No. 05-11284

In The Supreme Court of the United States

JALIL ABDUL-KABIR, formerly known as TED CALVIN COLE,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Was Cole's mitigating evidence of childhood neglect and possible neurological dysfunction sufficiently within the jury's effective reach when it answered the pre-1991 Texas capital-sentencing special issues, which required the jury to determine whether the defendant's murderous conduct was deliberate and whether there was a probability he would commit further acts of criminal violence?

2. Did this Court's opinions in *Penry v. Johnson,* 532 U.S. 782 (2001), and *Smith v. Texas,* 543 U.S. 37 (2004), overrule *Jurek v. Texas,* 428 U.S. 262 (1976), *Graham v. Collins,* 506 U.S. 461 (1993), and *Johnson v. Texas,* 509 U.S. 350 (1993), and their Fifth Circuit progeny, which held that most types of mitigating evidence will find sufficient effect within the former special issues?

3. Does the lower court's holding – that treatable mental problems are within the effective reach of a sentencing jury in answering the pre-1991 special issues – impermissibly resurrect the threshold test for "constitutional relevance" that this Court rejected in *Tennard v. Dretke,* 542 U.S. 274 (2004)?

4. When the prosecution implored jurors to "follow the law" and "do their duty" in answering the former Texas special issues, is there "a reasonable probability that the jury has applied the . . . [special-issue] instructions in a way that prevents the consideration of constitutionally relevant evidence," *Boyde v. California,* 494 U.S. 370, 380 (1990)?

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This Court should affirm the lower court's judgment affirming the denial of habeas corpus relief. The Court of Criminal Appeals of Texas identified the correct federal authority—divined from this Court's opinions as of 1999—and reasonably applied it to Petitioner Ted Calvin Cole's[1] claim under *Penry v. Lynaugh,* 492 U.S. 302 (1989) (*Penry I*), during state habeas corpus proceedings. Moreover, assuming *arguendo* the state court decision was unreasonable, Cole fails to demonstrate a reasonable likelihood that his sentencing jury was unable to give sufficient mitigating effect to his evidence of childhood neglect and potential neurological dysfunction in answering the former Texas special issues. Nothing in this Court's intervening opinions in *Smith v. Texas,* 543 U.S. 37 (2004), *Tennard v. Dretke,* 542 U.S. 274 (2004), or *Penry v. Johnson,* 532 U.S. 782 (2001) (*Penry II*), dictates a different result. As a result, habeas corpus relief is not available to Cole.

STATEMENT OF THE CASE

I. Facts of the Crime

The facts supporting Cole's capital murder conviction are summarized in the lower court's published opinion as follows:

> In December 1987, Cole was staying at an abandoned motel [in San Angelo, Texas] with his

[1] Respondent Nathaniel Quarterman will be referred to herein as "the Director." "JA" refers to the Joint Appendix, followed by page numbers. "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by volume number and followed by page numbers. "SX" refers to the numbered exhibits offered by the State and admitted into evidence at trial.

stepbrother, Michael Hickey ("Michael"), and Michael's wife, Kelly Hickey ("Kelly"). Cole mentioned to the Hickeys that he was willing to kill someone to obtain cash.[2] Cole and Michael decided to rob Kelly's grandfather, Raymond Richardson,[3] and then strangle him to death.

Two days after this conversation, Cole, Michael, and Kelly went to Richardson's home and visited with him in his living room for several hours. The group moved to the kitchen. As Richardson left the kitchen, Cole pushed him to the floor, where Richardson landed face down. Cole then sat on Richardson's back and strangled him with a dog leash that the men had brought to the house for this purpose. After Richardson died, the group put his body under his bed. They searched the house for cash, finding twenty dollars in Richardson's wallet. Michael took the money from the wallet, and Cole took the money to the grocery store to buy beer and bacon. Cole returned to Richardson's house and shared the groceries with Michael. The morning after the murder, Kelly and Michael surrendered themselves to the police and gave statements. Kelly eventually testified at Cole's trial.

The police arrested Cole at Richardson's home the morning after the murder. Cole gave the police two statements in which he confessed to having murdered Richardson. The statements were

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[2] Cole and Michael planned to abscond to Florida with the money obtained from the crime. 15 RR 426. They previously attempted to leave Texas for Colorado but were forced to turn back after running out of money. *Id.* at 434.

[3] Richardson was sixty-six years old and legally blind. 15 RR 306-07.

> introduced against Cole at trial. In one of these statements, Cole admitted that the group decided to strangle Richardson because "it was quiter [*sic*] then [*sic*] shooting him and not as messy as cutting his throat, and it just seemed the easiest way to do it." [On June 4, 1988,] [t]he jury found Cole guilty of the capital murder of Richardson while in the course of committing and attempting to commit robbery.

JA:220-21 (*Cole v. Dretke,* 418 F.3d 494, 496-97 (5th Cir. 2005)).

II. Facts Relating to Punishment

Cole's mother, Nancy Hickey, testified for the defense that Cole's father abandoned his family when Cole was five or six years old. JA:35-36. Ms. Hickey was a self-described "drunk" and unable to care for her two children by herself. *Id.* at 36-37. Thus, she moved to Oklahoma to live with her parents. *Id.* at 36. But no school buses ran in the area and Cole's grandfather refused to allow Ms. Hickey to use his car to take Cole to school. *Id.* As a result, Ms. Hickey placed Cole into a children's home operated by her parents' church so he would be able to attend school. *Id.* at 36-37. Cole remained there for four or five years. *Id.* at 37, 56.

Cole returned home to live with his mother—now remarried and sober—in San Angelo when he was ten or eleven years old. JA:39-40. Cole made good grades in school and eventually reunited with his father—who was attending seminary school—at about age fifteen. *Id.* at 41-43. Cole lived with his father in Dallas for a year before returning to San Angelo. *Id.* at 43-44.

It was at this point in 1973, when Cole was sixteen years old, that he murdered his best friend by shooting him in the throat just "to see what it was like." 17 RR 697-99, 708-09. For this first-degree murder, Cole was sentenced to two to fifteen years confinement after pleading guilty. 18 RR 49-56 (SX36). Cole was paroled in 1980 but soon found himself in trouble again after repeatedly orally and anally raping two young boys. 17 RR 724-30, 785. Cole pleaded guilty, his parole was revoked, and he was sentenced to fifteen years in prison for aggravated sexual abuse of a child. 18 RR 57-63 (SX37).

The State presented expert testimony from psychiatrist Richard Coons who, along with psychologist George Parker, examined Cole prior to trial. JA:9, 18-19, 21. Dr. Coons determined that Cole exhibited "a number of sociopathic antisocial personality features," namely a lack of remorse or conscience. *Id.* at 22-25. Dr. Coons noted, for example, that Cole's diary reflected "a desire for homosexual pedophilia . . . and a knowledge that it's wrong." *Id.* at 26. Although Dr. Coons stated that sociopathic persons could not profit or learn from their experiences, he specifically declined to diagnose Cole as such. *Id.* at 30-32.

The defense presented expert evidence from psychologist Jarvis Wright who also examined Cole in preparation for trial. JA:60-62. Dr. Wright determined that Cole's intelligence quotient (IQ) was 121, but that he had a fragmented personality because of his "very rugged, rough childhood." *Id.* at 63, 67. Consequently, Cole lacks proper impulse control and seeks immediate gratification. *Id.* at 69-70. Dr. Wright speculated that Cole might suffer from neurological dysfunction in his central nervous system, but could not say whether there was actual damage. *Id.* at 69-70, 77-78. In sum, Dr. Wright testified that Cole was

"bright, very bright, sizzling bright" but "extremely depressed."[4] *Id.* at 73, 86. In his opinion, Cole would be dangerous "on the street" but would "mellow" and "burn out" within ten years. *Id.* at 68, 73-74. In addition, Dr. Wright stated that Cole's long history of incarceration suggested that he would function best within the "routine, disciplined, highly-structured" lifestyle of prison. *Id.* at 74-75.

