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I Did Not Want To Kill Him But I Thought I Had To: In Light of *Penry II*'s Interpretation of *Blystone*, Why the Constitution Requires Jury Instructions on How to Give Effect to Relevant Mitigating Evidence in Capital Cases

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**I DID NOT WANT TO KILL HIM BUT
THOUGHT I HAD TO: IN LIGHT OF *PENRY
II'S** INTERPRETATION OF *BLYSTONE*,**
WHY THE CONSTITUTION REQUIRES JURY
INSTRUCTIONS ON HOW TO GIVE EFFECT
TO RELEVANT MITIGATING EVIDENCE IN
CAPITAL CASES**

*David Barron****

*“We were drowning and we wanted some kind of help.
And when it’s that serious for God’s sakes,
when you’re pleading for help, you have to give us something,
we were reasonable people, intelligent people, making a very
difficult decision, asking for help.”¹*

* *Penry v. Johnson*, 532 U.S. 782 (2001). Textually and in short citation form, this case is referred to as *Penry II*. The first Supreme Court opinion concerning John Paul Penry’s capital case is referred to as *Penry I*. See *Penry v. Lynaugh*, 492 U.S. 302 (1989).

** *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

*** Brooklyn Law School Class of 2003; B.A., Boston College 2000. The author wishes to thank attorney Robert Brett Dunham for providing the insight and inspiration for this article and attorneys John H. Blume and Jerome H. Nickerson for exemplifying everything the author would like to become both as a lawyer and a person. The author also wishes to thank Professors Ursula Bentele, Michael Madow and Daniel Medwed of Brooklyn Law School for their advice and support throughout law school. Finally, the author wishes to thank the members of the *Journal of Law and Policy* for their editorial advice, and my close friends of whom there are too many to name individually, for their support in everything and putting up with my obsession with the death penalty. The author also wishes to acknowledge all lawyers currently representing death row inmates.

¹ See Alan Berlow, *A Jury of Your Peers? Only if You’re Clueless*,

INTRODUCTION

Death is unique because of its irrevocability.² Therefore, one of the most important decisions a person can make is whether another individual should live or die.³ Although mistaken decisions could cost people their lives, throughout history juries have been free to impose the death penalty on any individual convicted of a capital crime who they believed deserved a sentence of death.⁴ Over the past thirty years, however, the Supreme Court has placed restrictions on who can be sentenced to death.⁵ In doing so, the Supreme Court clearly stated that only very serious crimes such as murder permit the jury to impose a death sentence.⁶ As a result, the Supreme Court imposed

WASH. POST, Aug. 11, 2002, at B1; Alan Berlow, *Deadly Decisions, Juror Confusion*, AM. RADIO WORKS (Aug. 2002) [hereinafter Berlow, *Deadly Decisions*] (quoting Fred Baca, the jury foreman in the 1982 Texas capital murder trial of Bobby Moore), at http://www.americanradioworks.org/features/deadlydecisions/confusion_print.html. Baca's comments were made in response to his experience as a juror, particularly in reference to questions the jury asked the judge pertaining to the definition of mitigation. *Id.* These questions went unanswered throughout the deliberations. *Id.* This confusion resulted in Bobby Moore receiving a death sentence that he may not have received otherwise. *Id.*

² *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (discussing the need for reliability in capital cases because of the finality of the sentence).

³ *See Mills v. Maryland*, 486 U.S. 367, 383 (1988) ("The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make.").

⁴ *See* Bureau of Prisons, U.S. DEP'T OF JUSTICE, NAT. PRISONER STAT. NO. 32, Executions 1962-1963, *reprinted in* Hugo Adam Bedau, *THE DEATH PENALTY IN AMERICA* 113-15 (Anchor Books, 1964). Between 1930 and 1944, New York, Georgia, North Carolina, Texas and California accounted for a total of 908 executions. *Id.*

⁵ *See generally* *THE DEATH PENALTY IN AMERICA* (Hugo Adam Bedau, ed., Oxford Univ. Press 3d ed. 1982) (discussing the evolution of the death penalty in the United States).

⁶ *See Coker v. Georgia*, 433 U.S. 584 (1977) (holding the death penalty for rape unconstitutional on the basis that a death sentence is disproportionate to the crime of rape of an adult and, therefore, constitutes cruel and unusual punishment, violating the Eighth Amendment of the United States

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requirements that death penalty statutes narrow the number of people eligible for a sentence of death,⁷ and provide for an individualized sentencing scheme.⁸ An individualized sentencing scheme requires jurors, prior to sentencing a defendant to death, to consider both “aggravating” circumstances—factors making the crime worse⁹—and “mitigating” circumstances—factors

Constitution). *But see* State v. Wilson, 685 So.2d 1063, 1072 (La. 1996) (holding that “in the case of the rape of a child under the age of twelve, the death penalty is not an excessive punishment”), *cert. denied*, 520 U.S. 1259 (1996); *see also* U.S. CONST. amend. VIII (“Nor shall cruel and unusual punishment be inflicted”). The Supreme Court has held the death penalty unconstitutional for crimes other than murder. *Compare* Enmund v. Florida, 458 U.S. 782 (1982) (holding that imposing a death sentence violated the prohibition against cruel and unusual punishment when the defendant merely drove the getaway car during a robbery and did not know of the violence that occurred in connection with the crime), *with* Tison v. Arizona, 481 U.S. 137 (1987) (permitting a death sentence to be imposed against someone who did not physically commit murder but either had the *mens rea* necessary to commit murder or acted with a reckless indifference toward human life).

⁷ *See* Tuilaepa v. California, 512 U.S. 967 (1994) (requiring that the circumstances permitting a sentencing body to impose a death sentence apply only to a subclass of defendants convicted of murder rather than to every defendant convicted of murder). Under *Tuilaepa*, the Supreme Court required limitations on the “eligibility phase,” which determines who can receive the death penalty, but refused to require limitations on the “selection phase,” which determines whether an individual defendant receives the death penalty. *Id.* at 973. *See also* Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (holding that “the use of aggravating circumstances is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury’s discretion”); Zant v. Stephens, 462 U.S. 862, 877 (1983) (holding that to pass constitutional muster, a capital sentencing scheme must “generally narrow the class of persons eligible for the death penalty”); James R. Acker & C. S. Lanier, *Capital Murder from Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death*, 29 CRIM. L. BULL. 291, 297 (1993) (noting the “eligibility phase” and the “selection phase” as the two principle limitations on capital punishment legislation).

⁸ *See* Lockett v. Ohio, 438 U.S. 586 (1978). Individualized sentencing involves “consideration of the character and record of the individual offender and the circumstances of the particular offense” *Id.* at 604 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

⁹ While the Supreme Court does not specifically define what constitutes

making either the crime or the defendant appear less heinous.¹⁰

an aggravating factor, the Court requires disclosure to the defense of what aggravating factors will be presented to the jury prior to the commencement of trial. *Lankford v. Idaho*, 500 U.S. 110, 125 (1991) (reversing a death sentence because the defendant was not given sufficient notice that he might be subjected to capital punishment); see Louis D. Bilonis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283 (1991) (providing a comprehensive analysis of individualized sentencing and the effect of *Lockett* upon the concept of aggravation and mitigation within the context of the death penalty). While aggravating factors have not been given a legal definition by either the courts or statutes, the term has been defined as “any circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences.” BLACK’S LAW DICTIONARY 65 (6th ed. 1990); see Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 12-14 (1995) (defining aggravating factors in common usage as anything that tends to annoy or bother another person and discussing the likelihood that jurors use the “common” definition during deliberations); see also, e.g., 42 PA. CONS. STAT. § 9711 (1998). There is no exclusive list of what constitutes an aggravating circumstance, but the most common aggravating factors include the following: whether the victim was a police officer, was being held for ransom, was killed because he or she was to testify in a criminal trial or was tortured to death; or whether the defendant hired the killer, killed while committing a felony, subjected a third person to a grave risk of death, had a history of felony convictions or had been previously convicted of another murder. *Id.*

¹⁰ See *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (O’Connor, J., concurring) (referring to mitigating evidence as “facts about the defendant’s character or background or circumstances of the particular offense that may call for a penalty less than death”). While there is no agreed upon legal definition of mitigating circumstances, the Supreme Court has construed the concept of mitigation more liberally than aggravation and allows almost anything to be presented to the jury as mitigation. See Bilonis, *supra* note 9.

While mitigating circumstances have not been given a legal definition by either courts or statutes, the term has been defined as those circumstances that “do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.” BLACK’S LAW DICTIONARY 1002 (6th ed. 1990). See also *infra* Part II (discussing mitigation in the context of the *Lockett* Doctrine). See *infra* Part III (analyzing jurors’ failure to understand the distinction between a common usage of the term mitigation and the use of the concept of mitigation in the legal forum). Some of the most common mitigating factors include lesser involvement in the crime, physical abuse as a

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Nevertheless, in order for an individualized sentencing scheme to ensure that only the worst criminals are given the death penalty, the jury must know how to “give effect” to relevant mitigating evidence presented to them at sentencing.¹¹ Accordingly, the Supreme Court has interpreted the Eighth Amendment’s prohibition of cruel and unusual punishment to mean that a jury cannot be prevented from giving effect to mitigating evidence.¹² Despite the Supreme Court’s unwavering dedication to the belief that a death sentence should be determined based upon consideration of aggravating and mitigating circumstances,¹³ cases such as *Blystone v. Pennsylvania*,¹⁴ as well as empirical studies,¹⁵ demonstrate that

child and mental retardation, as well as defendant’s age, poverty and a lack of a criminal record.

¹¹ See *Penry v. Johnson*, 532 U.S. 782, 789-90 (2001) (referring to “giving effect” to mitigating evidence in terms of deciding how much weight the mitigating factors deserve and considering mitigating evidence in assessing the defendant’s personal culpability for the crime for which the defendant was convicted).

¹² See *McKoy v. North Carolina*, 494 U.S. 433 (1990) (holding that a death penalty statute cannot require juries to unanimously find the existence of mitigating evidence prior to considering whether the mitigating evidence is strong enough to spare the defendant’s life); *Mills v. Maryland*, 486 U.S. 367 (1988) (holding that a death penalty statute cannot require juries to unanimously find the existence of mitigating evidence prior to considering whether the mitigating evidence is strong enough to spare the defendant’s life); *Lockett v. Ohio*, 438 U.S. 586 (1978) (reversing the death sentence of a defendant who merely drove the getaway car during a robbery and murder because the applicable statute did not permit the jury to consider the defendant’s lesser involvement in the crime).

¹³ See, e.g., *Buchanan v. Angelone*, 522 U.S. 269 (1998) (refusing to require jury instructions on particular mitigating factors, but reaffirming that a death sentence should be based upon a consideration of both aggravating and mitigating circumstances).

¹⁴ 494 U.S. 299 (1990) (upholding a death sentence despite both the jury’s expressed confusion about the definition of mitigation and desire not to impose a death sentence). See also *infra* Part III (discussing confused jurors in capital cases).

¹⁵ See, e.g., Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701 (2000) (discussing juries’ lack of comprehension and suggesting ways to correct the

defendants may lose their life not for the crime they committed, but because the jury failed to comprehend the law and did not receive the guidance necessary to adequately evaluate mitigating factors. As a result, cases exist where the jury believed the defendant did not deserve the death penalty, but, nonetheless, imposed the death penalty mistakenly believing they either had found no mitigation or that the particular mitigating evidence was not legally sufficient to spare the defendant's life.¹⁶

In *Blystone*, the Pennsylvania death penalty statute, which requires a jury to impose a death sentence upon the finding of no

problem). The author points out that “[s]yntactic and semantic bars to juror comprehension . . . can be made more comprehensible by simplifying sentence structure and by giving additional information about the meanings of abstract terms.” *Id.* at 701; *see also* Craig Haney, *Taking Capital Jury Seriously*, 70 IND. L.J. 1223 (1995) (discussing the reasons why juries impose the death sentence).

Th[e] decision-making process is . . .

. . . governed by confusion, lack of understanding and even chaos. Jurors decide life-and-death questions laboring under numerous misconceptions about the utility and operations of capital punishment—sometimes unclear about the fundamental importance of certain kinds of evidence (including something as basic as whether the evidence is aggravating or mitigating).

Id. at 1224-25; Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183 (1995) (discussing the reasons why juries impose the death sentence).

