No. 05-11287

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

BRENT RAY BREWER,
Petitioner,

-v-

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

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE.

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SUMMARY OF ARGUMENT IN REPLY

Respondent's Brief in Opposition ("BIO") focuses on the merits of Petitioner's claim under Penry v. Lynaugh, 492 U.S. 302 (1989) ("Penry I"), and completely (if understandably) ignores the most compelling reason supporting a grant of *certiorari* – namely, that the Fifth Circuit and the Texas Court of Criminal Appeals have both openly expressed uncertainty about whether to follow the unambiguously broad reading of Penry I set out in this Court's *per curiam* decision in Smith v. Texas, 543 U.S. 37 (2004). Equally important, both courts have, for the most part, resolved this tension by following their own pre-Smith cases, despite the fact that those cases are irreconcilable with Smith's rationale and result. As Petitioner has pointed out, the answer to this question will determine the outcome in dozens of Texas capital appeals yet to be decided. *See* Petition for Writ of

Certiorari ("Petition") at 31-33. Accordingly, as we emphasize below, this important question merits definitive resolution by this Court.

With respect to the merits of Petitioner's Penry I claim, Respondent – like the Fifth Circuit – proceeds from the premise that this Court did not mean what it said in Smith. BIO at 9 ("Smith's 'full effect' requirement means nothing more than *sufficient* effect"). Relying on this "sage" insight, BIO at 14, Respondent argues that Petitioner's evidence of childhood abuse and mental disorder as a young adult was insufficiently severe to require additional instructions beyond the "deliberateness" and "future dangerousness" questions of the pre-1991 Texas capital sentencing statute. BIO at 20. Such an analysis ignores Smith and rewrites Tennard and Penry, as illustrated by the Fifth Circuit's continuing movement away from the clear direction charted by Smith. *See, e.g.*, Garcia v. Quarterman, ___ F.3d.___, 2006 WL 1932895 (5th Cir., July 13, 2006). For all these reasons, Petitioner's Penry I claim warrants plenary review.

1. *Certiorari* is warranted because the Fifth Circuit has conceded that its own decisions are in tension with Smith, indicating an urgent need for guidance before the Fifth Circuit goes any further down the wrong road.

One compelling reason to grant review here is that the Fifth Circuit has openly acknowledged its uncertainty about the meaning of Smith. *See* Petition at 8-13. Soon after Smith, for example, the Fifth Circuit indicated that it understood Smith to be "limited to [evidence of] mental impairment," despite the absence of any such limitation in the text of this Court's opinion. *In re* Kunkle, 398 F.3d 683, 685 (5th Cir. 2005). The court below expressly added that whether Smith swept any more broadly was a question for *this* Court. Id. A few months later, in R.G. Smith v. Dretke, 422 F.3d 269 (5th Cir. 2005), the Fifth Circuit acknowledged that its prior Penry jurisprudence, which held that mitigating evidence of "an impoverished background, growing up in a crime-infested environment

and alcohol abuse" could be given adequate effect in answering the special issues, was in tension with Smith, where this Court indicated that at least two of those same factors had "little, if anything, to do with" the special issues. R.G. Smith, 422 F.3d at 287 n.8 (conceding that this Court's opinion in Smith appeared to take "the exact opposite" position from the Fifth Circuit's longstanding view of Penry as essentially limited to mental retardation).

In a third decision in March 2006, the Fifth Circuit expressly acknowledged that "tension" exists between the "some effect" standard consistently applied in its own decisions and the emphatic "*full* consideration and *full* effect" standard declared by this Court in Penry II and Smith. *See* Tennard v. Dretke, 442 F.3d 240, 253 n.7 (5th Cir. 2006). As in R.G. Smith, however, the Fifth Circuit discounted the need to resolve that tension, breezily announcing that it would "leave it to other[s] to tidy the High Court's Augean stables." Id.

The Texas Court of Criminal Appeals ("CCA"), too, remains "uncertain as to the Supreme Court's current Penry II jurisprudence." *Ex parte* Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006) (denying Penry relief on remand from this Court). The CCA recognizes that "numerous post-Smith, post-Tennard Fifth Circuit cases have held that mitigating evidence [like that at issue in Smith] is fully encompassed by the Texas 'future dangerousness' or 'deliberation' special issues." Id. at 466 and n.35.[1]

These cases speak with one voice in calling for guidance from this Court with respect to this issue, which will recur in scores of Texas cases. *See* Petition at 8-13. Collectively, these decisions demonstrate a serious need for this Court to correct the Fifth Circuit's misreading of Smith *now*,

[1] Smith's petition seeking review of the CCA's most recent decision in his case is pending before this Court *sub nom*. Smith v Texas, No. 05-11304.

before it goes too far in the wrong direction.[2]

2. *Certiorari* is warranted because the Fifth Circuit's decision in this case simply revives the discredited "severity" and "permanence" tests emphatically rejected in Tennard.