Psychologist Wendell Dickerson also testified for the defense and stated that future dangerousness is very hard to predict and, in fact, such predictions are wrong "twice as often as" they are right, or two-thirds of the time. JA:93-94. He further opined that violent conduct diminishes with age and becomes "fairly rare" by the time individuals reach the age of forty. *Id.* at 95. Dr. Dickerson also averred that "most of the people [in prison] could probably be diagnosed as 'sociopath' in one way or another" in that they are lawbreakers without apparent mental problems. *Id.* at 97-98. Most of these individuals, once institutionalized, "go on about their business and live their life" without incident. *Id.* at 99. The incorrigible inmates are isolated and referred for psychiatric treatment, effectively controlling aggressive behavior. *Id.* Dr. Dickerson declined to reach a conclusion concerning Cole's future dangerousness because he had not examined him. *Id.* at 101.

The jury was then charged with answering the two special issues submitted in all Texas capital prosecutions

[4] Cole attempted suicide while incarcerated awaiting trial. JA:66. However, Dr. Wright testified that it was not unusual for a person standing trial for capital murder to be so depressed. *Id.* at 86.

prior to 1991. JA:127-29; *see also* TEX. CODE CRIM. PROC. art. 37.071(b) (West 1987). The "deliberateness" special issue asked if "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?" JA:127. The "future dangerousness" special issue queried the jury whether there was "a probability that the defendant . . . would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 128. The jury was instructed that, "in determining each of these special issues," it could "take into consideration all of the evidence submitted." *Id.* at 126; 17 RR 865.

During closing argument, defense counsel recalled Dr. Dickerson's testimony regarding predictions of future dangerousness as well as Dr. Wright's opinions concerning "burn out." JA:141-42. Stressing the State's burden of proof beyond a reasonable doubt, defense counsel argued that the prosecution failed to prove Cole would commit future acts of violence. *Id.* at 142. Defense counsel also noted Cole's tumultuous childhood and suggested that "[t]he only peace he ever finds is in the penitentiary . . . that's the only life he's ever known." *Id.* at 142-43.

The State countered that it had met its burden of proof and that there was no reasonable doubt regarding Cole's future dangerousness. JA:137, 140, 145, 147-48. However, the prosecutor did not argue to the jury that Cole's mitigating evidence was irrelevant or that it supported affirmative answers to the special issues. On June 4, 1988, the jury answered both special issues "yes" and the trial court assessed a sentence of death. *Id.* at 127-30.

III. Direct Appeal and Postconviction Proceedings in State Court

On September 26, 1990, the Court of Criminal Appeals of Texas affirmed Cole's conviction and sentence, and this Court denied certiorari review. *Cole v. State,* No. 70,401 (Tex. Crim. App. 1990) (unpublished, *per curiam* opinion), *cert. denied,* 499 U.S. 982 (1991).

Cole then filed an application for habeas corpus relief in state court asserting, *inter alia,* that the jury was unable to give sufficient effect to his mitigating evidence in violation of *Penry I.* JA:154. The trial court considered Cole's claim under *Penry I* and *Graham v. Collins,* 506 U.S. 461 (1993), and, on May 10, 1999, found that his evidence was placed within the jury's effective reach, especially by the expert testimony of Drs. Wright and Dickerson. JA:157-61.

Specifically, the court noted Dr. Wright's opinion that Cole would "mellow and change a good bit," or "burn out" as he aged, as well as Dr. Dickerson's belief that this change made individuals like Cole less dangerous. JA:160-61. The court concluded this testimony "provide[d] a basis for the jury to sufficiently consider the mitigating evidence offered by [Cole]" in answering the future-dangerousness special issue. *Id.* at 161.

On November 24, 1999, the Court of Criminal Appeals adopted these findings and conclusions and denied relief. JA:178-79 (*Ex parte Cole,* No. 41,673-01 (Tex. Crim. App. 1999) (unpublished, *per curiam* order)). Cole did not seek certiorari review.

IV. Federal Habeas Corpus Proceedings

Cole subsequently raised his *Penry I* claim in a petition for habeas corpus relief in the United States District Court for the Northern District of Texas, San Angelo Division. JA:1. Thereafter, on March 6, 2001, the district court below held that the state court's rejection of Cole's claim was not contrary to, or an unreasonable application of, this Court's *Penry I* jurisprudence. *Id.* at 197 (*Cole v. Johnson,* No. 6:00-CV-14-C (N.D. Tex. 2001) (unpublished order)) (citing *Williams v. Taylor,* 529 U.S. 362 (2000)). The court first explained that evidence of a "destructive family background could be considered under the future dangerousness special issue," based on Fifth Circuit precedent. *Id.* at 195-96. Second, the court held that Cole's putative organic neurological deficiency and resultant lack of impulse control "could be considered under either the deliberateness or the future dangerousness special issues."[5] *Id.* at 194, 196. This is because "[t]estimony regarding Cole's lack of impulse control was offered to explain the offense and demonstrate a capacity for change through his 'outgrowing' the impulsivity over time. The relevance of this evidence to the future dangerousness inquiry of the second issue is readily apparent." *Id.* at 196.

The United States Court of Appeals for the Fifth Circuit initially denied a certificate of appealability (COA) regarding Cole's *Penry I* claim. JA:4 (*Cole v. Cockrell,* No. 01-10646 (5th Cir. 2003) (unpublished, nondispositive opinion)). The court of appeals later declined to reconsider

[5] The district court also noted that "[t]he evidence is entirely insufficient to prove that Cole did, in fact, suffer from an organic neurological deficit . . . [or] from any organic brain damage." JA:194. However, this conclusion was rejected on appeal. *Id.* at 230-31 n.31.

its ruling in light of this Court's grants of certiorari in *Smith* and *Tennard.* JA:6 (*Cole v. Dretke,* 99 Fed.Appx. 523, 533 (5th Cir. 2004) (unpublished, *per curiam* opinion)). However, on November 15, 2004, this Court granted Cole's petition for writ of certiorari, vacated the lower court's judgment denying a COA, and remanded for further consideration in light of *Tennard. Abdul-Kabir v. Dretke,* 543 U.S. 985 (2004).

On remand, the court below granted a COA and initially determined that Cole's mitigating evidence—of a "turbulent family background" and "organic neurological deficiency"—met "the low threshold for relevance as articulated by the *Tennard* Court." JA:227-32 (citing *Tennard,* 542 U.S. at 284-85). The court of appeals then applied *Penry I, Graham, Johnson v. Texas,* 509 U.S. 350 (1993), *Penry II, Tennard,* and *Smith* to determine "whether the special issues are broad enough to encompass Cole's mitigating evidence." JA:232-50. "Unlike the evidence in *Penry,*" the court explained:

> Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes. The record does not suggest that the jury viewed Cole's mitigating evidence as an aggravating factor only, *i.e.,* because he cannot learn from his mistakes, he will remain a danger in the future. Rather, the evidence proffered by Cole's expert witnesses suggested to the jury that Cole could change in the future. The evidence intimated that someone from Cole's abusive background begins to change later in life. This evidence also suggests that even someone with . . . an organic neurological deficiency changes later in life. That this evidence fits well within the broad scope of the future dangerousness special issue is clearly

> evident from the testimony of Cole's own expert witnesses.