¹⁶ *Blystone*, 494 U.S. at 312 n.3 (Brennan, J., dissenting) (describing the jury's repeated requests for clarification); *see also* Prelim. Pet. for Writ of Habeas Corpus for Pet'r Blystone, *Blystone v. Horn*, No. 99-490 (W.D. Pa. filed Mar. 28, 2000). The jury asked the judge if they had to impose the death sentence if they found no mitigating factors. *Id.* at 68-69. Arguably, the jury's repeated questions demonstrate not only a misunderstanding of the law but also a feeling that the aggravating circumstance was not severe enough to impose a death sentence. *See* Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000) (discussing the jury's ability to understand the law as stated in actual capital cases as compared with revised mock jury instructions and explaining the implications of the results).

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mitigating factors but at least one aggravating factor,¹⁷ passed constitutional muster because the statute allowed the jury to take into account any and all factors about the defendant or the crime when considering mitigation.¹⁸

Recent developments reaffirmed the notion that in addition to permitting juries to consider mitigating evidence, juries must have both the opportunity and the means within the law to consider and give effect to relevant mitigating evidence.¹⁹ In *Penry II*, the Supreme Court held that the mere existence of a statute or a jury instruction allowing the jury to *consider* all mitigating evidence is not necessarily enough to permit the jury to *give effect* to the relevant mitigating evidence.²⁰ Despite this notion, nothing has been done to correct the continuing problem of juries sentencing defendants to death under the mistaken belief they have not found the necessary mitigation to spare the defendant's life.²¹

This note focuses on the effect *Penry II* has upon *Blystone* and subsequent cases, and discusses situations in which the jury either was confused about mitigation or expressed a desire to sentence the defendant to life in prison, but nonetheless imposed a death sentence. This note does not argue that the U.S. Constitution requires courts to give all capital juries specific instructions on the law of mitigation or how to determine when

¹⁷ 42 PA. CONS. STAT. § 9711(c)(1)(iv) (1998) (requiring that “the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.”). Mitigating circumstances “include[] any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” *Id.* at (e)(8).

¹⁸ *Blystone*, 494 U.S. at 304; *see also* 42 PA. CONS. STAT § 9711(c)(1)(iv) (1998).

¹⁹ *See Penry v. Johnson*, 532 U.S. 782 (2001) (reversing defendant's death sentence because the judge's instructions did not permit the jury to consider and give effect to evidence of the defendant's mental retardation).

²⁰ *Id.* at 793-96.

²¹ Research has found no statutes that have been amended or adopted to address what should be done when a jury appears confused on whether they found any mitigation.

mitigation exists.²² Rather, this note argues that, in light of *Penry II*, the U.S. Constitution requires that a jury receive instructions and guidance on what constitutes mitigating evidence and how to proceed once they have found mitigating evidence when the jury expresses confusion about mitigation or a desire not to sentence the defendant to death.²³

Part I of this note provides a comprehensive overview of death penalty jurisprudence in the United States, from *Furman v. Georgia*²⁴ to the present, and includes a discussion of guided discretion,²⁵ individualized sentencing and mitigation. Part II

²² See *Buchanan v. Angelone*, 522 U.S. 269 (1988) (holding juries do not have to be instructed on the concept of mitigating evidence or a particular statutory mitigating factor). *But see* STATE OF ILLINOIS, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 141 (2002) [hereinafter, REPORT OF THE GOVERNOR'S COMMISSION] (suggesting revisions to the Illinois pattern jury instructions, to include providing detailed explanations of the concept of mitigation), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html. The high number of misconceptions by capital jurors demonstrates that instructing juries on the concept of mitigating evidence might be the better practice. See *infra* Part III (discussing both empirical studies pertaining to jury comprehension in capital trials and cases where the jury asked the judge for assistance in understanding the complicated terminology applicable in capital cases).

²³ Cf. *Buchanan*, 522 U.S. at 272 (dealing with jury instructions when there is no evidence that the jury was either confused or desired to spare the defendant). The Supreme Court has never directly ruled on a judge's duty to ensure that constitutional mandates for capital sentencing are upheld when the jury expresses either a desire to spare the defendant's life or confusion pertaining to mitigation. See Berlow, *Deadly Decisions*, *supra* note 1 (referring to comments made by Paula Hannaford of the National Association of State Courts). Arguably, juries misunderstanding instructions lead to arbitrary death sentences, violating *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁴ 408 U.S. 238 (1972) (per curiam) (invalidating the death penalty in thirty-nine states, the District of Columbia, and the federal government by holding the death penalty as applied within the United States was unconstitutional because it allowed the sentencing body to arbitrarily impose a death sentence).

²⁵ See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (describing guided discretion as directing and limiting the sentencing bodies' authority to impose a death sentence in order to minimize the risk of arbitrary and capricious sentences); see also Lief H. Carter, *Capital Punishment*, in THE OXFORD

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discusses the *Blystone* and *Penry II* decisions. Part III demonstrates, through the analysis of empirical studies, that juries often do not understand how to give effect to mitigation. Part IV analyzes the effect of *Penry II* upon the future of capital punishment jurisprudence. Part V provides a brief summary on what the law now requires regarding jury instructions pertaining to mitigating evidence and what can be expected in the future. This note concludes that juries must be given specific guidance when the jury repeatedly expresses confusion on either the meaning of mitigation, how to determine whether mitigation exists, or what to do when mitigation has been found.

I. OVERVIEW OF DEATH PENALTY JURISPRUDENCE²⁶

Currently, thirty-eight states and the federal government sanction the death penalty as punishment for certain types of murder.²⁷ A moratorium on executions exists in two of these states,²⁸ and two judges have held the federal death penalty

COMPANION TO THE SUPREME COURT OF THE UNITED STATES 126 (Kermit L. Hall ed., 1992). Guided discretion can be defined as “statutory sentencing standards to guide sentencing bodies in making capital punishment decisions.” *Id.*

²⁶ See Hugo Adam Bedau, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* (Oxford Univ. Press, 1997) (providing a comprehensive analysis of the death penalty in the United States); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulations of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (analyzing Supreme Court death penalty jurisprudence since *Furman*).

²⁷ For a complete, current list of state death penalty statutes, see Death Penalty Information Center, *State by State Death Penalty Information*, at <http://www.deathpenaltyinfo.org/firstpage.html> (last visited Nov. 15, 2002). The states that sanction the death penalty are as follows: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.*

²⁸ See REPORT OF THE GOVERNOR’S COMMISSION, *supra* note 22. After discovering that more innocent people had been released from death row than

unconstitutional.²⁹ The other twelve states and the District of Columbia do not permit the death penalty.³⁰ Currently, guidelines must be followed prior to imposing a death sentence.³¹ For example, a death penalty statute must narrow the class of people eligible for the death penalty,³² and a jury must be able to give effect to relevant mitigating evidence.³³ These guidelines, which are relatively new developments resulting from an evolving interpretation during the past quarter century of the Eighth Amendment's prohibition against cruel and unusual punishment,

had been executed over the past twenty-four years, Illinois Governor George C. Ryan imposed a moratorium on executions beginning in 2000. *Id.* See also Death Penalty Information Center, *Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/innoc.html> (last visited Nov. 15, 2002). The problem in Illinois also plagues the entire country, as evidenced by the 102 wrongly convicted individuals released from death row since 1973. *Id.* See also Press Release, State of Maryland Governor's Press Office, Governor Glendening Issues a Stay of Execution in the Case of Wesley Eugene Baker (May 9, 2002) (staying one execution and stating an intent to stay all executions pending the release of a report detailing death penalty research conducted by the University of Maryland), at <http://www.gov.state.md.us/gov/press/2002/may/html/baker.html>.

²⁹ See *United States v. Quinones*, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002). In light of developing forms of technology, Judge Rakoff held the federal death penalty violates the Fifth Amendment of the United States Constitution because the finality of the death penalty deprives death row inmates of the procedural opportunities to prove their innocence as mandated by the Fifth Amendment's Due Process Clause. *Id.* See also *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002) (finding the Federal Death Penalty Act unconstitutional).

³⁰ See Death Penalty Information Center, *State by State Death Penalty Information*, *supra* note 27. The states that do not permit the death penalty are as follows: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.*

³¹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that Georgia's "threshold" death penalty statute dispels with the *Furman* concerns about arbitrarily and capriciously imposed death sentences).

³² See *supra* note 7 (citing Supreme Court cases and secondary authority discussing class narrowing and individualized sentencing).

³³ *Penry v. Johnson*, 532 U.S. 782 (2001).

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are constantly expanding.³⁴

*A. The Road to a New Error in Capital Punishment
Jurisprudence*

Prior to 1972, the Supreme Court rarely discussed the death penalty in terms of cruel and unusual punishment.³⁵ In 1972, in *Furman v. Georgia*, the Supreme Court's changing view on both the gravity of the death penalty and the analysis that would be applied in future capital cases became evident.³⁶ For the first time, the Supreme Court applied the Eighth Amendment to invalidate capital sentencing statutes for violating the prohibition against cruel and unusual punishment.³⁷ The Supreme Court was sharply divided on the reason for invalidating the statutes. This resulted in each justice writing an opinion, making *Furman* one

³⁴ See *Trop v. Dulles*, 356 U.S. 586 (1978) (establishing the evolving standards of decency method for determining cruel and unusual punishment and reversing a death sentence when the state law prevented the sentencing body from considering evidence of the defendant's lesser involvement in the murder); see also *infra* Part IV (analyzing the meaning of "giving effect to relevant mitigating evidence").

³⁵ See *Louisiana ex rel. Francis Resweber*, 329 U.S. 459, 463 (1947) (approving repeated electrocutions when the first attempt failed); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (approving public firing squads); *Bedau*, *supra* notes 4, 5 (discussing the history and evolution of the death penalty within the United States).

³⁶ 408 U.S. 238 (1972) (per curiam). In *Furman*, the issue was the constitutionality of state death penalty statutes that permitted the jury to impose a sentence of anything from a brief term of years to death when the defendant had been convicted of either murder or rape. *Id.*

³⁷ *Id.* at 239-40. "If the death penalty is limited by the fourteenth amendment's equal protection clause as are other laws in this country then selectivity based on unpopular defendants is unconstitutional" because imposing the death penalty on a particular class of people violates the desire for equality that was implicit within the ban on cruel and unusual punishment. Jason M. Schoenberg, *Making the Constitutional Cut: Evaluating New York's Death Penalty Statute in Light of the Supreme Court's Capital Punishment Mandates*, 8 J.L. & POL'Y 337, 345 n.43 (1999); see U.S. CONST. amend. VIII ("nor [shall] cruel and unusual punishment [be] inflicted").

of the longest Supreme Court opinions ever written.³⁸ Moreover, the Court only addressed the statutes as applied rather than the constitutionality of capital punishment on its face.³⁹ Despite the differing opinions, *Furman* invalidated all death penalty statutes throughout the country.⁴⁰

B. The Beginning of Modern Death Penalty Jurisprudence

Within four years of *Furman*, many states rewrote their death penalty statutes.⁴¹ Accordingly, cases began to appear before the Supreme Court challenging the constitutionality of three different types of statutes.⁴² The first type of statute, commonly referred to as a “weighing” type of “guided discretion,”⁴³ requires the

³⁸ Nina Rivkind & Steven F. Shatz, *CASES AND MATERIALS ON THE DEATH PENALTY* 44 n.a (2001) (stating that *Furman* took up 233 pages in the official reporter).

³⁹ *See generally Furman*, 408 U.S. 238 (1972). Justices Douglas, Stewart, and White each wrote concurring opinions in *Furman* in which they expressed their displeasure with the manner in which the death penalty was applied. *Id.* “Juries have practically untrammelled discretion to let an accused live or insist that he die.” *Id.* at 248 (Douglas, J., concurring). “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual” *Id.* at 310 (Stewart, J., concurring). “[T]here is no meaningful basis for distinguishing the few cases in which death is imposed from the many cases in which it is not.” *Id.* at 313 (White, J., concurring).

⁴⁰ *See Bedau, supra* note 5 (discussing the ramifications of *Furman*); Steiker & Steiker, *supra* note 26, at 371 (discussing the complexities of the Supreme Court’s death penalty doctrine since 1976). As a result of *Furman* all death sentences were commuted to sentences of life imprisonment. *Id.*

⁴¹ *Gregg v. Georgia*, 428 U.S. 153, 179 n.23 (1976) (addressing the constitutionality of the death penalty statute enacted in Georgia in the wake of *Furman*).

⁴² *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding mandatory death penalty statutes unconstitutional); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding a “weighing” statute); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding a “threshold” statute); *see also infra* Part II (discussing the specific questions under the Texas death penalty statute).