Respondent defends the Fifth Circuit's attempt in this case to revive the "severity" and "permanence" criteria, prominent features of its notorious pre-Tennard screening test for "constitutionally relevant mitigating evidence," as the key variables in the Penry calculus. *See* BIO at 20-21. Respondent even goes so far as to claim that this approach is endorsed by Tennard itself. Id. Respondent is mistaken.[3]

To find that that Petitioner's evidence of mental illness (clinical depression, for which he was involuntarily committed to a mental hospital) was within the jury's "effective reach" under the "future dangerousness" question, the Fifth Circuit applied a *per se* rule distinguishing chronic or permanent mental disorders from any other type or manifestation of mental illness. Brewer v. Dretke, 442 F.3d 273, 280 (5th Cir. 2006) (mitigating evidence of mental illness gives rise to a Penry I violation only "where the illness in question is chronic and/or immutable") (footnotes omitted). According to this view, since Petitioner's mental disorder was non-permanent, the future

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[2] The Fifth Circuit applied its baseless "constitutional relevance" test for mitigating evidence to reject Penry claims for nearly a decade before this Court struck down that rule as having "no foundation" in the Eighth Amendment. *See* Tennard v. Dretke, 542 U.S. 274 (2004). It would be regrettable if the Fifth Circuit's current and equally serious error – in profoundly misreading Smith – essentially mooted this Court's recent efforts to set the jurisprudence straight.

[3] Remarkably, Respondent argues that "this Court noted [in Tennard] that 'gravity' has a place in the Penry I calculus 'insofar as evidence of a trivial feature of the defendant's character ... is unlikely to have any tendency to mitigate [his] culpability.'" BIO at 20 (citing Tennard, 542 U.S. at 286). Of course, when this Court made that observation in Tennard, the example it offered of such a "trivial feature" was *how often the defendant takes a shower*. *See* Tennard, 542 U.S. at 286. This Court should reject Respondent's obtuse suggestion that a history of clinical depression is no more relevant

dangerousness issue gave the jury an adequate vehicle for giving it "sufficient" mitigating consideration and effect. Id. at 278-79.[4]

These "severity" and "permanence" requirements for obtaining relief under Penry I simply resurrect the threshold screening test Tennard rejected. Tennard makes clear that a court reviewing for Penry I error should not assess the "permanence" or "severity" of the condition the defendant asserts as mitigating, but instead ask whether the jury could have expressed its reasoned moral response to the relevant mitigating qualities of that evidence in answering the special issues. Tennard, 542 U.S. at 287-89.

Respondent defends the Fifth Circuit's analysis despite its utter failure to appreciate what is actually *mitigating* about a defendant's underlying mental disorder – *i.e.*, its effect on the defendant's moral culpability. *That* aspect of the underlying mental disorder is not captured in any way by the fact that there may exist some remote possibility that the disorder, as the years pass, may become less severe. Contrary to the Fifth Circuit's reasoning, the potential mitigating significance of Petitioner's clinical depression is not reduced by the fact that he suffered only a "single episode" rather than repeated episodes, or the fact that his depression manifested itself "without psychotic features." Brewer, 442 F.3d at 275 n.1. None of these aspects of the "severity" of Petitioner's mental disorder placed the relevant mitigating qualities of that condition within the reach of jurors permitted to answer only whether Petitioner would be dangerous in the future.

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to a defendant's moral culpability than his hygiene.

[4] The Fifth Circuit has reflexively applied the same rule in its other post-Smith decisions, relying each time on its own pre-Smith opinions. *See, e.g.*, Coble v. Dretke, 444 F.3d 345, 361 (5th Cir. 2006) (bipolar disorder and Vietnam-related post-traumatic stress disorder not permanent and hence not problematic under Penry).

Contrary to Respondent's view, even if jurors believed that Petitioner would never again suffer an episode of clinical depression, the "future dangerousness" inquiry did not give them a "meaningful basis to consider the relevant mitigating qualities" of that mental disorder. Johnson v. Texas, 509 U.S. 350, 369 (1993). If a juror concluded that Petitioner's mental disorder was acting on him at the time of the crime and thereby reduced his moral culpability, but *also* concluded based on the evidence as a whole that Petitioner might well act out violently in the future, regardless of whether he suffered additional bouts of clinical depression, she would have no vehicle for withholding a death sentence.