Id. at 242-43 (footnote omitted).

Further, the lower court noted that Cole's "family background" or evidence of his "transient upbringing" was well within the scope of the Texas special issues because it "more closely resembles Jurek's[6] evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse." JA:243 (quoting *Graham,* 506 U.S. at 476). "Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole suffered a turbulent childhood and may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future." *Id.* at 244.

Moreover, "[t]he state prosecutor did not ask the jury to consider Cole's mitigating evidence as aggravating" or argue that it "was irrelevant in mitigation." JA:245 (citing *Tennard,* 542 U.S. at 289). Finally, the court rejected Cole's suggestion that his jury was given a nullification instruction as in *Penry II* and *Smith*. *Id.* at 246-49 & n.66. As a result, the panel unanimously affirmed the district court's denial of habeas relief. *Id.* at 250. The court also denied rehearing *en banc* on March 17, 2006 with only two of sixteen circuit judges in dissent. *Id.* at 8 (*Cole v. Dretke,* 443 F.3d 441 (5th Cir. 2006) (*per curiam*)). This Court granted certiorari review on October 13, 2006. *Id.* at 251 (*Abdul-Kabir v. Quarterman,* 127 S. Ct. 432 (2006)).

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[6] *Jurek v. Texas,* 428 U.S. 262 (1976).

SUMMARY OF THE ARGUMENT

The court below properly affirmed the denial of federal habeas corpus relief because the state court did not unreasonably apply clearly-established federal law as of 1999 in denying postconviction relief to Cole. This well-established Supreme Court precedent demands a case-by-case inquiry into whether the sentencing jury was able to give sufficient effect to a defendant's mitigating evidence in answering the former Texas special issues concerning deliberateness and future dangerousness. Moreover, this Court has made it abundantly clear that almost all types of mitigating evidence may be sufficiently considered under the special issue scheme and that *Penry I* is the notable exception to the rule. This is true even where mitigating evidence—such as Cole's evidence of childhood neglect and a potential neurological dysfunction—may have some arguable relevance outside the special issues as well. All the Eighth Amendment requires is that a jury be able to consider Cole's mitigating evidence *in some manner*.

There is no principled distinction between Cole's evidence of an alcoholic mother who placed him in a children's home for several years and the evidence of a difficult childhood considered by this Court in *Graham*. There is also no meaningful similarity between Cole's childhood troubles and the severe abuse and deprivation which occurred in *Penry I*. Similarly, Cole's possible neurological problems, which were most likely to recede within ten years, do not bear any real resemblance to the permanent mental retardation and brain damage in *Penry I*. Indeed, Cole had an IQ of 121. In any event, the jury heard expert testimony that Cole—who had already spent much of his life in prison without violent incident—would

not be dangerous if sentenced to life imprisonment. Thus, his mitigating evidence had no *aggravating* relevance within the future-dangerousness special issue. In short, the relationship between the special issues and Cole's mitigating evidence completely lacks the same essential features as the relationship between the special issues and evidence such as mental retardation or low IQ. Any contrary holding would make *Penry I* the rule rather than the exception. As a result, the lower court's judgment should be affirmed.

ARGUMENT

I. Standard of Review

This proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which states in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 2006).

This Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court case, yet reaches an opposite result. *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). Here, where the state court correctly identified the controlling Supreme Court precedent, the unreasonable application test of § 2254(d)(1) applies. *Id.* at 406-08. A state court "unreasonably applies" clearly established federal law if it recognizes the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams,* 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "whether or not [this Court] would reach the same conclusion." *Id.* at 411; *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002). As this Court explained:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering

> the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Here, where the state court applied the broad Eighth Amendment rule of *Penry I* to the unique mitigating evidence in Cole's case, that court's judgment is entitled to maximum leeway under the AEDPA.

Finally, it is the state court's ultimate decision denying relief that is to be tested for unreasonableness, not its reasoning. *Saiz v. Ortiz,* 392 F.3d 1166, 1176 (10th Cir. 2004), *cert. denied,* 125 S. Ct. 2976 (2005); *Wright v. Dep't of Corr.,* 278 F.3d 1245, 1255 (11th Cir. 2002); *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001); *Cruz v. Miller,* 255 F.3d 77, 86 (2d Cir. 2001); *Long v. Humphrey,* 184 F.3d 758, 760-61 (8th Cir. 1999); *Matteo v. Superintendent,* 171 F.3d 877, 891 (3d Cir. 1999) (*en banc*); *see also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding that a federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence").

II. *Penry I* and Its Progeny Demand a Case-by-Case Inquiry into the Mitigating Significance of the Evidence Presented and Whether the Jury Was Able to Give Sufficient Effect to That Evidence Within the Scope of the Special Issues.

In *Penry I,* this Court was forced to reconcile its plurality opinions in *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976) (which requires that a capital-sentencing

authority be allowed to consider mitigating circumstances), *Jurek,* 428 U.S. at 276 (explaining that the pre-1991 Texas special issues—deliberateness and future dangerousness—allowed Texas juries to consider mitigating circumstances), and the unique, double-edged mitigating circumstances presented in *Penry I* itself (mental retardation, brain damage, and severe child abuse). 492 U.S. at 320-25. The resultant decision was a carefully crafted and, ultimately, case-specific compromise. Indeed, the successor cases in this Court have demonstrated one crucial principle: *Penry I* remains the rare exception to the general rule of *Jurek*.

A. *Jurek* to *Penry I* to *Johnson*: almost all types of mitigating evidence may be sufficiently considered in answering the former Texas special issues.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital-sentencing jury not be precluded *as a matter of law* from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson,* 428 U.S. at 303-04.

As the Court explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who

commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I,* 492 U.S. at 319 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). However, not all evidence presented as mitigating must be considered as such. *Franklin v. Lynaugh,* 487 U.S. 164, 174 (1988) (plurality opinion); *Skipper v. South Carolina,* 476 U.S. 1, 7 n.2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Buchanan v. Angelone,* 522 U.S. 269, 276-77 (1998); *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501 U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of particularized mitigating factors," *e.g.,* a defendant's criminal record (or lack thereof), the range of severity of such a record, his youth, the circumstances of the crime, duress and mental or emotional disturbance, and remorse. 428 U.S. at 272-73. Jurek's mitigating evidence of good character, youth, and intoxication was sufficiently within the ambit of the future-dangerousness special issue to satisfy the "individualized sentencing determination" required by *Woodson. Id.* at 271-73. And, in *Franklin,* the Court first recognized that the special issues were constitutionally sufficient even where the mitigating evidence had relevance to culpability apart from the concerns embodied in the deliberateness and future-dangerousness questions. 487 U.S. at 177-82. The Court specifically rejected the notion that the forward-looking

future-dangerousness inquiry was inadequate for the consideration of backward-looking character evidence. *Id.* at 177-78; *cf. id.* at 189-90 (arguing that good-character evidence was *not* within the scope of the future-dangerousness issue because it might have relevance to past culpability rather than future conduct) (Stevens, J., dissenting). Commonsense dictates that the individualized-determination doctrine of *Lockett* and *Eddings* must yield to the requirement that a capital-sentencing jury receive guidance in its decision-making at some point. Otherwise, *Jurek* is without meaning. As the Court explained:

> *Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities.

Franklin, 487 U.S. at 179 (citation omitted).

Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did *not* allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse. 492 U.S. at 322. This was because the evidence, which suggested that Penry was "less able . . . to control his impulses or to evaluate the consequences of his conduct," did not necessarily suggest that his murderous actions were less than deliberate. *Id.* Additionally, Penry's evidence indicated that he was unable to "learn from his mistakes," and was relevant to the future-dangerousness special issue *only* as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to

Penry's "two-edged" evidence. *Id.* at 324. Yet the Court specifically noted that its *Penry I* opinion did *not* negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence *could* be considered under the plain language of the special issues. *Id.* at 315-19. For more than a decade *Penry I* would be viewed as the narrow exception to *Jurek*.

During its next term, the Court acknowledged the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde v. California,* 494 U.S. 370, 380 (1990). Accuracy is important, but finality equally so. *Id.* Indeed, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Id.* at 380-81. As a result, the Court crafted a legal standard for reviewing ambiguous jury instructions that relies not on subjective and hypothetical hairsplitting but on objective and reasonable analysis. *Id.* at 378-81. The Court held that a *mere possibility* that the jury was precluded from considering relevant mitigating evidence did *not* establish Eighth Amendment error. *Id.* at 380. Rather, such error occurred only if there was a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.*; *see also Saffle v. Parks,* 494 U.S. 484, 490-92 (1990) (no Eighth Amendment error where there is no indication that the jury was "altogether prevented" from giving some effect to the evidence).

The Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not *solely aggravating* when viewed through the lens of the special issues. For example, in *Graham,* the Court declined to "read *Penry* [*I*] to effect a

sea change in the Court's view of the constitutionality of the . . . Texas death penalty statute."[7] 506 U.S. at 474. As in *Franklin,* the Court found that future dangerousness was a constitutionally adequate vehicle for the consideration of his mitigating evidence of youth, troubled upbringing, and good character. *Graham,* 506 U.S. at 475. This was because the "mitigating significance" of Graham's evidence did not *compel* affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76.

Thus, as in *Boyde,* the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original). Indeed, "virtually *any* mitigating evidence" can be characterized as relevant to culpability but outside the scope of the Texas special issues. *Id.* (emphasis in original). In his dissent, Justice Souter ably demonstrated how to do so. *Id.* at 518-21 (suggesting youth and difficult upbringing, *i.e.,* "his mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another" had mitigating relevance outside or aggravating relevance within the future-dangerousness question). But if this idea

[7] Cole avers that *Penry I* was not at issue in *Graham* because it merely applied the retroactivity doctrine of *Teague v. Lane,* 489 U.S. 288 (1989), in order to determine the state of the law in 1984, presumably when Graham's sentence became final. Petitioner's Brief (Brief) at 35. This is nonsense. In *Penry I,* the Court held that relief was dictated by *Lockett* and *Eddings,* decided in 1978 and 1982, respectively. 492 U.S. at 318-19. *Graham* decided that *Lockett* and *Eddings* did not dictate relief *on the facts of Graham's case,* and that *Penry I* was distinguishable *on its facts.* 506 U.S. at 472-77.

was followed to its logical conclusion, the Court noted, *Penry I* would have swallowed *Jurek* completely. *Id.* at 476-77. Such reasoning is inconsistent with *Jurek* and *Franklin.*

In *Johnson,* the Court again rejected the notion that a jury could ever view youth "as outside its effective reach in answering the [future-dangerousness] special issue." 509 U.S. at 368. This is so even if youth could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69. Again, the Court specifically rejected the notion that mitigating evidence must be allowed relevance in every way imaginable during sentencing. The Court explained that general "personal culpability" is, by its nature, intertwined with the notion of future dangerousness. *Id.* at 369-70. This is because "a Texas capital jury deliberating over the Special Issues is *aware of the consequences* of its answers," and is understood to "exercise a range of judgment and discretion" and basic "commonsense" in answering those issues. *Id.* at 370 (quoting *Adams v. Texas,* 448 U.S. 38, 46 (1980), and citing *Boyde,* 494 U.S. at 381, and *Franklin,* 487 U.S. at 182 n.12) (emphasis added); *cf. Blystone v. Pennsylvania,* 494 U.S. 299, 322 (1990) ("by focusing on the deliberateness of the defendant's actions and his future dangerousness, the [Texas capital sentencing] questions compel the jury to make a *moral judgment* about the severity of the crime and the defendant's *culpability*") (Brennan, J., dissenting) (emphasis added).

Further, as the Court explained, any contrary understanding would necessarily overrule *Jurek* and "entail an alteration of the rule of *Lockett* and *Eddings.*" *Johnson,* 509 U.S. at 372. "Instead of requiring that a jury be able to

consider *in some manner* all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence *in every conceivable manner* in which the evidence might be relevant." *Id.* (emphasis added). This would constitutionally require the jury "be instructed in a manner that leaves it free to depart from the special issues in every case" and effectively deprive the states of the prerogative "to structure the consideration of mitigating evidence," *id.* at 373, overruling *Furman v. Georgia,* 408 U.S. 238 (1972), and *Gregg v. Georgia,* 428 U.S. 153 (1976), as well. The Court specifically rejected the converse "full effect" argument advanced by Justice O'Connor in dissent. *Id.* at 375-76, 379-87.

In 1999, when the state court decided Cole's *Penry I* claim, this Court had been silent on the *Penry I* issue for more than six years. Notably, however, the Court continued to endorse *Jurek* and *Johnson. See, e.g., Ayers v. Belmontes,* 127 S. Ct. 469, 480 (2006); *Tuilaepa v. California,* 512 U.S. 967, 972-75 (1994); *Buchanan,* 522 U.S. at 276-77. Thus, a state court ascertaining clearly-established federal law would have understood the following. Pursuant to *Jurek,* the former Texas special issues were facially constitutional. Yet *Lockett* and *Eddings* require that a jury not be prevented from making an individualized sentencing decision based on the available mitigating evidence. Although *Penry I* held that diminished capacity evidence of a defendant's inability to learn from his mistakes might have only aggravating relevance to future dangerousness and, thereby, lead to a violation of the Eighth Amendment rule of *Eddings,* the Texas special issues remained constitutionally sufficient so long as the defendant's evidence could find *some* mitigating relevance

to culpability within the special issues, regardless of whether it might have aggravating relevance as well. There existed a presumption of constitutionality under most circumstances, even where the defendant could characterize—and re-characterize as necessary throughout successive appeals—the mitigating evidence as beyond the effective reach of the jury. This is because a Texas jury was presumed to understand the consequences of its actions and the moral judgment required.

The net result was that few types of mitigating evidence would have only aggravating relevance within the special issues and lead to *Penry I* error.

B. *Penry II* did not alter the Court's *Jurek*/*Penry I*/*Johnson* jurisprudence, nor did it justify a change in perception among the lower courts.

In 2001, the Court revisited *Penry I* to decide whether a supplemental instruction given during Penry's retrial—an instruction not at issue here—"complied with [the Court's] mandate in *Penry I*." *Penry II,* 532 U.S. at 786. The Court first reiterated its holding in *Penry I*—that the mitigating evidence presented at Penry's 1980 trial was "relevant only as an *aggravating* factor" to the special issues—and explained that Penry was retried in 1990, where "the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse." *Id.* at 787-88. The Court then considered whether the Texas court had "unreasonably applied" *Penry I* by its endorsement of the supplemental instruction. *Id.* at 796-804.