⁴³ *See Carter, supra* note 25 (defining “guided discretion”). Twenty-three states have a “weighing” death penalty statute. *See* ALA. CODE § 13-A-5-39 to -59 (Michie 1994); ALA. CODE § 13A-5-48 (Michie 1994) (outlining weighing

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sentencing body to find the existence of at least one statutory

provision); ARK. CODE ANN. § 5-4-601 to -617 (Michie Supp. 1987); ARK. CODE ANN. §§ 5-4-603(2), 5-4-604 (Michie Supp. 1987) (outlining weighing provision); CAL. PENAL CODE § 190.1-9 (West 1998, Supp. 2002); CAL. PENAL CODE § 190.3 (West 1998) (outlining weighing provision); COLO. REV. STAT. §§ 16-11-103, -401, -401.5, -402 to -405, 16-12-201 to -210 (West supp. 1991); COLO. REV. STAT. § 16-11-103(2)(a)(III) (West Supp. 1991) (outlining weighing provision); CONN. GEN. STAT. § 53a-46a to -46b (West 2001); CONN. GEN. STAT. § 53-46a (West 2001) (outlining weighing provision); DEL. CODE ANN. tit. 11 § 4209 (Supp. 1991); DEL. CODE ANN. tit. 11, § 4209(d)(1)(b) (Supp. 1991) (outlining weighing provision); FLA. STAT. ANN. § 921.141 (West 2001); FLA. STAT. ANN. § 921.141(2)(b), (3)(b) (West 2001) (outlining weighing provision); IDAHO CODE § 19-2515 (Michie 1987); IDAHO CODE § 19-2515(c) (Michie 1987) (outlining weighing provision); IND. CODE ANN. §§ 35-38-6-1, 35-50-2-9 (West Supp. 1991); IND. CODE ANN. § 35-50-2-9(b) (West Supp. 1991) (outlining weighing provision); KAN. STAT. ANN. § 21-3439 (1994), KAN. STAT. ANN. § 21-4624 (Michie 1994) (outlining weighing provision); MD. ANN. CODE art. 27, § 413 (Michie 1996) (including weighing provision); MISS. CODE ANN. § 99-19-101 to -103 (West supp. 1991); MISS. CODE ANN. § 99-19-103 (West supp. 1991) (outlining weighing provision); MO. ANN. STAT. 565-030 to -040 (Vernon Supp. 1992); MO. ANN. STAT. § 565.030(4) (Vernon Supp. 1992) (outlining weighing provision); NEB. REV. STAT. § 29-2521 to -2534 (1989); NEB. REV. STAT. § 29-2522 (1989) (outlining weighing provision); NEV. REV. STAT. § 200.030-.035 (1991); NEV. REV. STAT. § 200.030(4)(a) (1991) (outlining weighing provision); N.H. REV. STAT. ANN. § 630.5 (Supp. 1991); N.H. REV. STAT. ANN. § 630:5(IV) (Supp. 1991) (outlining weighing provision); N.J. STAT. ANN. § 2C:11-3 (West 1995); N.J. STAT. ANN. § 2C:11-3 (West 1995) (outlining weighing provision); N.Y. PENAL LAW § 125.27 (McKinney 1998 & Supp. 1999); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1999) (outlining weighing provision); N.C. GEN. STAT. § 15A-2000 (Lexis 2000); N.C. GEN. STAT. § 15A-2000(b)(2) (Lexis 2000) (outlining weighing provision); OHIO REV. CODE ANN. § 2929.03-.05 (West 1989); OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1989) (outlining weighing provision); OKLA. STAT. ANN. tit. 21 § 701.10-.15 (West 1983); OKLA. STAT. ANN. tit. 21 § 701.11 (West Supp. 1992) (outlining weighing provision); 42 PA. CONS. STAT. § 9711 (1998); 42 PA. CONS. STAT. § 9711(C)(1)(IV) (1998) (outlining weighing provision); TENN. CODE ANN. § 39-13-204 (Lexis 1991); TENN. CODE ANN. § 39-13-204(g)(1)(B) (Lexis 1991) (outlining weighing provision). The statutory schemes of Oregon and Texas do not fit within the categories of weighing or non-weighing statutes but have been held constitutional by the United States Supreme Court. *See* OR. REV. STAT. § 163.150 (1997); TEX. CRIM. PROC. CODE ANN. art. 37.01-.071 (Vernon 1992).

aggravating circumstance.⁴⁴ Then, assuming the jury finds a statutory aggravator, the sentencing body must weigh the aggravating circumstances against the mitigating circumstances to determine whether the former outweighed the latter.⁴⁵ The second type of statute is also a form of guided discretion but is considered to be a “threshold statute.”⁴⁶

⁴⁴ See *supra* note 9 (discussing the meaning of aggravating circumstances); see also *infra* note 47 (citing Georgia’s threshold death penalty statute and discussing the meaning of “statutory aggravating circumstance”).

⁴⁵ See *supra* note 10 (discussing the meaning of mitigating circumstances); see also *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding the constitutionality of a “weighing” statute).

⁴⁶ See, e.g., GA. CODE ANN. § 17-10-31 (Michie 1997) (requiring a threshold showing of at least one statutory aggravating circumstance prior to permitting the jury to consider imposing the death sentence, but allowing the jury to impose a life sentence regardless of the consideration of mitigating circumstances). Thirteen states have a non-weighing, “threshold” death penalty statute. See ARIZ. REV. STAT. ANN. § 13-703 (West 2002); ARIZ. REV. STAT. ANN. § 13-703(F) (West 2002) (outlining non-weighing provision); GA. CODE ANN. § 17-10-30 (Michie 1997, supp. 2002); GA. CODE ANN. § 17-10-31 (Michie 1997) (outlining non-weighing provision); 720 ILL. ANN. STAT. 5/9-1 (Michie 1993, Supp. 2002); 720 ILL. ANN. STAT. 5/9-1(g)(h) (Michie 1993, supp. 2002) (outlining non-weighing provision); KY. REV. STAT. ANN. § 532.025 (Michie/Bobbs-Merrill 1999, supp. 2001); KY. REV. STAT. ANN. § 532.025(3) (Michie/Bobbs-Merrill 1999, supp. 2001) (outlining non-weighing provision); LA. CODE CRIM. PROC. ANN. art. 905 (West 1984); LA. CODE CRIM. PROC. ANN. art. 905.3 (West Supp. 1992) (outlining non-weighing provision); MONT. CODE ANN. § 46-18-301 (2001); MONT. CODE ANN. § 46-18-305 (2001) (outlining non-weighing provision); N.M. STAT. ANN. § 31-18-14 (Michie 1990); N.M. STAT. ANN. § 31-18-14(A) (Michie 1990) (outlining non-weighing provision); S.C. CODE ANN. § 16-3-20 (Law Co-op Supp. 1991); S.C. CODE ANN. § 16-3-20(C) (Law. Co-op Supp. 1991) (outlining non-weighing provision); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Michie 1998); S.D. CODIFIED LAWS ANN. § 23A-27A-6 (Michie 1998) (outlining non-weighing provision); UTAH CODE ANN. § 76-3-206 to -207 (Lexis Supp. 1992); UTAH CODE ANN. § 76-3-207(4) (Lexis supp. 1992) (outlining non-weighing provision); VA. CODE ANN. § 19.2-264.2 to -264.4 (Michie 1990); VA. CODE ANN. § 19.2-264.2 to -264.4 (C) (Michie 1990) (outlining non-weighing provision); WASH. REV. CODE ANN. § 10.95.020 -.190 (West 1990); WASH. REV. CODE ANN. § 10.95.060(4) (West 1990) (outlining non-weighing provision); WYO. STAT. § 6-2-102 (Michie 1988); WYO. STAT. § 6-2-102(e) (Michie 1988) (outlining non-weighing

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As in the “weighing” statute, the sentencing body is required to find the existence of at least one statutory aggravating circumstance,⁴⁷ and it must consider aggravating and mitigating factors prior to imposing a death sentence.⁴⁸ Yet, instead of weighing the aggravating factors against the mitigating factors, a “threshold” statute permits the jury to spare the defendant’s life for any or no reason at all.⁴⁹ The third type of death penalty statute made the death penalty mandatory for certain types of crimes, such as murder in the first degree.⁵⁰

In reaching a decision on the constitutionality of these statutes for the first time, the Supreme Court, in a one paragraph per curiam opinion, held that “the punishment of death does not invariably violate the Constitution.”⁵¹ In reviewing the “threshold” statute and the “weighing” statute, the Supreme Court concluded that the concern in *Furman*, exemplified by Justice Stewart’s statement that the death penalty was “wantonly

provision).

⁴⁷ See, e.g., GA. CODE ANN. § 17-10-30 (Michie 1997) (enumerating the statutory aggravating circumstances in Georgia). A statutory aggravating circumstance is an aggravating circumstance that is specifically enumerated within the death penalty statute. *Id.* Non-statutory aggravating circumstances are aggravating circumstances not specifically enumerated within the state’s death penalty statute. *Id.*

⁴⁸ See GA.CODE ANN. § 17-10-31 (Michie 1997).

⁴⁹ *Id.*; see *Gregg v. Georgia*, 428 U.S. 153 (1976) (per curiam) (upholding the constitutionality of a “threshold” statute).

⁵⁰ See *Roberts v. Louisiana*, 431 U.S. 633, 638 (1977) (striking down a mandatory death sentence for the murder of a police officer); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidating a death penalty statute requiring the death sentence for a first degree murder conviction); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating mandatory death sentences for first degree murder); see also *Sumner v. Shuman*, 483 U.S. 66 (1987) (holding a mandatory death sentence for an inmate convicted of murder while serving a life sentence unconstitutional).

⁵¹ *Gregg*, 428 U.S. at 168-69 (explaining that the reasoning behind the decision in *Furman*, 408 U.S. 238 (1972), was based upon the manner in which the death penalty was implemented and who was sentenced to death rather than a per se rule that the death penalty violated the Eighth Amendment’s prohibition of cruel and unusual punishment).

and freakishly imposed,”⁵² would be resolved as long as the sentencing body was given “adequate information and guidance.”⁵³ In analyzing how this could be accomplished, the Supreme Court suggested a bifurcated proceeding,⁵⁴ which would allow the sentencing body to first determine guilt and then, assuming the defendant was found guilty, determine the sentence in a separate proceeding.⁵⁵

The Supreme Court reached a different conclusion on the constitutionality of mandatory death sentences in *Woodson v. North Carolina*⁵⁶ and *Roberts v. Louisiana*.⁵⁷ In invalidating this type of sentencing scheme, the Supreme Court realized the “need for reliability in the determination that death is the appropriate

⁵² *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

⁵³ *Gregg*, 428 U.S. at 195.

⁵⁴ *Id.* The twin objectives of consistency and individuality are “best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.” *Id.* See also Death Penalty Information Center, *State by State Death Penalty Information*, at <http://www.deathpenaltyinfo.org> (last visited Nov. 15, 2002). The bifurcated system is now utilized in all states that permit the imposition of the death penalty. *Id.*

⁵⁵ Death Penalty Information Center, *State by State Death Penalty Information*, at <http://www.deathpenaltyinfo.org/firstpage.html> (last visited Nov. 15, 2002). Arizona, Colorado, Idaho, Montana and Nebraska required the judge to determine the sentence, but this was recently held to be a violation of the Sixth Amendment right to a trial by an impartial jury. See *Ring v. Arizona*, 122 S. Ct. 2428 (2002). Alabama, Delaware, Florida, and Indiana permit the judge to override the jury’s recommendation of life. See Death Penalty Information Center, *Developments Related to Ring*, at <http://www.deathpenaltyinfo.org/Ring.html#cases> (last visited Feb. 5, 2002). It is currently unclear as to whether these override provisions are affected by the United States Supreme Court’s decision in *Ring*. Nonetheless, the Florida Supreme Court has stayed two executions, in light of *Ring*, to allow the court to hear arguments on the Florida override system. Phil Long, *Florida Supreme Court Halts Two Executions*, MIAMI HERALD, July 9, 2002, at A1.

⁵⁶ 428 U.S. 280 (1976) (invalidating a statute requiring the death penalty for first degree murder).

⁵⁷ 428 U.S. 325 (1976) (invalidating a statute requiring the death penalty for first degree murder).

