CASENOTE

Uncertain Waters: *Tennard v. Dretke* Provides Swells of Protection for the Mentally Deficient But May Cause Rising Tides of Frivolous Claims

Continuing to address the morality and constitutionality of executing mentally deficient offenders, the United States Supreme Court in *Tennard v. Dretke*[1] held that the Texas jury instructions used during the sentencing phase violated the Eighth Amendment.[2] The jury instructions were unconstitutional because they did not provide sentencers with an adequate vehicle for assessing the defendant's mitigating evidence of low Intelligence Quotient.[3] This case has broad implications for jury instructions in capital cases across the nation. It also raises concerns that valid claims by deserving defendants will be lost in a sea of frivolous claims and unidentified intelligence tests.

1. 124 S. Ct. 2562 (2004).
2. *Id.* at 2573; U.S. CONST. amend. VIII.
3. *Tennard*, 124 S. Ct. at 2573.

I. FACTUAL BACKGROUND

Petitioner, Robert Tennard, was a young male with a reported Intelligence Quotient ("IQ") of 67, according to his Department of Corrections record. Tennard and two accomplices broke into his neighbors' home and murdered the couple. One accomplice killed a victim with a hatchet, while Tennard stabbed the other victim to death. This was not Tennard's first violent crime.[4]

A jury convicted Tennard of capital murder in October 1986.[5] During sentencing, the jury was instructed to answer two special issues: (1) Was the crime "committed deliberately and with the reasonable expectation that the death . . . would result;" and (2) "[was] there a probability that the defendant . . . would commit acts of violence that would constitute a continuing threat . . . ?"[6] The defense relied upon Tennard's low IQ and a previous victim's testimony regarding his gullibility as mitigating evidence. The jury answered both questions in the affirmative, and Tennard was sentenced to death.[7]

Tennard attempted to raise a Penry claim,[8] stating that his death sentence violated the Eighth Amendment due to his low IQ.[9] The Texas Court of Criminal Appeals rejected his claim, stating that his low IQ alone did not establish mental retardation.[10] It also stated that the low IQ and gullibility evidence were well within the jury's reach when it answered the "deliberateness" special issue.[11] In its denial of habeas corpus, the United States District Court of Texas agreed that a single low score on an unidentified IQ test did not establish mental retardation, and the IQ evidence was well known to the jury.[12]

---

4. Tennard v. Dretke, 124 S. Ct. 2562, 2565-66 (2004). Several years earlier Tennard was convicted of rape. The victim escaped after Tennard allowed her to go to the bathroom. He believed her promise not to run away. The defense capitalized on this information by using the rape victim's testimony as evidence of Tennard's gullible nature and low intelligence. *Id.* at 2566.

5. *Id.* at 2565.

6. *Id.* at 2566.

7. *Id.*

8. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

9. *Tennard*, 124 S. Ct. at 2567.

10. *Id.* at 2567.

11. *Id.*

12. Tennard v. Johnson, Civ. Action No. H-98-4238, App. 121, 128 (S.D. Tex., July 25, 2000).

The United States Court of Appeals for the Fifth Circuit affirmed the district court's denial of habeas corpus relief by applying its own test.[13] The court asked whether Tennard's low IQ was a "'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,'"[14] and whether the crime was attributable to the handicap.[15] The court determined that Tennard's claim failed both parts of the test, and it denied relief.[16] In 2003 the United States Supreme Court granted certiorari, [17] vacated the judgment, and remanded the case.[18] The Fifth Circuit reinstated its prior panel judgment denying habeas corpus relief, [19] and the Supreme Court granted certiorari for the second time.[20]

II. LEGAL BACKGROUND

A. *Habeas Corpus Relief*

Though lower federal courts do not have the authority to review state court criminal convictions and sentences on direct appeal, habeas corpus allows federal courts to review state court convictions and sentences for errors in federal law.[21] Such an appeal is considered a collateral attack.[22] The concept of habeas corpus dates back through the centuries to England.[23] Many American colonial courts allowed habeas corpus relief prior to the Revolutionary War, and it was constitutionalized by Article I, section 9, clause 2 of the Constitution.[24] The Constitution provides that habeas corpus may only be suspended in cases of rebellion, invasion, or when necessary to protect the safety of the general