The Court recognized "two possible ways" to interpret the supplemental instruction. First, the instruction "had no practical effect" because it merely told "the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue." *Penry II,* 532 U.S. at 798. Alternatively, it rendered the jury charge "internally contradictory" because the jury was also instructed that a "yes" answer to a special issue was appropriate only where supported by evidence proved beyond a reasonable doubt and a "no" answer was called for only when there was a reasonable doubt. *Id.* at 799. The supplemental instruction directed the jury to "change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence." *Id.* But "jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict,'" creating "a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of Penry's mental retardation and childhood abuse." *Id.*

Thus, neither of the two possible views of the supplemental instruction cured the error recognized in *Penry I.* The first left the jury in the same position as before, with no way to give effect to mitigating evidence that was only relevant to the special issues in an *aggravating* way. Conversely, the second advised the jury to render a false verdict because Penry's evidence was not relevant to the special issues in any *mitigating* way. However, both arguments rest on the same foundation: that Penry's evidence of mental retardation, brain damage, and severe child abuse was beyond the scope of the special issues. In essence, the supplemental instruction did not *create* new error; rather, the instruction simply *failed to correct* the

error identified in *Penry I* because, during Penry's retrial, the jury was again faced with mitigating evidence that compelled affirmative answers to the special issues and created a likelihood that the jury was unable to ethically assess a life sentence if it so chose.

Although the "full effect" language of Justice O'Connor's *Johnson* dissent surfaced in the *Penry II* majority opinion, 532 U.S. at 797, it had nothing to do with the supplemental-instruction issue because the *Penry I* Court had already reached the conclusion that Penry's mitigating evidence could not be given sufficient effect within the special issues. There is certainly no possibility a reasonable state court jurist would have assumed the *Penry II* majority turned the tables on the Court's prior opinion in *Johnson,* in which the Court specifically declined to adopt such a standard.

Although this Court approved of the "clearly drafted catchall instruction on mitigating evidence" that was adopted by Texas in 1991, it is important to note that the Court avoided holding any such instruction was *necessary. Penry II,* 532 U.S. at 803 (citing TEX. CODE CRIM. PROC. art. 37.071(2)(e)(1) (West 1991)); *Belmontes,* 127 S. Ct. at 480; *Blystone,* 494 U.S. at 305. Such a decision would have overruled *Jurek, Franklin, Graham,* and *Johnson,* which recognized that states are free to structure capital-sentencing schemes as they see fit, within certain reasonable parameters. *See Franklin,* 487 U.S. at 179 ("[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"). The very idea that a specific instruction is *not* constitutionally necessary implies that most kinds of mitigating evidence do not

require special accommodation under *Penry I.* Cole's evidence is no different.

C. *Tennard, Smith,* and the new standard of constitutional relevance

In the wake of *Penry II,* the floodgates seemingly opened. After eight years of silence, the Court granted certiorari in six *Penry* cases in five years.[8] In *Tennard,* the Court confronted a *Penry I* claim based on an IQ score of sixty-seven. 542 U.S. at 277. In adjudicating the claim, the lower court applied its "constitutional relevance" test,[9] developed during the nine-year interim since *Graham* and *Johnson. Tennard,* 542 U.S. at 281, 283-84. But this Court reversed, holding that constitutional relevance was an "improper legal standard" with "no basis in [Supreme Court] precedents," and that the correct standard to be

[8] During this same time period, however, the Court *denied* certiorari in several *Penry* cases in which the evidence was not dissimilar to Cole's. *See, e.g., Newton v. Dretke,* 371 F.3d 250, 256-57 (5th Cir.) (mitigating evidence of difficult upbringing within the scope of the special issues), *cert. denied,* 543 U.S. 964 (2004); *Robertson v. Cockrell,* 325 F.3d 243, 245-46 (5th Cir.) (*en banc*) (childhood abuse at the hands of his alcoholic father as well as drug abuse), *cert. denied,* 539 U.S. 979 (2003); *Harris v. Cockrell,* 313 F.3d 238, 242 (5th Cir. 2002) (alcoholism), *cert. denied,* 540 U.S. 1218 (2004); *Hernandez v. Johnson,* 248 F.3d 344, 349 (5th Cir.) (treatable, chronic schizophrenia), *cert. denied,* 534 U.S. 1043 (2001). "[W]hile it is inappropriate to ascribe undue significance to denials of certiorari," this Court has certainly sent mixed signals to the court below in recent years. *See Robertson,* 325 F.3d at 256-57 & nn.21-24 (collecting cases in which certiorari was denied).

[9] "To be constitutionally relevant, the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell,* 284 F.3d 491, 595 (5th Cir. 2002) (internal quotations omitted).

applied was *only* whether the evidence was within the effective reach of the jury in answering the special issues. *Id.* at 287-88. Without actually determining that Tennard's low IQ was beyond the scope of the special issues, the Court merely remanded for further review. *Id.* at 288-89. The Court did not adopt or endorse the "full effect" language mentioned in *Penry II* and Justice O'Connor's *Johnson* dissent. Nor did the Court even mention *Jurek* or *Johnson,* much less overrule those precedents.

In essence, the *Tennard* Court chastised the Fifth Circuit for invoking "its own restrictive gloss on *Penry I*"—constitutional relevance—as a screening test. *Tennard,* 542 U.S. at 283. The Court explained that:

> [T]he "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard—"any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"—applies.

Id. at 284 (quoting *McKoy v. North Carolina,* 494 U.S. 433, 440 (1990)). "Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Id.* at 285 (quotations and citations omitted).

Although the Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability," it is clear that most types of mitigating evidence will meet the *Tennard* relevance

standard. 542 U.S. at 286 (citation omitted). As noted *supra,* the lower court held that Cole's mitigating evidence—of a "turbulent family background" and "organic neurological deficiency"—satisfies the *Tennard* constitutional-relevance definition. JA:227-32.

The Court's opinion in *Smith v. Texas* the next term noted its ruling in *Tennard* but focused on an entirely different issue: a supplemental instruction similar to the one addressed in *Penry II.* As in *Penry II,* this instruction "did not provide the jury with an adequate vehicle for expressing a 'reasoned moral response' to all of the evidence relevant to the defendant's culpability." *Smith,* 543 U.S. at 45-48 (quoting *Penry II,* 532 U.S. at 796). Importantly, no *Penry II* instruction was submitted in the instant case. In this sense, *Smith* and *Penry II* are not directly on point.

In addition, the *Smith* Court reiterated its disapproval of the constitutional-relevance standard rejected in *Tennard. Smith,* 543 U.S. at 45. The state court in *Smith* had adopted that standard for the first time only two months prior to the issuance of *Tennard. Smith,* 543 U.S. at 43-45; *see also Ex parte Smith,* 132 S.W.3d 407, 413-14 (Tex. Crim. App. 2004) (citing *Robertson,* 325 F.3d at 251, and *Graham,* 950 F.2d at 1029). Of course, that standard was not employed by the court below. Beyond that, the *Smith* Court did not adjudicate the issue of whether Smith's evidence was beyond the effective reach of the jury in answering the former Texas special issues. Thus, *Smith* adds little to the *Jurek*/*Penry I*/*Johnson* story other than to reinforce the tangential opinions in *Penry II* and *Tennard.*

D. The current state of *Penry I* jurisprudence

When *Jurek, Penry I,* and the litany of cases that follow in the wake of those opinions are viewed as a whole, the following Eighth Amendment inquiry may be gleaned: a court must determine (1) whether the mitigating evidence has met the "low threshold for relevance" established in *Tennard* and, if so, (2) whether the evidence was within the effective reach of the jury in answering the special issues. 542 U.S. at 284-85; *Coble v. Dretke,* 444 F.3d 345, 358 (5th Cir. 2006); *Bigby v. Dretke,* 402 F.3d 551, 564-65 (5th Cir.), *cert. denied,* 126 S. Ct. 239 (2005); *Madden v. Collins,* 18 F.3d 304, 308 (5th Cir. 1994). "For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." *Brewer v. Dretke,* 442 F.3d 273, 278-79 (5th Cir.), *cert. granted,* 127 S. Ct. 433 (2006); *see also Tennard v. Dretke,* 442 F.3d 240, 257 (5th Cir. 2006) ("The key inquiry . . . is whether the jury could give sufficient *mitigating* effect to Tennard's evidence") (opinion on remand) (emphasis in original); *Bigby,* 402 F.3d at 564 (special issues must confer sufficient discretion on the sentencing body to consider the character and record of the individual offender); *Graham,* 506 U.S. at 468 (same). Of course, this objective inquiry is subject to the deferential standard of 28 U.S.C. § 2254(d)(1). *Tennard,* 542 U.S. at 288-89; *Coble,* 444 F.3d at 349-50; *Brewer,* 442 F.3d at 276-77; *Tennard,* 442 F.3d at 254.

