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Justices Say Death Row Inmate With Low IQ Deserves Appeal

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BODY:

The Supreme Court on Thursday ruled that a man with an IQ of 67 who had been on Texas' death row for 17 years deserved another chance to challenge his sentence, a decision that could affect dozens of other condemned inmates in Texas.

The 6-3 decision said the federal appeals court in New Orleans had paid only lip service to the proper federal standard for when a condemned prisoner was entitled to have his case reviewed.

Sixty to 100 inmates on Texas's death row might benefit from the ruling, lawyers involved in the case said.

The contested issue was whether the jury in Robert J. Tennard's 1986 Houston murder trial had been given instructions that effectively communicated the latitude they had on whether to give Tennard a life sentence.

Tennard, a convicted rapist on parole, stabbed a man 15 times after he and several others had been drinking and smoking marijuana. One of Tennard's friends used a hatchet to kill another man at the gathering. The other defendant received a life sentence.

When Tennard, then 23, was tried, the jury was aware of his low IQ. However, at the time, jurors in capital cases in Texas were told to determine the appropriate punishment by considering two "special issues": whether the crime was committed deliberately and whether the defendant posed a risk of danger in the future.

In 1991, Texas changed its law and now provides jurors with more explicit instructions about weighing aggravating and mitigating circumstances. The Texas Legislature had acted in the wake of a 1989 Supreme Court ruling, *Penry vs. Lynaugh*, which held that Texas' two-question approach was a constitutionally inadequate vehicle that did not allow jurors to consider and give effect to the mitigating evidence of mental retardation and childhood abuse.

Tennard asked for a resentencing hearing based on the *Penry* decision. That request was rejected by the Texas Court of Criminal Appeals, which ruled that "there is no evidence ... [that Tennard's] low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes ... or control his impulses."

That decision was upheld by a federal district judge in Houston and by the U.S. 5th Circuit Court of Appeals in New Orleans, which has jurisdiction over constitutional challenges to death penalty cases from Texas, Louisiana and Mississippi.

The 5th Circuit said that for Tennard to have been entitled to a review, his lawyers would have needed to prove at trial that he had a "uniquely severe permanent handicap" and presented evidence that his crime "was attributable to this

Los Angeles Times June 25, 2004 Friday

severe permanent condition." The court said Tennard's low IQ alone was not proof that he was mentally retarded and that, even if he was, his lawyers had failed to show that his crime was attributable to his mental capacity.

The 5th Circuit's standard makes it almost impossible for a defendant to get the low-IQ issue before a jury as mitigating evidence in the penalty phase, Tennard's attorney, Rob Owen, argued at the Supreme Court.

A majority of the justices, led by Sandra Day O'Connor, agreed. She said a defendant was entitled to an appeal if he had "made a substantial showing of the denial of a constitutional right." The substandard jury instructions had, in effect, denied him his rights, O'Connor said.

Her opinion was joined by justices John Paul Stevens, Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

O'Connor noted that in previous cases when the Supreme Court had addressed the standard for the relevance of mitigating evidence in capital cases, "we spoke in the most expansive terms" -- a low threshold in distinct contrast to the high barrier set by the 5th Circuit. She then quoted another Supreme Court ruling that said that virtually no limits could be placed on relevant mitigating evidence in a death penalty case.

The Supreme Court sent the case back to the 5th Circuit. In view of the majority's strong language, "it would be very difficult for the 5th Circuit to do anything but order a new sentencing hearing for Tennard," said Houston attorney Richard Burr, Owen's co-counsel.

Jerry Strickland, a spokesman for the Texas attorney general's office said: "We respect the court's decision and will continue to proceed with these cases ... However, because there is pending litigation it would be inappropriate for us to comment further."

Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas -- the court's most conservative members -- issued separate dissents. All said the courts had applied the proper standard.

The ruling was praised by several legal experts, including Eric M. Freedman, a professor at Hofstra University's School of Law. "The Supreme Court strongly reaffirmed the importance of a wide-ranging examination into mitigating circumstances," which is a critical factor in most death penalty trials, Freedman said.

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