pet. for cert. filed,* 74 USLW 3260 (Oct. 12, 2005) (No. 05-493). The lower court's attempt to distinguish *Boyde* relies upon the same sophistic hairsplitting repeatedly employed by the Ninth Circuit. Namely, the state court attributed to Penry's jury the same willingness to ignore the clearly drafted instructions, the context of the trial, and the pellucid arguments of counsel.

There is simply no reasonable likelihood Penry's jury was foreclosed from considering evidence of mental impairments that fell short of mental retardation in answering the mitigation special issue. Initially, the lower court's illogical interpretation of the jury instructions in this case directly contradicts the Court's reasoning in *Boyde.* Indeed, the state court's erroneous reasoning would

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[6] Penry's application for state habeas corpus relief was dismissed as moot by the Court of Criminal Appeals on November 16, 2005. *Ex parte Penry,* No. 15,918-05, 2005 WL 3072165, *1 (Tex. Crim. App. 2005).

invalidate the instruction held constitutional by this Court in *Boyde.* This clearly indicates the lower court was engaged in the type of hyper-technical parsing forbidden by that opinion. *Boyde,* 494 U.S. at 380-81.

Additionally, the court below failed to address this Court's recent opinion in *Payton,* which reinforces the rationale of *Boyde.* The lower court's conclusion is also untenable because there is no sensible combination of jury instructions and special issues which would have avoided the specious problem identified in the opinion below. Finally, the state court's decision does violence to "the concerns of finality and accuracy" animating both *Payton* and *Boyde,* 494 U.S. at 380. For these reasons, this Court should grant certiorari, reverse, and render judgment in favor of the State.

I. As in *Boyde* and *Payton,* the Language "*Any Other* Mitigating Circumstance or Circumstances" Means *Anything* That Might Have Diminished Penry's Culpability, and Does Not Preclude Evidence of Mental Impairments.

In *Boyde,* this Court reviewed a catchall mitigation instruction submitted as part of a longer list of aggravating and mitigating factors to be considered by a California capital jury. 494 U.S. at 373-74 & n.1. The Court held that there was no Eighth Amendment error because the catchall instruction — which directed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime" — did not prevent the jury from considering evidence of Boyde's deprived childhood, academic deficiencies, and good character. *Id.* at 381. The Court explained that "any other circumstance" necessarily includes a defendant's background and character, which is relevant "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*" *Id.* at 382 (quoting *Penry I,* 492 U.S. at 319) (emphasis in *Boyde*).

The lower court attempted to distinguish *Boyde* by explaining that Penry's jury was excluded from considering under the fourth special issue what it "had already considered: mental impairment that did not rise to the level of mental retardation." PA:9. Apparently, the jury's prior determination that Penry did not meet the diagnostic criteria for mental retardation prejudiced it against assessing a life sentence because of any other kind of mental disability. But this logic flies in the face of *Boyde.*

In *Boyde,* the jury had already considered "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." PA:7 n.14 (quoting *Boyde,* 494 U.S. at 373 n.1). The jury had already weighed "[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [*sic*] of intoxication." PA:7-8 n.14 (quoting *Boyde,* 494 U.S. at 373 n.1). Under the lower court's rationale, Boyde's jury was then precluded from giving effect to evidence of mental or emotional disturbance which did not rise to the level of *extreme,* or a mental disease or defect that did not *wholly* diminish his capacity to appreciate the wrongfulness of his conduct or to conform his behavior to the law.

But in *Boyde* the Court firmly held that this was not the case: "any other circumstance" includes *any* aspect of defendant's background or character. 494 U.S. at 382. Likewise, in the instant proceeding, "*any other* mitigating circumstance or circumstances" means *anything* that might have diminished Penry's culpability, regardless of any specific mitigating factors previously considered. 5 CR 50 (emphasis added); *see also* PA:15.

As the dissenting opinions in the court below correctly note, the state court appears to "attribute to the jury a willingness to engage in technical and hairsplitting distinctions based upon the most fragile grammatical foundations," and presumes the jury

"ignore[d] the content and tenor of every word in the jury instructions except the word 'other.'" PA:22, 28. In addition, the court below seriously misreads *Boyde,* which makes it clear that jurors are not assumed to make severe, technical, and irrational distinctions that defy commonsense. 494 U.S. at 380-81. Indeed, the lower court's misinterpretation of *Boyde* is made even clearer when *Payton* is considered.[7]

In *Payton,* this Court revisited its holding in *Boyde* and rejected yet another challenge to the California catchall mitigation instruction. There, Payton complained that the "any other circumstance which extenuates the gravity of the crime" did not permit the jury to consider a post-crime religious conversion, because the jury was not specifically instructed that it could do so. *Payton,* 125 S. Ct. at 1436-37. The Court strenuously rejected this notion, explaining once again that "any other circumstance" meant *anything* which might reduce culpability, pre- or post-crime. *Id.* at 1439. No specific instruction was necessary. In fact, Payton's jury — like Boyde's — was merely instructed that *all* evidence received during any part of the trial was to be considered as mitigating, and no evidence was to be disregarded. *Id.* at 1441; *cf. Boyde,* 494 U.S. at 383. Given that Payton's entire punishment case focused on his religious conversion, reasonable jurors would not have viewed the entire proceeding as a charade and would not have ignored the evidence they were not specifically instructed to consider. *Payton,* 125 S. Ct. at 1441-42; *cf. Boyde,* 494 U.S. at 383-84.