Smith forecloses Respondent's argument that allowing jurors to consider and give effect to the "non-permanent" nature of a serious mental disorder is an acceptable substitute for allowing them directly to consider and give effect to its actual consequences for an offender's moral culpability. While the transience or amenability to treatment of a particular mental disorder might make it *less aggravating* under the future dangerousness question, this Court's cases demand that the jury be provided a vehicle for considering such evidence *as mitigating* – not simply as "potentially somewhat less aggravating." This Court should grant *certiorari* to reaffirm this central tenet of Eighth Amendment jurisprudence.

3. *Certiorari* is warranted because the Fifth Circuit's decisions continue to take that court farther and farther from the course clearly charted by this Court in Smith.

As noted, in the absence of direction from this Court, the Fifth Circuit continues to veer from the course set in Smith. The most recent example of this trend is Garcia v. Quarterman, ___ F.3d.___, 2006 WL 1932895 (5th Cir., July 13, 2006). Garcia argued that the jury was unable to give mitigating effect to evidence that he had been repeatedly sexually abused before he was ten

years old. *See* Garcia, 2006 WL 1932895 at *3 - *7 (describing penalty-phase evidence). Garcia's jury received only the two standard "deliberateness" and "future dangerousness" queries, plus a "nullification instruction." Id. at *7. The Fifth Circuit majority found no Penry error. While expressly disavowing any reliance on procedural default, the majority asserted flatly that defense counsel was *required to argue for jury nullification* at trial (*i.e.*, to demand that the jurors violate their oaths to answer the special issues honestly) in order to claim later that he was harmed by the preclusive effect of the unconstitutional charge. Id. at *8 ("Garcia cannot seek mitigating treatment for his childhood abuse because he did not do so before the jury"). It rejected "the ... position that any evidence of childhood abuse must be considered under Penry regardless of the context in which it was offered at trial." Id.

As Garcia makes clear, the Fifth Circuit is busily crafting new "screening tests" to evade this Court's clear guidance in Smith. *See* Garcia, 2006 WL 1932895 at *14 (Benavides, J., dissenting) (criticizing majority's rationale as "an end run around Penry II," an "approach ... at odds at least with the spirit of Tennard" for introducing another "threshold screening test ... [with] no foundation in Supreme Court precedent"), id. at *15 ("Instead of following [Penry's] mandate, the majority creates another threshold screen"). The court below has gone from upholding the use of "nullification" charges as vehicles for the consideration of mitigating evidence to actually *requiring* that defense counsel have argued for nullification before the jury as a condition of later raising a Penry claim. Garcia, *supra*.

The longer this Court waits to intervene, the more distorted and begrudging the Fifth Circuit's application of Smith will likely become.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner's sentencing hearing was marred by the same constitutional flaw as those in Penry and Smith. Jurors heard mitigating evidence about Petitioner's youth, physical and psychological abuse as a child, and serious mental illness. Individually or collectively, that evidence could well have persuaded them to spare Petitioner's life. The jurors, however, were limited to instructions that "had little, or nothing, to do with" Petitioner's mitigating evidence and thus gave them no vehicle for expressing that conclusion. This Court can have no confidence that Petitioner's death sentence represents the jury's actual conclusion that a death sentence was the *appropriate* punishment for his role in the crime. *Cf.* Smith.

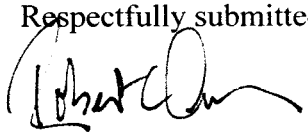
Petitioner lost below despite the fact that the plain language of Smith demands relief. The only explanation for this outcome is that the Fifth Circuit has never taken Smith seriously; instead, the court below has repeatedly questioned whether this Court meant what it said in Smith and has labored at every turn to evade its mandate. Garcia is just the latest and boldest example of the Fifth Circuit's resistance to following this Court's teaching in Smith. Only this Court can bring the Fifth Circuit back into conformity with the requirements of the Eighth Amendment.

This Court has recognized that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." Williams v. Taylor, 529 U.S. 362, 398 (2000). Equally important, a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing capital punishment." Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment). Faithful adherence to those insights suggests the

importance of reviewing – and reversing – the Fifth Circuit's decision in Petitioner's case.

For the reasons set forth above and in his Petition for Writ of Certiorari, Petitioner BRENT RAY BREWER respectfully prays that this Court grant a writ of *certiorari* to give the judgment of the United States Court of Appeals for the Fifth Circuit in this case plenary review; in the alternative, Petitioner asks that the Court summarily reverse the judgment below; or grant such other relief as the interests of justice require, including holding Petitioner's case pending the outcome of any *other* case in which the Court grants review to consider the correct application of Penry, Tennard, and Smith.

Respectfully submitted,



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