As discussed above, this Court has recognized that, in most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *Jurek,* 428 U.S. at 272-73. The fact that mitigating evidence might have "*some* arguable relevance

beyond the special issues" is immaterial because "virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues." *Graham,* 506 U.S. at 476 (citing *Franklin,* 487 U.S. at 190 (Stevens, J., dissenting)) (emphasis in *Graham*). To demonstrate Eighth Amendment error, there must exist more than "the mere possibility" that the jury was prevented from giving effect to mitigating evidence. *Johnson,* 509 U.S. at 367; *see also Brewer,* 442 F.3d at 281 (*Penry I* error results where "the only logical manner in which [the] jury could have considered the [mitigating] evidence [ ] under the future dangerousness special issue was as an aggravating factor"). Instead, Cole must show a reasonable likelihood the jury could not consider his mitigating evidence. *Boyde,* 494 U.S. at 380.

It is crucial to reiterate why the reasonable-likelihood standard exists: during repeated appeals brought by successive lawyers over the course of a decade or more, the trial record is embellished, exaggerated, and rehashed so much that what the jury listened to at trial bears no resemblance to the evidence described in a habeas corpus petition. Hyperbole is human nature. However, these subjective tendencies must be quelled in favor of an objective viewpoint if a jury verdict is ever to become final. Put another way, just because Cole can imagine a way the evidence might be relevant to his culpability outside the scope of the future-dangerousness special issue does not mean that a jury would deem that evidence to be beyond its grasp. This is mere speculation and is forbidden by *Boyde.* 494 U.S. at 380.

III. The Court Below Properly Rejected Cole's *Penry I* Claim.

When Cole's mitigating evidence is considered objectively, there is no *reasonable* likelihood the jury was precluded from giving constitutionally sufficient mitigating effect to it in answering the Texas future-dangerousness special issue. First, the lower court properly determined that Cole's evidence of childhood neglect was within the purview of future dangerousness because the expert testimony established he was "capable of change" and, thus, would not remain dangerous in the future. JA:243-44. As the court of appeals explained:

> [T]he Supreme Court itself has indicated that "family background" evidence falls within the broad scope of Texas's special issues. In *Graham,* the Court stated:
>
> > Moreover, we are not convinced that *Penry* [*I*] could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh*. As we have noted, *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. *We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light.* Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of

> mental retardation and harsh physical abuse.

JA:243 (quoting *Graham,* 506 U.S. at 476) (emphasis in *Cole*).

Cole counters that "*Graham* did not involve evidence of a *troubled* family background, marked by mistreatment, abandonment, and neglect." Brief at 36 (emphasis in original). Yet the four dissenting justices clearly believed it did, but employed the phrase "difficult upbringing" instead. *Graham,* 506 U.S. at 520 (Souter, J., dissenting). The two concepts are undoubtedly synonymous. Indeed, the Fifth Circuit had previously described it as a "difficult childhood." *Graham v. Collins,* 950 F.2d 1009, 1013 (5th Cir. 1992) (*en banc*) (quoting *Graham v. Collins,* 896 F.2d 893, 897 (5th Cir. 1990)). And the *Graham* dissenters made clear just what they thought was "difficult" about Graham's childhood: "his mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another." *Graham,* 506 U.S. at 520.

Cole's childhood involved an alcoholic mother who relinquished her custody to a children's home for nearly five years. JA:36-37, 56. After Cole returned home to live with his mother, by then sober and remarried, Cole experienced a reasonably idyllic childhood from the age of ten until sixteen. *Id.* at 39-40. During this time, Cole excelled in school, and his success was no doubt due to his high intelligence and stable home life. *Id.* at 41-43, 63. At the age of sixteen, however, Cole murdered his best friend and thereafter spent most of his life in prison for various assaultive offenses. 17 RR 697-99, 708-09; 18 RR 49-63. There is no meaningful distinction between Cole's evidence of a troubled upbringing followed by a lengthy criminal

history and Graham's evidence of a violent crime spree preceded by a difficult childhood. It certainly does not compare to the frequent child abuse and emotional deprivation experienced by Penry. *See Penry I,* 492 U.S. at 308-10 (expert testimony concerning "beatings and multiple injuries to the brain at an early age," as well as social and emotion deprivation; sibling's testimony that "mother had frequently beaten him over the head with a belt when he was a child," and "routinely locked [him] in his room without access to a toilet for long periods of time").

The lower court has rejected Eighth Amendment claims based on very similar evidence of a troubled childhood:

> This [C]ourt . . . has also held that evidence of a defendant's "unstable" and "transient" childhood could be given effect under the special issues. *Jacobs v. Scott,* 31 F.3d 1319, 1327 (5th Cir. 1994) (citing *Graham v. Collins,* 506 U.S. 461 [ ]). In *Jacobs,* we distinguished evidence of a troubled childhood offered by the defendant from that in *Penry I. Id.* Jacobs argued that:
>
> > evidence was presented showing that Mr. Jacobs had an unstable, troubled childhood. He never knew his mother, and has only vague memories of his father. His father left him to live alone with strangers when he was a small boy, and Mr. Jacobs never saw him again. Mr. Jacobs ended up living in several foster homes as a child, separated from his sister, parents, and all other family connections.
>
> *Id.* Coble had a troubled childhood similar to that of Jacobs and Graham, "as opposed to a childhood

> rife with harsh physical abuse like that of Penry." *Id.* Coble's evidence of his troubled childhood included: (1) the death of his father before he was born; (2) poverty in childhood; (3) his stepfather's alcoholism and conflicts with his mother; and (4) his mother's nervous breakdown. His evidence of his childhood is more "transient" and "unstable," like the evidence presented in *Jacobs* and *Graham* than it is similar to Penry's evidence of abuse. Coble's evidence is distinguishable from that in *Penry.*

Coble, 444 F.3d at 362.

As in *Coble, Jacobs,* and *Graham,* Cole's childhood troubles—a neglectful mother and largely absent father—were well within the reach of the jury in answering the future-dangerousness special issue. Indeed, it is very likely that the vast majority of death-eligible criminals had similar, negative childhood experiences. But the overwhelming number of such inmates who were tried prior to 1991 in Texas are not entitled to *Penry I* relief. If this were the case, *Penry I* would cease to be the exception to *Jurek.* Instead, *Jurek* would be the exception to *Penry I.* Thus, it is important to recognize the *exceptional* nature of the mitigating evidence in *Penry I.* 492 U.S. at 308-10. Cole's evidence of childhood neglect is clearly not so exceptional; rather, it is just a typical death penalty case and Cole is not entitled to a retrial after nearly twenty years.