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punishment.”⁵⁸ The Supreme Court held that a “mandatory death penalty statute does not meet the constitutional requirement of replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing death.”⁵⁹

Furthermore, in *Woodson*, the Supreme Court took the reliability element of sentencing to a higher level when it discussed the concept of individualized sentencing.⁶⁰ The Supreme Court reasoned that “mandatory death penalty statutes unconstitutionally fail to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.”⁶¹ Thus, a mandatory death penalty statute for certain types of murder prevents the consideration of “compassionate or mitigating factors serving from the diverse frailties of humankind”⁶² and results in a “faceless, undifferentiated mass [being] subjected to the blind infliction of the penalty of death.”⁶³ Therefore, the Supreme Court concluded that mandatory death sentences would be inconsistent with the “fundamental respect for humanity underlying the Eighth Amendment.”⁶⁴

*C. Every Human Being is Unique: The Requirement of Individualized Sentencing*⁶⁵

Individualized sentencing means that the sentencing proceeding should be based on a consideration of “relevant facets of the character and record of the individual offender” and “the

⁵⁸ *Woodson*, 428 U.S. at 305.

⁵⁹ *Id.* at 303.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*; see *infra* note 6 (discussing the death penalty for crimes other than murder).

⁶³ *Woodson*, 428 U.S. at 304.

⁶⁴ *Id.*

⁶⁵ See *Bilionis*, *supra* note 9 (discussing individualized sentencing and the *Lockett* Doctrine).

circumstances of the particular offense.”⁶⁶ Accordingly, if properly implemented, individualized sentencing would alleviate the problem of arbitrary death sentences.⁶⁷

This concept of individualized sentencing, first discussed as dicta in *Woodson*,⁶⁸ did not have a major impact upon death penalty jurisprudence until *Lockett v. Ohio*.⁶⁹ In *Lockett*, the Supreme Court declared unconstitutional a statute that did not permit the decision maker to consider as a mitigating factor the defendant’s lesser involvement in the crime.⁷⁰ In doing so, the Supreme Court reiterated the need for a “greater degree of reliability when a death sentence is imposed”⁷¹ and handed down specific guidelines to ensure a death sentence is not applied in an “arbitrary and capricious manner.”⁷² These new guidelines require that the “sentencing body be able to [consider] as a mitigating factor, any [relevant] aspect of [a] defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”⁷³ in order to ensure that the death penalty is not “imposed

⁶⁶ *Woodson*, 428 U.S. at 304 (discussing the concept of individualized sentencing); accord *Gregg v. Georgia*, 428 U.S. 153 (1976) (discussing the concept of individualized sentencing); *Furman v. Georgia*, 408 U.S. 238 (1972) (discussing the concept of individualized sentencing).

⁶⁷ See generally *Furman*, 408 U.S. 238 (1972) (discussing the importance of individualized sentencing in ensuring that the death penalty is not arbitrarily imposed).

⁶⁸ 428 U.S. 280 (1976) (holding mandatory death sentences unconstitutional while also discussing individualized sentencing).

⁶⁹ 438 U.S. 586 (1978).

⁷⁰ *Id.* In *Lockett*, the defendant merely drove the getaway car and may not have been present at the time the robbery occurred. *Id.*

⁷¹ *Id.* at 604; accord *Furman v. Georgia*, 408 U.S. 238 (1972) (holding the death penalty, as applied in the United States, unconstitutional since the death sentences were unreliable due to there being no way to distinguish those who were sentenced to death from those whose lives were spared).

⁷² *Lockett*, 438 U.S. at 601; see generally *Furman v. Georgia*, 408 U.S. 238 (1972).

⁷³ *Lockett*, 438 U.S. at 604; accord *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988).

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in spite of factors which may call for a less severe penalty.”⁷⁴

As a corollary to this requirement, the sentencing body must be given the means to consider mitigating evidence.⁷⁵ This ensures that the sentencing body’s “ability to consider . . . relevant mitigating evidence” is more than merely a goal that cannot be achieved.⁷⁶ Thus, the sentencing body’s decision should focus on the individual defendant rather than the crime or the impact of the crime.⁷⁷

The individualized sentencing requirement adopted and expanded upon in *Lockett* has resulted in a large number of cases interpreting the extent of the *Lockett* Doctrine.⁷⁸ In *Penry v. Lynaugh*,⁷⁹ as a natural result of *Lockett*, the Supreme Court held

⁷⁴ *Lockett*, 438 U.S. at 605; accord *California v. Brown*, 479 U.S. 538 (1987) (reversing a death sentence where the jury failed to address relevant mitigating factors in determining the sentence).

[E]vidence about the defendant’s background and character is relevant [as mitigation] 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 545 (O’Connor, J., concurring).

⁷⁵ *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (reversing a death sentence because the jury was not given the means to give mitigating weight to the defendant’s mental retardation).

⁷⁶ *Lockett*, 438 U.S. at 604.

⁷⁷ See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991) (holding that victim-impact evidence is admissible at the sentencing proceeding of a death penalty case not because of the impact of the crime, but to enable the jury to get a clear picture of what happened so that the sentencing decision will be more focused on the individual defendant).

⁷⁸ See *infra* notes 79-95 (discussing cases applying and expanding the *Lockett* Doctrine).

⁷⁹ 492 U.S. 302 (1989) (reversing a death sentence because the jury instructions did not permit the jury to consider the defendant’s mental retardation as grounds to spare his life). *Penry* was retried by the state of Texas and convicted under the same statute, which was amended to include a supplemental instruction pertaining to mental retardation. *Penry v. Johnson*, 532 U.S. 782, 786 (2001). Again, *Penry*’s death sentence was reversed by the United States Supreme Court. *Id.* at 804. See Harvey Rice, *Penry Sentenced 3rd Time to Die: Jury Rejects Argument for Retardation*, HOUS. CHRON., July

that “[t]he sentencer must . . . be able to . . . *give effect* to [any mitigating evidence relevant to the defendant’s background or to the circumstances of the crime] in imposing [the] sentence.”⁸⁰ Therefore, the sentencing body must be “provided with a vehicle for expressing its reasoned moral response to mitigating evidence in rendering its sentencing decision.”⁸¹

As a result of *Lockett* and its progeny, the sentencing body cannot refuse to consider relevant mitigating evidence or refuse to give relevant mitigating evidence any weight.⁸² Similarly, the judge cannot prevent the defendant from placing relevant mitigating evidence before the jury.⁸³ Finally, the Supreme Court has held that the sentencing body must also be allowed to consider non-statutory mitigating factors.⁸⁴

These expansive readings of *Lockett* have led to the presentation to a jury of myriad factors in an attempt to spare the defendant’s life.⁸⁵ As a result, many courts have held that, under *Lockett*, the defendant cannot be prevented from presenting mitigating evidence bearing upon the defendant’s age,⁸⁶ mental

4, 2002, at 1; *Nightline* (ABC television broadcast, July 11, 2002). The State of Texas sought the death penalty against Penry for a third time, and on July 3, 2002, the jury imposed a third death sentence on Penry after finding he was not mentally retarded. *Id.* See *infra* Part II (discussing the facts and law pertaining to the two *Penry* cases).

⁸⁰ *Penry I*, 492 U.S. at 319.

⁸¹ *Id.* at 328.

⁸² *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (reversing a death sentence where the sentencing body refused to consider mitigating evidence pertaining to the defendant’s unhappy upbringing and emotional disturbance).

⁸³ *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (reversing a death sentence when the judge refused to allow the defendant to offer evidence of his good behavior while in prison).

⁸⁴ *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (holding that the requirement that the “sentencer not refuse to consider or be precluded from considering any relevant mitigating evidence” applies to non-statutory mitigating evidence, *quoting Skipper*, 476 U.S. at 4).

⁸⁵ See *Bilionis*, *supra* note 9 (discussing the impact of the *Lockett* Doctrine).

⁸⁶ See *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989) (plurality opinion) (reversing a death sentence because the trial court prevented the defendant

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retardation,⁸⁷ provocation by others,⁸⁸ insanity,⁸⁹ alcohol or drug usage,⁹⁰ limited involvement in the actual homicide,⁹¹ neglect,⁹² child abuse,⁹³ poverty⁹⁴ and a minor criminal record.⁹⁵

D. Recent Developments Pertaining to the Individualized Sentencing Scheme and Jury Instructions

During the past decade, the Supreme Court started retreating from the principles of *Lockett* and handing down rulings that are

from presenting age as a mitigating factor while holding that executing a defendant who was under the age of sixteen at the time of the commission of the crime constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. *But see* *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment prohibition of cruel and unusual punishment and, therefore, overruling in part *Penry I*, which permitted the execution of the mentally retarded). In light of *Atkins*, a debate currently exists as to whether executing a juvenile remains constitutional. *See* *Patterson v. Texas*, 123 S. Ct. 24 (2002) (Ginsburg, J., dissenting, joined by Breyer, J.).

⁸⁷ *Penry v. Lynaugh*, 492 U.S. 302 (1989), *overruled in part by*, *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that that executing the mentally retarded violates the Eighth Amendment prohibition against cruel and unusual punishment); *see also* *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (holding that juries must make findings of facts that could increase the sentence). In light of *Ring*, it appears as if the jury must both determine whether the defendant is mentally retarded, making him ineligible for the death penalty, and, in the alternative, whether a lower intellectual status not rising to the level of mental retardation constitutes sufficient mitigation to spare the defendant's life.

⁸⁸ *Spinkellink v. Wainwright*, 578 F.2d 582, 621 (5th Cir. 1978).

⁸⁹ *Ford v. Wainwright*, 477 U.S. 399, 414 (1986).

⁹⁰ *Robison v. Maynard*, 829 F.2d 1501, 1511 (10th Cir. 1987).

⁹¹ *Enmund v. Florida*, 458 U.S. 782 (1982). *But see* *Tison v. Arizona*, 481 U.S. 137 (1987) (permitting the death penalty for a defendant who did not commit murder, but either had the *mens rea* necessary to commit the murder or acted with a reckless indifference towards the crime).

⁹² *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987).

⁹³ *Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir. 1986), *cert. denied*, 482 U.S. 918 (1987).

⁹⁴ *See generally* *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986).

⁹⁵ *Coleman v. Risley*, 839 F.2d 434, 453 (9th Cir. 1988).

less favorable to defendants.⁹⁶ For example, the Supreme Court does not require the trial judge to instruct the jury with either an explanation of the terminology contained within the instructions or how to apply the principles of mitigation.⁹⁷ This poses a problem for a confused jury because, absent an explanation, a jury that is unable to understand the instructions or does not know when it has found relevant mitigating evidence is incapable of adequately considering the mitigating evidence.

In *Buchanan v. Angelone*,⁹⁸ the Supreme Court failed to directly address the issue of what to do with juries that are confused about mitigation when the Court held that a capital jury does not generally have to be instructed on the concept of mitigating evidence or on a particular statutory mitigating factor.⁹⁹ In *Weeks v. Angelone*,¹⁰⁰ decided prior to *Penry II*, the Supreme Court again dodged the issue of juries expressing a misunderstanding mitigation. Instead, the court only addressed the issue of what the judge should do when the jury asks if they are required to impose the death penalty upon finding that an aggravating factor has been proven beyond a reasonable doubt.¹⁰¹

⁹⁶ See, e.g., *Buchanan v. Angelone*, 522 U.S. 269 (1998) (holding that a judge does not need to give specific instructions pertaining to the law of mitigation when there is no reason to believe that the instruction is necessary).

⁹⁷ See *id.* at 272.

⁹⁸ 522 U.S. 269 (1998).

⁹⁹ *Id.* at 272.

¹⁰⁰ 528 U.S. 225 (2000).

¹⁰¹ *Id.* at 234. The existence of an aggravating factor is never sufficient in itself to sentence a person to death. Cf. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (ruling that aggravating factors are those that only apply to a subclass of defendants and thus narrow the class of people eligible for the death sentence); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (holding that “the use of aggravating circumstances is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury’s discretion”). Nevertheless, many jurors believe the existence of an aggravating circumstance requires the defendant to be sentenced to death. See William S. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1091 (1995) (finding that many jurors “believed that they were required to impose the death penalty if they found that the crime was heinous, vile or depraved”); Theodore Eisenberg et al.,

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Despite the jury's obvious misunderstanding of the law,¹⁰² the Supreme Court held that the trial judge did not err by merely referring the jury back to the relevant portion of his original jury instructions since the jury "would have asked another [question] if it felt the judge's response unsatisfactory."¹⁰³ Thus, the Supreme Court assumed that the jury was no longer confused because, unlike in *Blystone*, the jury did not ask any further questions. While Supreme Court jurisprudence pertaining to jury instructions in capital cases has not been favorable to defendants, the Supreme Court has determined that jury instructions violate the principles of individualized sentencing established in *Lockett* when "there [is a] reasonable likelihood that the jury . . . applied the instruction in a way that prevented consideration of constitutionally relevant [mitigating] evidence."¹⁰⁴

II. CASE LAW PERTAINING TO GIVING EFFECT TO RELEVANT MITIGATING EVIDENCE

During the past thirty years, the Supreme Court has begun addressing what it means to consider evidence in the sentencing

Jury Responsibility in Capital Sentencing: An Empirical Study, 44 BUFF. L. REV. 339, 360 (1996) (stating that "[n]early one-third of jurors were under the mistaken impression that the law required a death sentence if they found heinousness or dangerousness"); William S. Geiner & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials*, 15 AM. J. CRIM. L. 1, 41 (1989) (finding a significant number of jurors in death penalty cases believed that the death penalty was mandatory or presumed for first degree murder).