13. Tennard v. Cockrell, 284 F.3d 591, 597 (5th Cir. 2002).
14. *Id.* at 595 (quoting Davis v. Scott, 51 F.3d 457, 460 (5th Cir. 1995)).
15. *Id.* (quoting *Davis*, 51 F.3d at 460-61).
16. *Id.* at 597.
17. This decision was made in light of *Atkins v. Virginia*, where the Court held that executions of mentally retarded criminals qualified as "cruel and unusual punishments" proscribed by the Eighth Amendment. 536 U.S. 304, 321 (2002).
18. *Tennard*, 124 S. Ct. at 2568.
19. *Id.* The Fifth Circuit considered whether Tennard had a valid *Atkins* claim. It reinstated the prior opinion after stating that Tennard never argued his execution would violate the Eighth Amendment. *Id.*
20. *Id.*
21. HOWARD P. FINK ET AL., *Federal Habeas Corpus and State Prisoners, in* FEDERAL COURTS IN THE 21ST CENTURY 911, 911 (1996).
22. *Id.*
23. *Id.*
24. *Id.*; U.S. CONST. art. I, § 9, cl. 2.

public.[25] This part of the Constitution, in conjunction with 28 U.S.C. § 2241,[26] gives federal courts the authority to grant the writ.[27]

Through the years, habeas corpus has been expanded and restricted by numerous cases and courts.[28] Justice O'Connor and Justice Kennedy are known for voting against narrowing habeas corpus, while Chief Justice Rehnquist and Justices Scalia and Thomas strongly favor further reductions.[29] At times, heated and profound disagreements have arisen between the two groups.[30]

The statutory authorization of habeas corpus can be divided into three prerequisites: (1) The applicant must "be in state custody;" (2) the applicant must have "exhausted [all] presently available state remedies;" and (3) the applicant must not "[repeat] claims in successive petitions."[31] Claims are mainly granted for state violations of federal constitutional provisions.[32] To be relieved from a judgment of guilt, the applicant must prove the existence of a "fundamental defect, which inherently results in a complete miscarriage of justice."[33]

B. The Eighth Amendment and Common Law Protections

Habeas Corpus claims can be brought for violations of the Eighth Amendment,[34] which, in part, mandates that punishment be proportional to the crime committed.[35] Cruel and unusual punishments are expressly prohibited.[36] To determine whether punishment is cruel and unusual, the court determines whether such punishment was prohibited when the Bill of Rights was adopted or whether modern social standards require such prohibitions.[37] According to *Trop v. Dulles*,[38] the Eighth Amendment is based on "evolving standards of decency" and the "dignity of man."[39]

---

25. U.S. CONST. art. I, § 9, cl. 2; FINK, *supra* note 21, at 911.
26. 28 U.S.C. § 2241 (1966).
27. U.S. CONST. art. I, § 9, cl. 2; 28 U.S.C. § 2241; FINK, *supra* note 21, at 911, 915.
28. FINK, *supra* note 21, at 912-13. *See also* Frank v. Mangum, 237 U.S. 309 (1915); Brown v. Allen, 344 U.S. 443 (1953).
29. FINK, *supra* note 21, at 913.
30. *Id.*
31. *Id.* at 916.
32. *Id.* at 917.
33. *Id.*
34. U.S. CONST. amend. VIII.
35. *Id.*; Atkins v. Virginia, 536 U.S. 304, 310 (2002).
36. Penry v. Lynaugh, 492 U.S. 302, 330 (1989).
37. *Id.* at 330-31.
38. 356 U.S. 86 (1958).
39. *Id.* at 100-01.

At common law idiots and lunatics were exempt from criminal prosecution and punishment.[40] Idiocy was understood to mean a defect manifested since birth, which impaired the sufferer's ability to reason, understand, and distinguish between good and evil.[41] This common law exemption became the modern insanity defense.[42] Subsequent cases have questioned whether the mentally retarded, in general, should be exempt from capital punishment given the common law exception for the severely impaired.[43]