Similarly, the catchall instruction submitted in Penry's trial did not require a specific admonishment to consider evidence of mental impairment that did not rise to the level of mental

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[7] *Payton* was decided on March 22, 2005, some six months before the instant opinion issued. Yet the lower court did not attempt to distinguish it. The Court of Criminal Appeals did not even mention it.

retardation. As in *Boyde* and *Payton,* Penry's jury was instructed to consider *any* and *all* evidence "that a juror might regard as reducing [his] moral blameworthiness," including "*any* aspect of [his] character, background, or circumstances of the crime" which might make a death sentence inappropriate. 5 CR 48-50 (emphasis added); *see also* PA:13-14. There is no reasonable likelihood the jurors would have refused to consider any mitigating evidence when they were specifically instructed to consider "*all* evidence submitted" at trial that "mitigates against the imposition of the death penalty." *Boyde,* 494 U.S. at 380; *cf.* 5 CR 48 (emphasis added); *see also* PA:13.

Further, Penry's entire sentencing trial was focused on his mental shortcomings, whether they rose to the level of mental retardation or not. *See Boyde,* 494 U.S. at 383 ("Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe" that "any other circumstance" covered any aspect of the mitigating evidence). The idea that the jurors would ignore the mental health assessments of eight experts and numerous lay witnesses, which they were *specifically instructed* to consider, is ludicrous.

As one dissenter argued below:

> Four weeks of trial testimony circled around the intersection of Johnny Paul Penry's mental abilities and moral culpability and to what extent his mental "slowness" was related to his deplorable childhood.
>
> * * *
>
> To conclude that it is "reasonably likely" that this jury did not get the message requires one to assume that they were all mentally slow.

PA:26, 28.

In fact, all parties and the trial court relied upon the

definition of mental retardation set forth in the Diagnostic and Statistical Manual of Mental Health Disorders, Fourth Edition, Text Revision (DSM-IV-TR), published by the American Psychiatric Association and noted by this Court in *Atkins.* 536 U.S. at 308 n.3. This multi-pronged definition was referenced repeatedly throughout trial and was relied upon by all expert witnesses testifying for the State and the defense. It was also part of the jury's instructions. 5 CR 50; *see also* PA:14.

Importantly, in order for a patient to be diagnosed with mental retardation all of the minimum diagnostic criteria must be met. If the minimum diagnostic criteria are not met, a diagnosis of a condition *other* than mental retardation may be warranted, such as borderline intellectual functioning. DSM-IV-TR at 740. Based upon the extensive expert testimony elicited at trial, there can be no doubt that the jury appreciated this distinction, and understood it could give mitigating effect to such mental deficiencies short of mental retardation.[8] Put another way, any mental impairment that the jury believed did not meet the diagnostic criteria for mental retardation was simply another mitigating circumstance, as that term was defined in the trial court's charge.

"[R]easonable jurors surely would not have felt constrained to ... *ignore all* of the evidence presented ... during the sentencing phase." *Boyde,* 494 U.S. at 383-84. Rather, a capital jury possessed of a commonsense understanding of the instructions and

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[8] For example, State's expert Roger Saunders testified that a diagnosis of borderline mental retardation "would indicate that maybe he's not mentally retarded but operating in the qualitative level just above mental retardation in the borderline range of intellectual functioning." 43 RR 175-76. Dr. Saunders described borderline mental retardation as "just hovering above the mentally — the mild mentally retarded range," or "[e]xtremely low," but not mentally retarded. *Id.* at 183, 193-94. This important distinction was confirmed by State's experts Edward Gripon and Gary Mears. 46 RR 30; 56 RR 165.

armed with a "clearly drafted catchall instruction on mitigating evidence," such as the instant mitigation special issue, would not engage in the rhetorical gymnastics identified by the court below. *Penry II,* 532 U.S. at 803.

Notwithstanding the lower court's erroneous interpretation of the jury instructions, it is plain that those instructions were clearly explained to the jury during closing argument. As the prosecutor stated:

> If you don't believe [Penry]'s mentally retarded, *your job is not complete* on that fourth special issue. As we discussed, you still have to look at the other evidence in this case and decide whether there are any other kind of evidence there that you believe reduces this man's moral culpability for commission of these crimes, *whether it's child abuse, mental illness, whatever.* You get to decide.

Id. at 32-33, 49-50 (emphasis added); *see also* PA:9.