¹⁰² See *Tuilaepa*, 512 U.S. at 972 (holding that aggravating factors are necessary to impose the death penalty and, therefore, perform the required narrowing function, but are not enough, alone, to impose a death sentence). Therefore, the finding of an aggravating circumstance is not enough, in itself, to justify a death sentence. Cf. *id.*; see also, *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (holding that to pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty").

¹⁰³ *Weeks*, 528 U.S. at 234, 236.

¹⁰⁴ *Boyd v. California*, 494 U.S. 370, 380 (1990).

phase of a capital murder trial.¹⁰⁵ The Supreme Court eventually reached the conclusion that the word “consider” means the jury must not only weigh the mitigating evidence in their decision, but also must have a “vehicle” for giving effect to this mitigating evidence.¹⁰⁶ Defining exactly what is meant by a “vehicle” for giving effect to mitigation became the subject of two landmark decisions pertaining to modern death penalty jurisprudence.¹⁰⁷

A. *Blystone v. Pennsylvania*

In *Blystone v. Pennsylvania*,¹⁰⁸ Scott Blystone and his friends picked up a hitchhiker and robbed him.¹⁰⁹ Upon request, the hitchhiker failed to hand over any money.¹¹⁰ Blystone pulled over to the side of the road and took thirteen dollars from the hitchhiker at gunpoint.¹¹¹ After taking the money, Blystone then ordered the hitchhiker to lay face down and shot him six times in

¹⁰⁵ See *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring); see also *supra* note 74 (quoting Justice O’Connor’s concurrence).

¹⁰⁶ *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989) (referring to “vehicle” as a way for the jury to obey the law and still determine that the defendant should receive a life sentence based on the mitigating evidence presented at trial).

¹⁰⁷ See *Penry v. Johnson*, 532 U.S. 782 (2001) (holding that a constitutional statute is not enough in itself to ensure that a sentencing body has an avenue to give effect to relevant mitigating evidence); *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (holding that a statute mandating death if no mitigating circumstances exist gives the jury an avenue to consider relevant mitigating evidence because the jury must consider the potential mitigating evidence in order to determine whether mitigating evidence exists).

¹⁰⁸ 494 U.S. 299 (1990).

¹⁰⁹ *Id.* at 301.

¹¹⁰ See Mem. of Law in Supp. of Writ of Habeas Corpus for Pet’r Blystone at 64, *Blystone v. Horn*, No. 99-490 (W.D. Pa. filed Mar. 28, 2000).

¹¹¹ See *id.* There is currently a dispute over whether Blystone actually obtained any money from the hitchhiker and, therefore, whether the aggravating circumstance of committing the murder in the commission of a robbery actually existed. *Id.* Moreover, the jury never considered whether the taking of only thirteen dollars constituted a mitigating circumstance. *Id.*

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the head, causing his death.¹¹²

Blystone was charged with capital murder and represented at trial by a public defender.¹¹³ At the sentencing phase of trial, Blystone failed to present any mitigating evidence.¹¹⁴ Nonetheless, under Pennsylvania law, the failure to present mitigating evidence does not preclude the jury from finding mitigating evidence.¹¹⁵ In Pennsylvania, the entire guilt phase of the trial is incorporated as evidence into the sentencing phase.¹¹⁶ This means the jury must weigh any factors and evidence from the guilt phase along with the aggravators and mitigators presented at sentencing to determine whether the aggravators outweigh the mitigators.¹¹⁷ Then, if the jury finds at least one statutory aggravating circumstance and no mitigating circumstances, the jury must impose a death sentence.¹¹⁸

During the sentencing phase jury deliberations in *Blystone*, the jury asked for the definition of mitigation and was told that mitigating factors are commonly understood.¹¹⁹ The judge, then,

¹¹² *Blystone*, 494 U.S. at 301-02. *But see generally* Mem. of Law in Supp. of Writ of Habeas Corpus for Pet'r Blystone, *Blystone v. Horn*, No. 99-490 (W.D. Pa. filed Mar. 29, 2000) (disputing many of the facts of the case).

¹¹³ *See Blystone v. Horn*, Prelim. Pet. for a Writ of Habeas Corpus at 6. Blystone's lawyer was a part time-public defender with little experience, funds, or assistance. *Id.* Each of these factors affects the outcome of capital cases. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (analyzing how the quality of representation determines whether a defendant receives a death sentence).

¹¹⁴ *Blystone*, 494 U.S. at 306 n.4.

¹¹⁵ *See* 42 PA. CONS. ST. § 9711 (1998) (defining, explaining and enumerating mitigating circumstances).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at § 9711(c)(1)(iv).

¹¹⁸ *Id.* "[T]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance" *Id.*

¹¹⁹ *See* Mem. of Law in Supp. of Writ of Habeas Corpus for Pet'r Blystone at 64, *Blystone v. Horn*, No. 99-490 (W.D. Pa. filed Mar. 29, 2000).

reread the initial instruction, which did not define mitigation.¹²⁰ After further reviewing the evidence, the jury again asked about the definition of mitigating factors and more specifically asked the judge if they were required to sentence the defendant to death if they found an aggravating factor and no mitigating factor, to which the judge responded by rereading his initial jury instructions.¹²¹ Arguably, individuals who ask whether a particular act is required may not want to commit the act. Therefore, one may conclude that the jury's question was based upon the hope of avoiding having to impose a death sentence. Thus, the jury may have been asking the judge to resolve the possible dilemma of either pretending to find the existence of an aggravating circumstance in order to impose a life sentence or imposing a death sentence when they did not believe death was the appropriate sentence.¹²² Since the judge neither explained that the desire to impose a life sentence may constitute mitigation nor provided any other guidance, despite the apparent desire to spare Blystone's life, the jury sentenced him to death upon finding no mitigating circumstances and one aggravating circumstance: he "committed a killing while in the perpetration of a felony."¹²³

Blystone appealed his conviction, claiming that Pennsylvania's death penalty statute improperly limited the jury's

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See *Penry v. Johnson*, 532 U.S. 789 (2001) (discussing the presumption that juries obey the laws and the impossible task of asking jurors to choose between obeying the law as stated and imposing the sentence they believe is most justified); see also *supra* note 16. The bifurcated system employed in capital cases seems to prevent jury nullification from becoming a viable option in capital cases. The sentencing phase and the guilt phase are separate proceedings. Under this system, the jury determines whether a defendant is guilty of capital murder prior to hearing any potentially mitigating evidence. Therefore, a jury is not likely to find a defendant guilty of a lesser offense in order to avoid imposing a death sentence because the jury usually can impose a life sentence based upon the evidence presented at the sentencing phase of a capital trial.

¹²³ *Blystone v. Pennsylvania*, 494 U.S. 299, 302 (1990); see also *supra* note 111 (noting the factual uncertainties with respect to the *Blystone* case).

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discretion by requiring the jury to sentence him to death.¹²⁴ The magnitude of the claim and its potential impact upon the sentences of other death row inmates drew a great deal of attention,¹²⁵ particularly after the Supreme Court agreed to hear the case.¹²⁶

In analyzing the constitutionality of the Pennsylvania statute, the Supreme Court compared the mandatory portion of the statute with the list of enumerated mitigating circumstances.¹²⁷ The Supreme Court concluded that the statute permitted the jury to hear and evaluate all mitigating evidence because the “catch all”

¹²⁴ *Id.* at 306.

¹²⁵ *See generally* Steiker & Steiker, *supra* note 26 (discussing the complexities of modern Supreme Court death penalty jurisprudence and the attention that is paid to death penalty cases).

¹²⁶ 494 U.S. 299 (1990).

¹²⁷ *Id.* Compare 42 PA. CONS. STAT. § 9711(c)(1)(iv) (1998) (describing the circumstances under which a death penalty is mandatory) with 42 PA. CONS. STAT. at § 9711(e) (providing an inclusive list of mitigating circumstances).

Mitigating circumstances—Mitigating circumstances shall include the following:

- (1) The defendant has no significant history of prior criminal convictions.
- (2) The defendant was under the influence of extreme mental or emotional disturbance.
- (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (4) The age of the defendant at the time of the crime.
- (5) The defendant acted under extreme duress . . . or acted under the substantial domination of another person.
- (6) The victim was a participant in the defendant’s homicidal conduct or consented to the homicidal acts.
- (7) The defendant’s participation in the homicidal act was relatively minor.
- (8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

Id.

mitigating factor permits the presentation of “any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.”¹²⁸ Moreover, the Supreme Court concluded that the combination of the “catch all” mitigator and the incorporation of the guilt phase of the trial into the sentencing phase of the trial required the jury to consider and evaluate the potentially mitigating circumstances in order to determine whether mitigating evidence existed.¹²⁹ Therefore, the Supreme Court held that the mandatory aspect of Pennsylvania’s death penalty statute did not limit the jury’s discretion since the “catch all” provision afforded the jury a “vehicle for expressing its reasoned moral response to [the mitigating] evidence in rendering its sentencing decision.”¹³⁰ As a result, the Supreme Court upheld Blystone’s conviction as well as Pennsylvania’s death penalty statute.¹³¹

B. Penry I and Penry II

In *Penry v. Lynaugh*,¹³² John Paul Penry, who was mentally retarded,¹³³ was charged and convicted of capital murder for the

¹²⁸ *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990); *see also* 42 PA. CONS. STAT. at § 9711(e)(8) (allowing a finding of “[a]ny other evidence of mitigation”); *infra* Part IV (discussing the relation between *Blystone* and the *Penry* cases and noting that the “catch all” mitigator is merely a codification of the *Lockett* principle).

¹²⁹ *Blystone*, 494 U.S. at 308-09; *see also supra* text accompanying notes 115-18 (explaining Pennsylvania’s death penalty scheme).

¹³⁰ *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989).

¹³¹ *Blystone*, 494 U.S. at 309.

¹³² 492 U.S. 302 (1989). Penry’s conviction was reversed, resulting in his retrial, re-conviction and, subsequent, appeal to the United States Supreme Court in *Penry v. Johnson*, 532 U.S. 782 (2001).

¹³³ *Penry I*, at 307-08. A full discussion of mental retardation and the death penalty is beyond the scope of this article. It should be noted, however, that the Supreme Court recently held that executing the mentally retarded violates the Eighth Amendment prohibition against cruel and unusual punishment. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that in light of evolving standards of decency, as exemplified by the growing trend among states to pass legislation barring the execution of a mentally retarded person,

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brutal rape and murder of a young woman.¹³⁴ At the sentencing phase, Penry's lawyer introduced extensive evidence concerning Penry's mental retardation and the abuse he suffered as a child.¹³⁵ Despite the *Lockett* principle that a jury must consider any and all mitigating circumstances,¹³⁶ the *Penry I* jury was never instructed that it could consider Penry's mental retardation and abuse in determining his sentence.¹³⁷ Moreover, Texas law, at the time of the first two Penry cases, required the judge to impose the death penalty if the sentencing body affirmatively answers three statutorily required questions:¹³⁸ 1) "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;"¹³⁹ 2) "whether there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;"¹⁴⁰ and 3) "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any,

this country can no longer stand for the execution of mentally challenged individuals); *see also* Death Penalty Information Center, *Mental Retardation and the Death Penalty* (providing comprehensive information pertaining to mental retardation and the death penalty), at <http://www.deathpenaltyinfo.org/dpicmr.html> (last visited Aug. 22, 2002).

¹³⁴ *Penry I*, 492 U.S. at 307.

¹³⁵ *Id.* Penry was in and out of hospitals as a child and had an I.Q. below 63, which resulted in part from severe beatings as a child. *Id.* at 307-09. Moreover, Penry was repeatedly locked in his room without access to a toilet for long periods of time and had scars from frequent beatings with a belt. *Id.* At Penry's trial, the defense psychiatrist testified that "anyone with [Penry's] I.Q. is always incompetent." *Id.*

¹³⁶ *Lockett v. Ohio*, 438 U.S. 586 (1978); *see also* *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988).

¹³⁷ *Penry I*, 492 U.S. at 310-312.

¹³⁸ *Id.* at 310, *citing*, TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon 1981 & Supp. 1989); *see also* *infra* note 151 (explaining the 1991 amendment to the Texas death penalty statute).