C. *The Modern Trend*

Penry v. Lynaugh[44] was one of the first cases to address whether the modern consensus demands relief for prisoners suffering from mental retardation. The case involved the rape and murder of a woman in her Texas home. Evidence led police to Johnny Penry.[45] At the sentencing hearing, a clinical psychologist testified that Penry was mentally retarded. His IQ ranged between fifty and fifty-three, and he was diagnosed with organic brain damage due to trauma during childbirth. Penry's mental age was that of a six year-old, and his social maturity was that of a nine or ten year-old. The jury, nonetheless, found Penry competent to stand trial. During the trial numerous psychiatrists testified regarding Penry's insanity defense.[46] The jury rejected Penry's insanity defense and convicted him of capital murder.[47] He was

---

40. *Penry*, 492 U.S. at 331.
41. *Id.* at 331-32.
42. *Id.* at 332.
43. *Id. See Atkins*, 536 U.S. at 304.
44. 492 U.S. 302 (1989).
45. On October 25, 1979, a woman was raped, beaten, and fatally stabbed with a pair of scissors in her own Texas home. Before her death the victim was able to provide police with a description of her assailant. This description led authorities to defendant Penry, a twenty-two year-old man with a history of brain damage and childhood abuse. He was arrested and charged with capital murder. *Id.* at 309.
46. *Id.* at 308-11. During the trial, Penry raised an insanity defense and provided more expert testimony regarding his mental deficiency, but to no avail. A psychiatrist testified that Penry suffered mild retardation and an inability to distinguish right from wrong. His family members' testimony established severe learning problems and a childhood full of violent abuse at the hands of his mother. The state presented two psychiatrists of its own. Both acknowledged that Penry suffered from serious cognitive deficiencies, but they stated that Penry understood right from wrong. They testified that Penry was legally sane at the time of the murder, though he was unable to learn from past mistakes. *Id.*
47. *Id.* During the sentencing phase, the jury was instructed to answer three special issues: (1) whether the conduct was deliberate; (2) whether defendant posed a future threat to society; and (3) whether his action was a reasonable response to provocation. The death penalty would only be administered if the jury unanimously answered all three questions in the affirmative. The jury did just that, and Penry was sentenced to death. *Id.*

sentenced to death after the jury was instructed to determine: (1) whether Penry deliberately committed murder, (2) whether Penry posed a future danger to society, and (3) whether Penry was provoked. The Texas Court of Criminal Appeals affirmed, and the United States Supreme Court denied certiorari.[48]

Penry subsequently filed a habeas corpus petition, asserting that his capital sentence violated the Eighth Amendment because the jury was not properly instructed on how to address mitigating evidence. The district court denied relief, and the Court of Appeals for the Fifth Circuit affirmed.[49] The Supreme Court granted certiorari to resolve two issues: (1) whether the jury instruction regarding mitigating evidence was consistent with the Eighth Amendment, and (2) whether the execution of mentally retarded criminals is cruel and unusual punishment proscribed by the Eighth Amendment.[50] The Supreme Court held that the jury was not properly instructed on the weight of Penry's mitigating evidence, but the execution of mentally retarded offenders did not alone constitute cruel and unusual punishment.[51]

Due to common law prohibitions against the punishment of "idiots," the Court stated that it may be cruel and unusual to execute the severely retarded, but Penry's mild retardation did not warrant such protection.[52] The Court opined that the severely retarded are already protected by the insanity defense.[53] Penry unsuccessfully argued that there was a growing national consensus against the execution of mentally retarded defendants.[54] The Court refused to hold that no mentally retarded offender possessed the required culpability, and the

---

48. *Id.* at 310-12.

49. *Id.* at 312.

50. *Id.* at 313.

51. *Id.* at 328, 340. Though the Court had previously upheld the constitutionality of the Texas special issue instructions, the Court stated that the special issues were to be interpreted broadly enough to allow the sentencer to consider all relevant mitigating evidence. The Eighth Amendment requires the death penalty to be imposed only after assessing the offender on an individualized basis. The Court stated that the special issues were phrased in such a way that the jury had no adequate means for finding Penry deserved a punishment less than death. *Id.* at 315, 317.

52. *Id.* at 333.

53. *Id.* In Penry's case the jury found him competent to stand trial and rejected his insanity defense, which reflects the jury's finding that Penry understood right and wrong. *Id.*

54. *Id.* at 340. At the time of this decision, only one state banned such executions, and the Court criticized Penry's lack of evidence regarding the behavior of juries and prosecutors. *Id.* at 334.