It is impossible to imagine how the jury's task could have been better explicated: if the jury did not find Penry to be mentally retarded, it was to further consider whether any other reason existed — including mental impairment or child abuse, the primary mitigating theories presented at trial — that justified leniency. As in *Boyde,* where the jury arguments "stressed a broad reading of" the words "any other circumstance," Penry's jury was repeatedly told by the instructions and the litigants to consider any mental deficiencies that fell short of mental retardation. *Cf. Payton,* 125 S. Ct. at 1440 (upholding "any other circumstance" instruction *despite* prosecutorial argument encouraging a narrow reading). Indeed, "for the jury to have believed it could not consider [the] mitigating evidence," despite nearly a month of testimony, "it would have had to believe that the penalty phase served virtually no purpose at all." *Id.*

Additionally, in light of the court's admonitions and the advocates' arguments, there is no indication the jury found its instructions to be ambiguous. It is highly improbable that not a single juror would have "sen[t] out a note to the judge requesting clarification if they had questions concerning the meaning of the word 'other' in this context." PA:27-28 (citing *Armstrong v. Toler,* 24 U.S. 258, 279, 11 Wheat. 258 (1826) (opinion of Marshall, C.J.) ("Had the jury desired further information, they might, and probably would, have signified their desire to the Court"). As one dissenting opinion recognized, "to conclude that [the jurors] would have ignored the mental-slowness evidence would have required them to ignore the content and tenor of every word in the jury instructions except the word 'other.'" PA:27-28. There is no reasonable likelihood such a thing happened.

II. The Lower Court's Reasoning Threatens to Contaminate Similar Cases in Which Mental Retardation Is Determined by a Jury During Punishment Proceedings.

The court below spuriously reasoned that "any other mitigating circumstance or circumstances" really means any other mitigating circumstance or circumstances *but not* deficits in intellectual or adaptive functioning that are not significantly subaverage. PA:9-10. Not only does this hyper-technical reading flatly contradict *Payton* and *Boyde,* it fails to indicate what instruction would be constitutional under the circumstances. Thus, trial courts across the State of Texas — including the lower court, which must conduct a punishment retrial — are left without any direction on how to proceed.[9]

Further, the lower court's reasoning could apply to any jurisdiction in which mental retardation is assessed by a jury

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[9] "The Texas Legislature has not yet enacted legislation to carry out the *Atkins* mandate." *Ex parte Briseno,* 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

during a sentencing proceeding.[10] For example, is a trial court required to instruct the jury to *reconsider* evidence of mental impairment that does not rise to the level of mental retardation, along with any other mitigating circumstances, in such a capital punishment proceeding? Is a trial judge obligated to submit the issue of mental retardation only after a jury passes judgment on the mitigating evidence as a whole? Either solution is redundant and confusing. More importantly, neither is constitutionally compelled by *Payton, Boyde* or *Penry I.*

Finally, if a jury is asked to decide "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed," TEX. CODE CRIM. PROC. Art. 37.071(2)(e)(1), then

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[10] *See, e.g.,* ARK. CODE ANN. § 5-4-618 (determination made prior to trial by court, but issue may be re-litigated to jury in sentencing phase); CAL. PENAL CODE § 1376 (unless requested otherwise, determination is made by jury following the guilt-innocence phase, but prior to the sentencing hearing); CONN. GEN. STAT. ANN. § 53a-43a(h) (determination made by jury with special verdict during sentencing phase); LA. CODE CRIM. PROC. § 905.5.1 (unless agreed upon by both defendant and state to try the issue before the court, determination is made by jury during punishment hearing; any pretrial determination by judge that defendant is not mentally retarded may be re-litigated during sentencing phase by jury); MD. CODE ANN. CRIM. LAW § 2-202(b) (determination made by jury during sentencing phase of trial); MO. REV. STAT. § 565.030.4(1) (determination made by jury during sentencing phase of trial); N.C. GEN. STAT. ANN. § 15A-2005 (upon consent of both defendant and state, determination is made by trial court following pretrial hearing; if trial court does not find defendant mentally retarded, issue may be retried to jury during sentencing phase); VA. CODE. ANN. § 19.2-264.1 (determination is made by jury during sentencing phase).

required to *redetermine* the mitigating sufficiency of one particular category of evidence, the risk of jury confusion grows. This is because such a scheme improperly comments on the weight of a single category of the mitigating evidence.

III. The Opinion Below Violates the Strong Policy in Favor of the Finality of Criminal Convictions and Sentences Recognized in *Boyde.*

In *Boyde,* this Court noted the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." 494 U.S. at 380. Accuracy is important, but finality equally so. *Id.* As a result, the Court crafted a legal standard for reviewing ambiguous — but not erroneous — jury instructions that relies not on subjective and hypothetical hairsplitting but on objective and reasonable analysis. *Id.* at 378-81. Commonsense must prevail over supposition in the present context.

Penry was first convicted and sentenced to death for this heinous crime more than twenty-five years ago, and has been retried twice in the intervening time. Yet the lower court ignores the interests of finality and rests its decision on conjecture and esoteric logic. This despite the fact the Court has explicitly rejected such reasoning in both *Payton* and *Boyde.* Because it is clear that Penry's jury understood the mitigating evidence before it and the grave decision it was making, finality demands that its verdict be reinstated and this saga come to an end.

CONCLUSION

For the foregoing reasons, this Court should grant the State's petition for writ of certiorari.

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