The court below also correctly rejected Cole's *Penry I* claim based on a possible neurological dysfunction. JA:239. As the court of appeals reasoned, "the testimony proffered by two of Cole's own expert witnesses is *directly contrary* to the testimony at Penry's penalty phase that

the *Penry* [*I*] Court found aggravating." *Id.* at 239. For example, Dr. Wright testified Cole would "begin to make changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a bit and change a good bit." *Id.* at 68, 240. Dr. Wright added, "the evidence is overwhelming there that individuals who have behaved as [Cole] has change. They burn out."[10] *Id.* at 74, 240. "Dr. Wright also testified that even though Cole's diary demonstrated a 'fantasy' to behave like a 'modern-day Viking' or a 'pirate,' Cole was unlikely to act on such fantasies because he did not have the 'wherewithal' to do so." *Id.* at 241 (quoting *id.* at 72). Dr. Wright added that Cole developed these fantasies simply as a way to deal with the monotony of prison life. *Id.* at 71-72. Dr. Dickerson confirmed that violent conduct diminishes with age and becomes "fairly rare" by the time individuals reach the age of forty. *Id.* at 95, 241.

Thus,

> Unlike the evidence in *Penry,* Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes. The record does not suggest that the jury viewed Cole's mitigating evidence as an aggravating factor only, *i.e.,* because he cannot learn from his mistakes, he will remain a danger in the future. Rather, the evidence proffered by Cole's expert witnesses suggested to the jury that Cole could change in the future.

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[10] Cole erroneously criticizes this testimony as "generic" and equally applicable to "*any* offender." Brief at 31 (emphasis in original). Not only does this statement ignore the explicit opinion of Dr. Wright, it disregards the very characteristic that rendered Penry's mitigating evidence *aggravating* within the future-dangerousness special issue: that his condition would never improve. *Penry I,* 492 U.S. at 323-24.

* * *

> That this evidence fits well within the broad scope of the future-dangerousness special issue is clearly evident from the testimony of Cole's own expert witnesses.

JA:242-43. This "burn out" theory was stressed by defense counsel during closing argument and possessed significant power in Cole's case: he was nearly thirty-two years old at the time of trial. *Id.* at 82, 141-42. Additionally, the jury was told that Cole was happiest in the disciplined structure of prison, to which he had grown accustomed during two lengthy incarcerations. *Id.* at 74-75, 142-43.

The lower court recently held that evidence of a borderline personality disorder was not within the jury's reach in answering the future-dangerousness issue where conflicting expert testimony indicated that successful treatment was unlikely. *Nelson v. Quarterman,* ___ F.3d ___, 2006 WL 3592953, *20 (5th Cir. Dec. 11, 2006) (*en banc*). The court reasoned that

> a juror considering Nelson's evidence of borderline personality disorder would have felt that he could give the evidence only one possible effect via the future-dangerousness issue: Such a juror would have seen the evidence as *only aggravating,* because Nelson's borderline personality disorder and the difficulty of treating it increase the likelihood that Nelson will act out violently again.

Id. at *21 (emphasis added). While the court of appeals questioned prior circuit authority[11] concerning treatable

[11] *See Lucas v. Johnson,* 132 F.3d 1069, 1082-83 (5th Cir. 1998) (finding evidence that a defendant was psychotic and schizophrenic, but

(Continued on following page)

mental illness, *id.* at *25, it is clear that the *Nelson* court based its holding on the record and the notion that *Penry I* error occurs only where the mitigating evidence has only *aggravating* relevance to the special issues.[12]

In Cole's case, however, there was no conflicting expert testimony concerning whether his potential neurological dysfunction was treatable or would diminish with time. In fact, Dr. Wright could not state with certainty that any such dysfunction existed. JA:77-78. No expert actually diagnosed Cole with any mental disease or disorder. Nor did the experts opine that Cole could not distinguish the difference between right and wrong or appreciate the consequences of his actions. *Id.* at 86; *see also* 15 RR 260-61, 270-74 (describing Cole's willingness to confess to instant crime); 17 RR 740 (Cole's voluntary confession to earlier child rapes). Further, as noted *supra,* the jury heard expert testimony that Cole would "burn out" in less than ten years. JA:68, 74, 95, 141-42. Therefore, Cole's putative neurological problem could not have had *aggravating* relevance within the special issues, and any contrary argument amounts to nothing more than pure speculation. Similarly, Cole's supposition that he might "be unable to stop himself" from "making the same 'mistake' again" is not supported by the evidence or common experience. Brief at 29, 33. *Boyde* makes it clear that

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that his mental problems had responded to antipsychotic drugs and was treatable, could be considered under the future-dangerousness special issue).

[12] Two judges who joined the *Nelson* majority were panel members in *Cole*, but reached the opposite conclusion in the instant case. *Cf.* JA:219. Moreover, the *en banc* Fifth Circuit's prior denial of rehearing in this case implies that the *Nelson* majority does not view Cole's *Penry I* claim as equivalent to Nelson's. *Cole,* 443 F.3d at 442.

Eighth Amendment error may not be premised on such conjecture. 494 U.S. at 380.

Other Fifth Circuit opinions confirm this reasoning. *See Coble,* 444 F.3d at 361-62 (holding treatable bipolar and posttraumatic stress disorders within scope of future-dangerousness issue); *Hernandez,* 248 F.3d at 349 (holding "evidence of chronic schizophrenia could be considered by the jury in answering the question of future dangerousness," because "[w]ith medication and treatment, remission can be sustained"); *Robison v. Johnson,* 151 F.3d 256, 265-67 (5th Cir. 1998) (holding that evidence of petitioner's schizophrenia, including testimony that it was treatable and could go into remission, could be given mitigating effect under the future-dangerousness special issue); *Demouchette v. Collins,* 972 F.2d 651, 653 (5th Cir. 1992) (holding that a jury was able to consider the mitigating effect of evidence of personality disorder under first special issue where major thrust of evidence was that the disorder caused defendant to act impulsively rather than deliberately); *but see Tennard,* 442 F.3d at 256 (finding *Penry I* violation where evidence showed low IQ, a "static trait" or "permanent physiological feature"); *Bigby,* 402 F.3d at 571 (paranoid schizophrenia not amenable to treatment or control not within scope of future dangerousness). A treatable mental problem is distinctly different from a chronic mental illness, like Penry's, that prevents a defendant from ever learning from his or her mistakes. The *Nelson* majority did not overrule these opinions and, indeed, did not even mention them.

Cole argues, Brief at 25-30, that the lower court's decision runs afoul of *Smith* and *Tennard* by attempting to revive the "permanence" element of the former constitutional relevance test. But temporary conditions are fundamentally

distinct from long-term, chronic characteristics and are less likely to mitigate culpability. If this were not the case, then mere intoxication at the time of the offense would be as mitigating as severe mental retardation. This is clearly not so. *See, e.g., Harris,* 313 F.3d at 242 (intoxication within the scope of the special issues for *Penry I* purposes); *James v. Collins,* 987 F.2d 1116, 1121 (5th Cir. 1993) (same). In fact, this Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." 542 U.S. at 286 (citation omitted). "Gravity" is a synonym for severity, seriousness, or importance. THE AMERICAN HERITAGE COLLEGE DICTIONARY 595 (3d ed. 2000). "Trivial" means insignificant or inessential. *Id.* at 1447. Transient or impermanent characteristics are certainly, on average, less serious or significant and are less likely to mitigate culpability. To deny this fact, as Cole does, is to deny commonsense. Either concept certainly bears on whether the likelihood of *Penry I* error is *reasonable.* Any other interpretation would lead to a *per se*-error analysis and overrule *Jurek, Graham,* and *Johnson.*

Moreover, *Tennard* and *Smith* do not support Cole's argument, because the opinions deal only with the application of permanence as a "screening test" which might foreclose reaching "the heart of [a petitioner]'s *Penry* [*I*] claims." *Tennard,* 542 U.S. at 282-86. Here, the court of appeals *did* reach the heart of Cole's *Penry I* claim and discussed each category of the evidence at length. In fact, Cole reads far too much into *Tennard* and *Smith* when he suggests that they dispense with any comparative analysis of the mitigating evidence. Reasonableness can hardly be

judged in the absence of such comparisons. This is especially true where the relative permanence of a mitigating circumstance bears *directly* on the probability of future dangerousness.