¹³⁹ TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon 1981 & Supp. 1989).

¹⁴⁰ *Id.*

by the deceased.”¹⁴¹ Penry’s jury answered each of these questions in the affirmative and thereby required the judge to impose a death sentence.¹⁴²

Penry appealed his death sentence on the ground that the statute violated *Lockett* by not allowing the jury to consider relevant mitigating evidence.¹⁴³ The Supreme Court granted certiorari and concluded that the three statutorily mandated questions did not adequately address the mitigating evidence of Penry’s mental retardation because a jury could reasonably consider Penry’s mental retardation as requiring an affirmative answer to one of the three statutory questions even if the jury desired to spare Penry’s life.¹⁴⁴ Thus, in essence, Penry’s mental retardation could be construed as an aggravating circumstance rather than a mitigating circumstance.¹⁴⁵ Moreover, the Supreme Court concluded that the trial judge did nothing to correct this problem.¹⁴⁶ The Supreme Court then held that “a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.”¹⁴⁷ Consequently, the Supreme Court reversed Penry’s conviction.¹⁴⁸

In 1990, the state of Texas retried Penry and a jury found him guilty of capital murder for a second time.¹⁴⁹ At the sentencing phase, Penry’s lawyer, again, offered strong evidence

¹⁴¹ *Id.*

¹⁴² *Penry I*, 492 U.S. 302, 310 (1989).

¹⁴³ *Id.* at 313. Penry’s counsel phrased the issue by stating that Penry’s death sentence violated the Eighth Amendment because “the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas ‘special issues’ [portion of the death penalty statute] were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering [the ‘special issues’].” *Id.*

¹⁴⁴ *Id.* at 320-23.

¹⁴⁵ *See id.*

¹⁴⁶ *See id.* at 320-28.

¹⁴⁷ *Id.* at 326.

¹⁴⁸ *Id.* at 323.

¹⁴⁹ *Penry v. Johnson*, 532 U.S. 782 (2001).

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of Penry's mental retardation and child abuse.¹⁵⁰ Despite the Supreme Court's ruling in *Penry I*, at the time of Penry's second trial, Texas still employed the same three statutory questions in determining whether to impose a death sentence.¹⁵¹ In attempting to address the Supreme Court's concern in *Penry I*, the trial judge told Penry's second jury:

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 If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.¹⁵²

After deliberating for more than two hours, the jury answered each of the three questions affirmatively, resulting in the judge imposing the required death sentence.¹⁵³

For a second time, Penry appealed his death sentence. The Supreme Court granted certiorari to determine whether the judge's supplemental instructions complied with the mandates of

¹⁵⁰ *Penry I*, 492 U.S. at 307-11. As a child, Penry suffered from organic brain impairment and had an I.Q. hovering around sixty, meaning he had the mentality of a six-year-old. *Id.* at 308. In addition, Penry suffered numerous beatings, including instances where his mother beat him over the head with a belt buckle, resulting in brain injuries. *Id.* at 309; *see also supra* note 135 (discussing the abuse Penry suffered as a child).

¹⁵¹ *See* TEX. CRIM. PROC. CODE ANN. § 37.071(2)(d)(1) (Supp. 1991). In 1991, Texas amended its death penalty statute by repealing the third statutory question and adding:

[I]n deliberating on the [statutory questions], [the jury] shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

Id.; *see also supra* text accompanying notes 138-41 (enumerating the statutory questions employed in Texas death penalty cases at the time of Penry's trials).

¹⁵² *Penry II*, 532 U.S. at 790.

¹⁵³ *Id.*

*Penry I.*¹⁵⁴ Prior to directly addressing this issue, the Supreme Court clarified its holding in *Penry I* by stating that merely informing the jury that they may consider mitigating circumstances is not enough to ensure that the jury also has a “vehicle” to give effect to mitigating evidence in determining whether to impose a death sentence.¹⁵⁵ The Supreme Court then directly addressed whether the supplemental instruction satisfied the principle of *Penry I* as the Court had just clarified it.¹⁵⁶ After commenting that an instruction inviting the jury to do something contrary to the instruction poses an ethical dilemma to the jury, the Court held that inviting the jury to disregard the law violates the constitution.¹⁵⁷ Therefore, the mere existence of a statute or, in *Penry*’s case, an instruction allowing the jury to consider mitigation is not necessarily enough to grant the jury a “vehicle” to give effect to the relevant mitigating evidence, particularly when the statute restricts the scope of the jury’s consideration of mitigating evidence or confuses the jury about the manner in which they can use the mitigating evidence in determining whether a death sentence is appropriate.¹⁵⁸ As a result, the Supreme Court concluded that, despite the facial validity of the Texas death penalty statute,¹⁵⁹ under the circumstances

¹⁵⁴ *Id.* at 787.

¹⁵⁵ *Id.* at 792.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 793. The Supreme Court viewed the supplemental instruction as the equivalent of instructing the jury to disregard the law since none of the three questions pertained to mental retardation as a mitigating circumstance. *Id.* at 799-803.

¹⁵⁸ *See generally id.*

¹⁵⁹ *See Jurek v. Texas*, 428 U.S. 262 (1976) (upholding the Texas death penalty statute despite the provision requiring the jury to answer three statutorily mandated questions rather than permitting the jury to weigh the aggravating circumstances against the mitigating circumstances or impose a life sentence at will). The Texas statute permitted the consideration of mitigation in answering the three statutory questions. *See generally id.*; *see also*, TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Supp. 1989). Texas still employs the “special issues” questions as the means to determine whether to sentence a defendant to death. TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Supp. 1991).

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surrounding Penry's case, a "reasonable juror could well have believed there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death" ¹⁶⁰ Therefore, the court reversed Penry's conviction for the second time. ¹⁶¹

III. STUDIES PERTAINING TO A JURY'S ABILITY TO UNDERSTAND AND APPLY RELEVANT MITIGATING EVIDENCE

A backbone principle of the American justice system is the jury's ability to follow and apply the law. ¹⁶² Obviously, this principle is successful only if juries understand the instructions that the judge reads to them. There has long been concern about how a person with no knowledge of the law can follow the complicated language and rules stated by a judge. ¹⁶³ This concern

¹⁶⁰ *Penry II*, 532 U.S. at 788, quoting *Penry v. Lynaugh*, 492 U.S. 302, 326 (1989).

¹⁶¹ *Penry II*, 532 U.S. at 796. The State of Texas decided to seek the death penalty against John Penry for a third time. See Michael Graczyk, *Third Sentencing Hearing Set for Mentally Retarded Death Row Inmate in Texas*, ASSOCIATED PRESS NEWSWIRES, Apr. 29, 2002. During the sentencing phase of Penry's third trial, the United States Supreme Court handed down their decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), barring the execution of the mentally retarded. In light of this decision, the state of Texas argued that, despite evidence of childhood trauma and a low I.Q., there was little conclusive evidence to prove that Penry was mentally retarded, claiming that mental retardation could be faked. See Harvey Rice, *Penry Sentenced 3rd Time to Die: Jury Rejects Argument for Retardation*, HOUS. CHRON., July 4, 2002, at 1; *Nightline* (ABC television broadcast, July 11, 2002) (discussing the recent prohibition against executing the mentally retarded while focusing on the *Penry* case, including interviewing Joe Price, the district attorney who prosecuted all three *Penry* cases). On July 3, 2002, a jury sentenced John Penry to death for a third time, thus, opening the door for a possible third *Penry* decision from the United States Supreme Court. *Id.*

¹⁶² See *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (discussing the presumption that juries follow instructions).

¹⁶³ Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996) (discussing studies of juror comprehension from the Zeisel study in the early 1990s and the Chicago Jury Project in the late 1950s). The Zeisel study asked specific questions pertaining to mitigation to potential jurors who were waiting

has become even greater now that juries are expected to understand and apply complicated schemes pertaining to mitigating and aggravating evidence prior to passing judgment upon the life of another human being.¹⁶⁴ As a result, researchers have begun to undertake comprehensive studies to better comprehend the jury's ability to understand the confusing law of mitigation.¹⁶⁵

A. Capital Jury Project

The Capital Jury Project attempts to determine the extent to which jurors understand instructions in capital cases while also making recommendations for improving a jury's understanding of the applicable law and instructions.¹⁶⁶ A group of researchers from the Capital Jury Project interviewed 916 capital jurors in

in the courthouse. *Id.* at 225-29. The study concluded that 48% of jurors misunderstood the concept of mitigation. *Id.* at 230. The results of the Chicago Jury Project are reported in Harry Kalven, Jr., & Hans Zeisel, *THE AMERICAN JURY* (1966). *See also* Justice Sandra Day O'Connor, Associate Justice, Supreme Court of the United States, Luncheon Address before the National Conference on Public Trust and Confidence in the Justice System (May 15, 1999) (acknowledging the problem of jury confusion, stating that jurors are "read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began").

¹⁶⁴ *See, e.g., California Pattern Jury Instructions, CA CALJIC* § 8.85 (1996). "A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." *Id.*; *Illinois Pattern Jury Instructions-Criminal, ILCS 7C.06* (2000) (referring to mitigating factors vaguely by stating that mitigating factors are reasons why the defendant should not be sentenced to death); *Oklahoma Uniform Jury Instructions-Criminal, OUII-CR* § 4-78 (2001). "Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." *Id.*; *see also Steiker & Steiker, supra* note 26 (discussing the complexities of current death penalty law).

¹⁶⁵ *See, e.g., Bowers, supra* note 101 at 1044-45 (explaining the reasoning for undertaking the Capital Jury Project).

¹⁶⁶ *Id.*

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eleven states.¹⁶⁷ The overwhelming evidence resulting from this study demonstrates that juries do not understand the concepts of aggravation and mitigation, and do not follow the instructions of the court.¹⁶⁸

As part of the study undertaken by the Capital Jury Project, jurors were questioned about specific aspects of mitigation.¹⁶⁹ Almost twenty-five percent of these jurors believed they could only consider the enumerated list of mitigating factors.¹⁷⁰ Forty-two percent of the jurors incorrectly believed they had to unanimously agree to the existence of the mitigating factor.¹⁷¹

¹⁶⁷ *Id.*

¹⁶⁸ See William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Juror's Predispositions, Attitudes and Premature Decision-Making*, 83 CORNELL L. REV. 1476, 1477 (1998) (discussing how capital jurors disregard judges' instructions by deciding the sentence prior to the commencement of the sentencing phase of the trial); Diamond & Levi, *supra* note 163, at 225 (finding that few Illinois jurors understood that they could consider mitigating factors not specifically enumerated by the trial judge); Eisenberg et al., *supra* note 101, at 360 (finding "[n]early one-third of jurors were under the mistaken impression that the law required a death sentence if they found heinousness or dangerousness"); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instruction in Capital Cases*, 79 CORNELL L. REV. 1, 10 (1993) (finding that "[t]wenty percent of the jurors on death juries believe that an aggravating factor can be established by preponderance of the evidence or only to a juror's personal satisfaction"); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1167 (1995) (finding that "[j]urors were confused about the burden of proof and unanimity was poor"). Only fifty-nine percent understood that they could consider any evidence they desired as a mitigating factor. *Id.*; see also James Frank & Brandon K. Applegate, *Assessing Juror Understanding of Capital Sentencing Instructions*, 44 CRIME AND DELINQUENCY NO. 3 (1988). A mock jury study revealed that juror comprehension of sentencing instructions is limited, especially with regard to mitigation. *Id.*

¹⁶⁹ See *supra* note 168.

¹⁷⁰ Luginbuhl & Howe, *supra* note 168, at 1165-69. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987). This view held by the jurors violates Supreme Court jurisprudence requiring the sentencing body to consider non-statutory mitigating factors. *Id.*

¹⁷¹ Luginbuhl & Howe, *supra* note 168, at 1165-69. This belief held by the jurors is an incorrect application of Supreme Court precedence. See *Mills*

The most disturbing finding was that forty-eight percent of the jurors polled said they chose the death penalty despite conceding that the factors opposing the death penalty were stronger than the factors in support of the death penalty.¹⁷² Finally, more than twenty-five percent of those interviewed thought death was mandatory when it was not,¹⁷³ and more than half failed to recognize situations in which life was mandated, such as where the jury failed to find the existence of any aggravating circumstance.¹⁷⁴

Pennsylvania provides an appropriate example. According to the Capital Jury Project, nineteen percent of Pennsylvania jurors interviewed concluded during the guilt phase that life imprisonment was the appropriate punishment for the defendant, although they later imposed a sentence of death.¹⁷⁵ The juror's admitted that their initial determination that life imprisonment was the appropriate sentence was based on the belief that the crime was not sufficiently heinous or gruesome to warrant death.¹⁷⁶ Pennsylvania law allows a jury to impose a death sentence only if the aggravating circumstances outweigh the mitigating circumstances; therefore, a finding of a lack of gruesomeness could result in a life sentence.¹⁷⁷ These jurors, however, still chose to impose a death sentence.¹⁷⁸ This evidence demonstrates the point that juries fail to understand mitigation

v. Maryland, 486 U.S. 367 (1988) (holding that a unanimity requirement for mitigating circumstances violates the *Lockett* principle that the sentencing body must be able to consider all relevant mitigating evidence).