And unlike *Tennard,* the prosecutor did not ask the jury to consider Cole's mitigating evidence as aggravating. The prosecuting attorney certainly argued the State had carried its burden of proof concerning Cole's probable future dangerousness.[13] JA:140, 147-48. But the prosecutor based this argument on the *aggravating* evidence presented by the State—including Cole's prior murder and sexual assault convictions—and not Cole's mitigating evidence. *Id.* at 137-38. Importantly, however, the prosecutor did not "press[ ] exactly the most problematic interpretation of the special issues, suggesting that [Cole's mitigating evidence] was irrelevant in mitigation, but relevant to the question whether he posed a future danger."[14] JA:245 (quoting *Tennard,* 542 U.S. at 289).

Cole further suggests that "[n]either party at [his] trial made any argument that [his] abused childhood logically warranted a 'no' answer to the 'future dangerousness'

[13] Cole asserts that the State's argument violates *Penry I.* Brief at 23. This argument is specious because the State was merely arguing it met its burden of proof. The State will make just such an argument *in every case.* But not every death penalty case results in *Penry I* error.

[14] Cole also argues that the State's voir dire invited the jurors to ignore the mitigating evidence in answering the special issues. Brief at 19-21. But, as this Court reasoned in *Penry II,* it is doubtful that "jurors would have remembered the explanations given during voir dire, much less taken them as a binding statement of the law." 532 U.S. at 801. In Cole's case, voir dire began more than two weeks before the sentencing phase of trial. Thus, "[t]he comments of the court and counsel during voir dire were surely a distant and convoluted memory by the time the jurors began their deliberations on [Cole]'s sentence." *Id.* at 802.

question." Brief at 23-24, 36-37. But Cole is wrong. Defense counsel urged the jury to answer negatively because Cole would "burn out" and cease to be dangerous. JA:141-42. Counsel further suggested that Cole would prosper and benefit from the structured, disciplined environment of prison: "[t]he only peace he ever finds is in the penitentiary . . . that's the only life he's ever known." *Id.* at 142-43. Moreover, counsel clearly argued to the jury that there was no probability—beyond a reasonable doubt—that Cole would commit future acts of violence if sentenced to life imprisonment. This is certainly not a plea for "nullification" in spite of the evidence, as Cole claims. Brief at 24 n.12.

IV. The State Court Reasonably Rejected Cole's *Penry I* Claim.

On state postconviction review, the Court of Criminal Appeals carefully considered Cole's *Penry I* claim and reasonably applied the appropriate Supreme Court precedent. JA:157-61 (citing *Penry I* and *Graham*). The court first set forth a detailed description of *all* of the mitigating evidence before the jury. *Id.* at 157-59. The court then correctly explained that, in addressing a *Penry I* claim, "[t]he issue is whether the sentencing jury had been unable to give effect to [Cole]'s mitigation evidence within the confines of the statutory 'special issues.'" *Id.* at 159. This issue "must be determined on a case by case basis, depending on the nature of the mitigating evidence offered and whether there exists other testimony in the record that would allow consideration to be given." *Id.* at 160. Because of the expert opinions provided by Drs. Wright and Dickerson, the state court explained, there was "a basis for the jury to have given consideration to the type of

mitigating testimony offered by [Cole]." *Id.* (quoting *id.* at 68, 74, 77-79, 102).

Cole criticizes the state court's reasoning as cursory and ill-founded. Brief at 40-44. However, as explained above, the state court's reasoning is inapposite under the AEDPA. It is only the court's ultimate decision that is to be reviewed. *Saiz,* 392 F.3d at 1176; *Wright,* 278 F.3d at 1255; *Santellan,* 271 F.3d at 193; *Cruz,* 255 F.3d at 86; *Matteo,* 171 F.3d at 891. The state court's decision—that there was no reasonable likelihood Cole's mitigating evidence was outside the jury's effective reach in answering the special issues—is without question a reasonable application of *Jurek* and *Penry I.* The state court did not fail to examine the trial record or screen out any of Cole's mitigating evidence. Although Cole argues that "it is impossible here to identify what aspects of Mr. Cole's mitigating evidence the [state court] viewed as irrelevant to the jury's sentencing decision," Brief at 42, it is clear that the state court viewed *all* of Cole's evidence as relevant. Otherwise the court would not have thoroughly described that evidence. JA:157-59. Nor did the state court employ a "severity" or "nexus" analysis, as Cole implies. Brief at 42. Those terms do not appear in the court's findings, and its insistence on a case-specific assessment of "the nature of the mitigating evidence offered" and the context of the trial is exactly what *Penry I* requires. *Id.* at 160-61; *see Brown v. Payton,* 544 U.S. 133, 144 (2004) (explaining that the whole context of the trial must be considered in a *Penry I* analysis) (citing *Boyde,* 494 U.S. at 383).

In any event, if the state court's decision was even arguably unreasonable, the lower court was entirely within its authority to consider and reject Cole's claim *de*

novo. Although Cole suggests otherwise, Brief at 26, habeas corpus relief is precluded except where a person is "in custody pursuant to the judgment of a State court . . . in violation of the Constitution." 28 U.S.C. § 2254(a). The fact that a state court may have conducted an unreasonable analysis of a federal constitutional claim does not entitle Cole to relief. It only means that a federal habeas court may avoid the deferential standard owed to reasonable state court judgments under § 2254(d) and review a petitioner's claim *de novo.*

Finally, overriding the state court's denial of Cole's *Penry I* claim at his point would violate the recognized policy interests of comity and finality. The finality of that 1999 judgment and the respect owed to it as a matter of federalism would be upset if the Court invalidated Cole's death sentence based on precedent that did not exist at the time. The *Teague* question is usually framed as "'whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Goeke v. Branch,* 514 U.S. 115, 118 (1995) (quoting *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994) (internal quotations omitted)). Here, the state court would have been compelled by *Johnson* and *Graham* to reject Cole's *Penry I* claim in 1999.

Any other holding would unfairly trample the "reasonable, good-faith interpretations" of these precedents that the state court relied upon in adjudicating Cole's *Penry I* claim. *Graham,* 506 U.S. at 467 (quoting *Butler v. McKellar,* 494 U.S. 407, 414 (1990)). Indeed, "reasonable jurists in [1999] would have found that, under [the Court's] cases, the Texas statute satisfied the commands of

the Eighth Amendment" with regard to Cole's mitigating evidence. *Id.* at 472.

> The interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command.

Johnson, 509 U.S. at 366-67. Thus, to the extent the relief Cole requests requires a new rule, both the AEDPA and the non-retroactivity doctrine of *Teague* bar relief.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed in all respects.

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