¹⁷² Luginbuhl & Howe, *supra* note 168, at 1165-69.

¹⁷³ *Id.*; see also Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1451 (1997) (stating that “[w]hen jurors are repeatedly asked whether they can follow the law and impose the death penalty, they begin to believe the law actually requires them to reach death verdicts”).

¹⁷⁴ Luginbuhl & Howe, *supra* note 168, at 1165-69.

¹⁷⁵ See Bowers et al., *supra* note 168 at 1488, table 1.

¹⁷⁶ *Id.* at 1500.

¹⁷⁷ 42 PA. CONS. STAT. § 9711 (1998) (requiring that a death sentence may only be imposed if aggravating factors outweigh mitigating factors).

¹⁷⁸ See Bowers et al., *supra* note 168 at 1488-90.

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and, therefore, impose a death sentence upon defendants jurors do not believe deserve to be put to death.¹⁷⁹

The bifurcated system is one proposed way of addressing this problem, since bifurcated trials are often employed to ensure that evidence pertaining to sentencing does not infect the guilt phase and that juries consider only the evidence presented at sentencing in determining whether to spare a defendant's life.¹⁸⁰ Even in this context, however, studies by the Capital Jury Project show that many jurors decide the appropriate sentence during the guilt phase of the trial.¹⁸¹ Thus, in addition to finding that jurors make uninformed decisions, the Capital Jury Project reveals they do so many times prematurely.¹⁸²

B. Additional Studies

As evidenced by the numerous occasions in which juries have asked the judge to help them understand mitigation, a jury's inability to understand mitigation is a common situation in death penalty trials.¹⁸³ In many of these cases, juries either asked the

¹⁷⁹ *Id.*; See also Mem. of Law in Supp. of Writ of Habeas Corpus for Pet'r Blystone at 64, Blystone v. Horn, No. 99-490 (W.D. Pa. filed Mar. 29, 2000).

¹⁸⁰ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁸¹ See, e.g., Bowers et al., *supra* note 168, at 1477, 1488 (stating that interviews with capital jurors in 11 states revealed that almost half believed they knew what the punishment should be before the sentencing phase of the trial).

¹⁸² See generally Bowers et al., *supra* note 168.

¹⁸³ See Berlow, *Deadly Decisions*, *supra* note 1 (quoting the jury foreman, Fred Baca). One of the most disturbing examples is the case of Bobby Moore. According to a post-trial interview with the jury foreman, the jury asked the judge to "tell them which evidence could be considered as mitigating, but the question went unanswered so often that they finally stopped asking." *Id.*; see also, *Deck v. State*, 68 S.W.3d 418, 424, 431 (Mo. 2002) In *Deck*, the Missouri Supreme Court reversed a death sentence on grounds of ineffective assistance of counsel for failure to object when the judge responded to the jury's inquiry regarding the "legal definition of mitigating circumstances" by saying, "any terms that you have not had defined for you should be given the ordinary meaning." *Id.* at 424. The judge then denied the

judge to define aggravation and mitigation,¹⁸⁴ or took it upon themselves to consult a dictionary.¹⁸⁵ At least one Supreme Court justice has found this problematic because “mitigating evidence is a term of art, with a constitutional meaning that is unlikely to be apparent to a lay jury.”¹⁸⁶ The majority of the Supreme Court, however, has held that aggravation and mitigation are ordinary words that do not have to be defined.¹⁸⁷

To further support the proposition that jurors do not understand the concept of aggravation and mitigation, researchers compiled a list of instructions from actual death penalty cases, along with questions asked by jurors while deliberating in capital cases.¹⁸⁸ Based on this list, and in conjunction with general

jury’s request for a dictionary. *Id.* at 431. *See also* *People v. Lang*, 782 P.2d 627 (Cal. 1989) (discussing the trial judge’s decision to respond to the jury’s inquiry about the meaning of aggravation and mitigation by reading the dictionary definitions of the terms), *cert. denied*, 498 U.S. 881 (1990); *People v. Adcox*, 763 P.2d 906 (Cal. 1988) (discussing whether a judge, in response to the jury’s request for a definition of aggravation and mitigation, can define aggravation and mitigation by reading from *Corpus Juris Secundum*), *cert. denied*, 494 U.S. 1038 (1990); *People v. McLain*, 757 P.2d 569 (Cal. 1988) (discussing the jury’s request for a definition of aggravation and mitigation), *cert. denied*, 489 U.S. 1972 (1989); *People v. Hamilton*, 756 P.2d 1348 (Cal. 1988) (discussing the jury asking the judge to read them the definition of aggravation and mitigation on three occasions during deliberations), *cert. denied*, 489 U.S. 1040 (1989); *State v. Jones*, 451 S.E.2d 826 (N.C. 1998) (upholding a death sentence despite the judge reading to the jury the American Heritage Dictionary’s definition of “mitigate”).

¹⁸⁴ *See McLain*, 757 P.2d at 580 (upholding a conviction despite the jury requesting a definition of aggravation and mitigation to which the judge asked whether they wanted the legal or ordinary definition while telling the jury no legal definition of these terms existed); *Hamilton*, 756 P.2d at 1362 (upholding a conviction where the jury asked for the instructions to be read to them three times and asked for a definition of mitigation in layman’s terms to which the judge responded by reciting the definition from a legal dictionary).

¹⁸⁵ *See People v. Karis*, 758 P.2d 1189 (Cal. 1987) (upholding a conviction despite a juror using a dictionary to obtain the definition of mitigation), *cert. denied*, 490 U.S. 1012 (1988).

¹⁸⁶ *Watkins v. Murray*, 493 U.S. 907, 910 (1989) (Marshall, J., dissenting).

¹⁸⁷ *Id.* at 908-09.

¹⁸⁸ *See Bowers*, *supra* note 101, at 1044-45 (discussing the manner in

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constitutional principles pertaining to mitigation, researchers posed questions to a random sampling of the population.¹⁸⁹ The results were astounding. The first question asked whether jurors could spare a person's life if they found a mitigating factor not mentioned by the judge.¹⁹⁰ An overwhelming sixty-four percent of the people polled incorrectly believed this was insufficient to prevent the imposition of a death sentence.¹⁹¹ The second question used an instruction that was given in a capital trial in reference to a weighing statute.¹⁹² The people polled were asked whether they had to impose a death sentence if they reached the conclusion that the mitigating evidence outweighed the aggravating evidence, but felt they were unable to find a mitigating factor that was sufficient to preclude the death penalty.¹⁹³ An overwhelming fifty-eight percent of the people wrongly believed a death sentence had to be imposed.¹⁹⁴

The statistical analysis discussed above and the responses to

which the data was compiled).

¹⁸⁹ Luginbuhl & Howe, *supra* note 168, at 1162-70 (discussing jurors' inability to correctly respond to questions pertaining to the law of mitigation); *see also* Diamond & Levi, *supra* note 163, at 230-33 (discussing the results of the Zeisel survey); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW AND SOC'Y REV. 153 (1982) (finding comprehension of jury instructions by college students generally poor); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988) (observing the low comprehension level of pattern instructions by people called to jury service in Texas); Tiersma, *supra* note 9, at 1 (discussing jurors' ability to understand instructions given in capital trials by posing these questions to members of the population who had not heard the questions in the past nor served on a capital jury).

¹⁹⁰ Luginbuhl and Howe, *supra* note 168, at 1165-68.

¹⁹¹ *Id.* All death penalty statutes and Supreme Court jurisprudence require the jury to consider all evidence offered in mitigation prior to imposing a death sentence. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982). Moreover, the Supreme Court has held that non-statutory mitigators, which normally would not be mentioned by the judge, can be presented to and considered by the jury. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987).

¹⁹² Luginbuhl and Howe, *supra* note 168, at 1165-68.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

actual instructions and issues from real cases indicate a disturbing trend among juries in capital cases: an inability to follow the law that is based on a clear misunderstanding of what the law requires. That is, the Supreme Court has held that the presence of an aggravating factor is merely a threshold requirement to make a defendant eligible for the death penalty.¹⁹⁵ Nevertheless, many jurors erroneously believe a death sentence is required.¹⁹⁶ Furthermore, data suggests that the problem of jurors not understanding the law and not following jury instructions is more than an academic concern, because an overwhelming number of jurors “seem not to understand what they are to do with such evidence.”¹⁹⁷ Moreover, in some instances, jurors “recognize that evidence in mitigation has been presented, but do not know what the law allows, or requires them to do with such evidence,”¹⁹⁸ as was illustrated by more than fifty percent of jurors making the contradictory statement that mitigating evidence outweighed the aggravating evidence but was not sufficient to spare a defendant’s life.¹⁹⁹

IV. ELEVEN YEARS LATER, *PENRY II* ACHIEVED THE RECOGNITION *BLYSTONE* DESERVED

Both the principles of American society and the United States Constitution are based upon the fundamental belief that the rights of an individual should be protected from the opposition of the

¹⁹⁵ *Tuilaepa v. California*, 512 U.S. 967 (1994); *see also* Steiker & Steiker, *supra* note 26 (discussing the threshold requirement to impose a death sentence).

¹⁹⁶ Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; And Mitigation is No Excuse*, 66 BROOK. L. REV. 1011 (2002) (discussing jury misconceptions about the sentencing phase of a capital case); *see also*, Bowers, *supra* note 101, at 1091 n.32. (finding that “many jurors believe that the death penalty is mandatory” when an aggravating circumstance is present).

¹⁹⁷ Bentele & Bowers, *supra* note 196, at 1042.

¹⁹⁸ *Id.* at 1043.

¹⁹⁹ *Id.*

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masses.²⁰⁰ For most of American history, however, this principle has not found its way into the criminal justice system.²⁰¹ Defendants were punished without any consideration of the reason why they committed the crime.²⁰² Until recently, in determining the appropriate sentence, the sentencing body did not consider any aspect of the defendant's life that would have made him less culpable.²⁰³ In the early 1970s, the Supreme Court began to recognize the inherent unfairness of imposing a sentence without considering the uniqueness of the individual defendant.²⁰⁴ In an attempt to eradicate the problem of arbitrarily imposed sentences, the Court adopted individualized sentencing.²⁰⁵ Despite criticism that individualized sentencing is contradictory to the aversion of arbitrary and capriciously imposed death sentences,²⁰⁶

²⁰⁰ See THE FEDERALIST NO. 10, at 81 (James Madison) (C. Rossiter ed., 1961) (discussing the need for the Constitution in order to protect individuals against the inherent problem of majoritarian government); see also Bedau, *supra* note 26 (explaining the reasoning for current death penalty laws and the high level of support for the death penalty in the United States in contrast to that of most of the rest of the world).

²⁰¹ See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the right to counsel to the states and marking the beginning of the individual rights movement within the criminal context and the application of the Bill of Rights to the states).

²⁰² See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (invalidating the death penalty partly because the failure to consider why an individual committed the crime gave the jury untrammelled discretion to determine who would be sentenced to death and, therefore, resulted in the arbitrary infliction of capital punishment).

²⁰³ *Id.*

²⁰⁴ See *id.*

²⁰⁵ *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (discussing what has now become known as individualized sentencing when the Court referred to the necessity and requirement that a jury consider all "relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" and "the circumstances of the particular offense").

²⁰⁶ *Walton v. Arizona*, 497 U.S. 639, 714-15 (1990) (Scalia, J., concurring) (explaining why he no longer can reconcile the *Lockett* Doctrine with the concern over arbitrary sentencing as expressed in *Furman*); see Scott E. Sundry, *The Lockett Paradox: Reconciling Guided Discretion and Unguided*

the Supreme Court has strictly adhered to its application.²⁰⁷ The Supreme Court, however, has failed to ensure that the individualized sentencing process is applied in a manner that guarantees the underlying principle that each person will be treated as uniquely individual human beings.²⁰⁸

The Supreme Court has consistently stated that the sentencing body must be able and willing to consider all relevant mitigating evidence at sentencing in order to avoid a sentence that is both arbitrary and capricious.²⁰⁹ This right is meaningless, however, if the sentencing body is unable or incapable of giving effect to this evidence in determining a sentence.²¹⁰ Therefore, implicit within the reasoning of *Lockett*, in order for a death sentence to pass constitutional muster, juries must be able to understand and recognize mitigation and know what the law requires them to do with any mitigating evidence they have found.²¹¹ Unfortunately, many juries are unable to accomplish these tasks.²¹²

The problem of a jury failing to understand the law of mitigation was first presented to the Supreme Court in

Mitigation in Capital Sentencing, 38 UCLA L. REV. 1147, 1185 (1991) (noting that the choice between these two principles depends on choosing between the risk of a death sentence based on an arbitrary factor and the risk of one imposed because mitigating evidence was excluded).

²⁰⁷ See Billionis, *supra* note 9, at 283.

²⁰⁸ *Woodson*, 428 U.S. at 304.

²⁰⁹ See *Lockett v. Ohio*, 438 U.S. 586 (1978) (requiring the sentencing body to consider both aggravating and mitigating circumstances prior to imposing a death sentence); *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating Georgia's death penalty scheme because the manner in which defendant's were selected for the death penalty was arbitrary and capricious).

²¹⁰ See *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (requiring the sentencer's guidance be channeled by "clear and objective standards that provide specified detailed guidance").

²¹¹ See *Penry v. Johnson*, 532 U.S. 782, 803-03 (2001); see also *Teague v. Lane*, 489 U.S. 288 (1989) (establishing that new rules of criminal procedure cannot be made on a habeas case). Since this right falls within the principles of the *Lockett* Doctrine, it is not a new rule of criminal procedure. See *Lockett*, 438 U.S. 586 (1978). Thus, the *Teague* Doctrine, which prevents creating new rules on a habeas case, has no impact.

²¹² See *supra* Part III.B (discussing the jury's inability to understand and adequately apply the principles of individualized sentencing).

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Blystone.²¹³ Although unique in many respects, this case is perhaps most interesting for what was missing.²¹⁴ *Blystone*'s lawyer interpreted the statute as unconstitutional on its face,²¹⁵ arguing that the statute mandating the death penalty prevented the jury from considering mitigating evidence.²¹⁶ Instead *Blystone*'s lawyer should have challenged whether the jury was capable of understanding and recognizing relevant mitigating evidence along with correctly applying the law to the relevant mitigating evidence.²¹⁷ Due to the manner in which *Blystone*'s lawyer presented the issue, the Supreme Court never had the opportunity to address the jury's ability to understand mitigation and apply the law to any mitigating evidence that they found.²¹⁸

After *Blystone*, litigation focused on whether juries were permitted to give effect to relevant mitigating evidence, rather than whether juries were capable of giving effect to relevant mitigating evidence.²¹⁹ Additionally, when the issue of what to do about juries that did not understand the law of mitigation was eventually raised, the battle appeared lost when, in *Buchanan v. Angelone*,²²⁰ the Supreme Court held that juries neither need to be instructed on the concept of mitigating evidence generally nor on particular statutory mitigating factors.²²¹ In *Buchanan*, however,

²¹³ *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

²¹⁴ See *supra* Part II (discussing *Blystone*'s unusual facts and applicable statutory provisions)

²¹⁵ *Blystone*, 494 U.S. at 302.

²¹⁶ *Id.*

²¹⁷ Cf. *id.* Since Pennsylvania's death penalty statute clearly required the consideration of mitigating evidence in order to determine whether mitigating evidence existed, the real issue was whether the jury understood how to consider any potential mitigating evidence. *Id.*; see also 42 PA. CONS. STAT. § 9711 (1998) (providing the requirements to impose a death sentence).

²¹⁸ See generally *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

²¹⁹ See, e.g., *Penry v. Johnson*, 532 U.S. 782 (2001). While the Supreme Court's opinion addressed the broader issue this note addresses, the case was presented to the Court as dealing with whether the supplemental instruction pertaining to mental retardation permitted the jury to consider mental retardation as mitigating evidence. *Id.*

²²⁰ 522 U.S. 269 (1998).

²²¹ *Id.* (discussing whether a judge must specifically instruct a jury on the

the jury did not express confusion pertaining to the meaning of mitigation or a desire to not sentence the defendant to death.²²² Therefore, the Supreme Court again avoided dealing with the issue.²²³

The Supreme Court finally dealt with the issue indirectly in *Penry v. Johnson*.²²⁴ Thus, the Court differentiated between *Blystone* and *Penry II*. Despite the different results in the cases, the two cases are not inconsistent. *Blystone* merely addressed a facial challenge to a death penalty statute on the basis that the statute prevented the jury from considering mitigation.²²⁵ As such, *Blystone* was correctly decided because the statute required the jury to conclude, prior to imposing a death sentence, that mitigation either did or did not exist. Therefore, in determining that there was no valid mitigating evidence in support of *Blystone*, the jury had to consider the evidence presented at the guilt/innocence phase before considering any evidence presented at the sentencing phase.²²⁶ Thus, the Supreme Court correctly concluded that, on its face, the Pennsylvania statute met the constitutional mandate of *Lockett*.²²⁷

The Supreme Court, however, was unable to build upon the reasoning of *Blystone* in *Penry II* because the latter case raised an “as applied” statutory challenge based on the *Lockett* principle.²²⁸

law of mitigation when the jury has not expressed any confusion nor asked for an instruction on mitigation).

²²² See *id.*

²²³ See generally *id.*

²²⁴ 532 U.S. 782 (2001). Research has found that the number of cases raising issues pertaining to confused juries drastically decreased after *Buchanan*.

²²⁵ See generally *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

²²⁶ See 42 PA. CONS. STAT. § 9711. This statute, which was at issue in *Blystone*, requires the entire guilt/innocence phase of the trial to be incorporated into the sentencing phase. Thus, any aspect of the guilt/innocence phase of trial could be considered sufficient mitigation to spare the defendant’s life. *Id.*

²²⁷ See *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Lockett v. Ohio*, 438 U.S. 586 (1978).

²²⁸ See generally *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Penry v. Johnson*, 532 U.S. 782 (2001).

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Lockett stood for the principle that juries cannot be prevented from considering mitigating evidence, and must be willing and capable of considering mitigating evidence during the sentencing phase in order to ensure that each defendant receives an individualized sentence.²²⁹ Thus, analysis under *Lockett* is a three step process.²³⁰ First, the defendant must be permitted to present all mitigating evidence.²³¹ Second, the jury must be permitted to consider the mitigating evidence.²³² Third, the jury must be able to understand and recognize mitigation while also knowing what the law requires them to do with the mitigating evidence once they have found it.²³³ The first two aspects, but not the third, were addressed adequately in *Blystone*.²³⁴ The third step of the *Lockett* principle, however, was at issue in *Penry II*.²³⁵

As in *Blystone*, the *Penry II* jury had to consider the mitigating evidence presented at both the guilt phase and sentencing phase in order to determine whether mitigating circumstances existed.²³⁶ As a result, the Texas death penalty statute, on its face, permitted the consideration of mitigating evidence, so the statute could not be considered unconstitutional across the board. The Supreme Court, however, did not end its analysis of the Texas death penalty statute here. Instead, the Supreme Court addressed the statute as it was applied to Penry's

²²⁹ *Lockett v. Ohio*, 438 U.S. 586 (1978); see also Part I(C) (discussing the *Lockett* Doctrine).

²³⁰ See generally *Penry v. Johnson*, 532 U.S. 782 (2001).

²³¹ *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (reversing a death sentence because the judge refused to allow the defendant to offer evidence of his good behavior while in prison).

²³² *Id.* (holding that the sentencing body cannot be precluded from considering any mitigating evidence).

²³³ Cf. *Penry II*, 532 U.S. 782 (2001) (reversing a death sentence because the jury was not clearly instructed on what sentence could be imposed if the jury found the defendant's mental retardation mitigating).

²³⁴ See *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (holding that the Pennsylvania death penalty statute permitted the defendant to present and the jury to hear all relevant mitigating evidence).

²³⁵ See *Penry II*, 532 U.S. at 803-04.

²³⁶ See TEX. CRIM. PROC. CODE ANN. § 37.071(b) (enumerating the procedures in a capital case).

specific characteristics, particularly his mental retardation.²³⁷ As a result, in *Penry II*, the Supreme Court was able to reach the correct conclusion under *Lockett* without having to overturn *Blystone*.²³⁸

While admitting that the Texas death penalty statute, on its face, was constitutional, the Supreme Court recognized that *Lockett's* mandate that the jury be permitted to hear relevant mitigating evidence is rendered meaningless when the jury is unable to give effect to the mitigating evidence that is presented.²³⁹ Therefore, the Supreme Court held that death penalty statutes permitting the jury to consider all mitigating evidence are still unconstitutional under *Lockett* when a "reasonable juror could well have believed that there was no vehicle for expressing the view that [the defendant] did not deserve to be sentenced to death."²⁴⁰ Thus, *Penry II* confirmed that challenges to a death sentence on the basis of the jury's consideration of mitigating evidence must be addressed under the three-prong test discussed *supra*.²⁴¹

In order to satisfy the requirement set forth in *Penry II*, the jury must be able to understand the law of mitigation, recognize mitigating evidence when it is presented, and know what the law requires them to do with this evidence once they have found it.²⁴² Unfortunately, it is impossible to analyze each individual juror to ensure the ability to accomplish these tasks. Therefore, the system necessarily operates under the presumption that juries understand the law as explained to them by the judge, including the instructions pertaining to mitigation.²⁴³ As the statistical

²³⁷ See *Penry II*, 532 U.S. 803-04.

²³⁸ *Id.*; see also *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Lockett v. Ohio*, 438 U.S. 586 (1978). Arguably, the Supreme Court would have reached the same conclusion in *Blystone* as it did in *Penry II* if the statute was addressed as applied to the defendant rather than as a facial challenge.

²³⁹ See *Penry II*, 532 U.S. 803-04.

²⁴⁰ *Id.* at 791.

²⁴¹ *Id.*; see also *supra* notes 230-35 and accompanying text (discussing the three-prong test).

²⁴² See generally *Penry v. Johnson*, 532 U.S. 782 (2001).

²⁴³ See *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (discussing the

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analysis discussed in Part III of this note illustrates, though, many jurors are confused about the law of mitigation.²⁴⁴ Admittedly, this problem is not easily remedied. *Penry II*, however, mandates that this problem be addressed when a juror has either expressly or impliedly indicated that he or she does not have a strong enough understanding of mitigation to ensure they impose a sentence that complies with constitutional mandates.²⁴⁵ At a minimum, to ensure that the defendant's death sentence is constitutional under *Penry II*, judges must give specific guidance to juries who express confusion on the law of mitigation.²⁴⁶ Only this safeguard will protect a defendant from an erroneous sentence due to a juror's mistaken belief that they had not found mitigation where mitigating evidence actually existed.

CONCLUSION

During the past thirty-five years, death sentences have been called into question at an alarming rate.²⁴⁷ Thus, every effort should be made to ensure that the death penalty is more reliable at preventing people who do not deserve to be sentenced to death from receiving a death sentence. As was demonstrated by the

presumption that juries follow instructions).

²⁴⁴ See *supra* Part III (discussing juror confusion).

²⁴⁵ *Penry II*, 532 U.S. at 803-04.

²⁴⁶ See *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (holding that all findings of fact that could enhance a defendant's sentence must be made by the jury). The importance of juries understanding mitigating evidence and correctly applying the law to the facts should take on greater significance in light of this United States Supreme Court's ruling that juries must make findings of fact in capital cases.

²⁴⁷ See James Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1846-50 (2000) (discussing the extremely high error rate in capital cases and the underlying reasons behind these errors). Almost two-thirds of all death sentences are reversed either on direct appeal or in collateral post-conviction proceedings. *Id.*; see also *United States v. Quinones*, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002) (holding the federal death penalty unconstitutional in light of the likelihood that an innocent person could be sentenced to death and precluded from establishing his innocence).

empirical studies discussed in Part III, juries' inability to understand the law of mitigation strongly contributes to the number of invalid death sentences. Therefore, requiring a judge to provide guidance to juries that are confused about the law of mitigation would substantially decrease the number of defendants wrongfully sentenced to death. These instructions are only one of many improvements within the criminal justice system that are necessary to ensure that an individual gets a fair trial. In light of the gravity and irreversibility of correcting a wrong sentence once an individual has been executed, however, this minimum safeguard must be employed. As long as the government continues to sanction the death penalty and allow the criminal justice system to take a person's life, it is certainly not too much to ask that these judicially-imposed safeguards be properly applied.